Oil Over Again: From Exxon Valdez to BP and Beyond

Oliver A. Houck
Professor of Law
Tulane University
May 19, 2010

I am writing this review in New Orleans with a bitter smell in the air. They are burning off phenols and as yet not-fully-disclosed dispersants from the Deepwater Horizon blowout, fifty miles to the south, which local public health officials assure us, without knowing exactly what is being incinerated, are no problem. But if our eyes begin to burn, they advise that we stay indoors. British Petroleum’s CEO has just opined safely from London that the spillage, which has already exceeded that from the Exxon Valdez, is minor given the size of the Gulf of Mexico.

Which brings to mind that last great spill in North America, the one that brought a sea change in the law but very little change in the high risk practice of offshore deepwell drilling. The literature on the British Petroleum disaster is of course yet to be written, but the story on the Exxon Valdez is suddenly pertinent and has been told in several ways. John Keeble’s Out of the Channel describes the richness of Prince William Sound, the crown jewel of the most valuable fishery in North America, where entire stocks have yet to return. Riki Ott’s Not One Drop: Betrayal and Courage in the Wake of the Exxon Valdez Oil Spill is an impassioned plea for the cleanup workers and fishing communities that, too, have yet to recover. But the best read of all is David Lebedoff’s Cleaning Up, a courtroom thriller on the Exxon Valdez civil damages trial, a five year marathon pitting some 14,000 fishers against the most powerful corporation on earth. This is a book worth taking back off the shelf. It is what Louisianans will now be facing, probably for years. Which bodes to test the limits of post-Valdez legislation, punitive damages, and concepts dear to the field of Admiralty as well.

The book begins with a conundrum. Captain Hazelwood of the Valdez was one of the best seamen in Exxon’s or anyone else’s fleet. He had wide experience, and had pulled his ships out of dangerous spots. The problem was he drank, often, and a stint in rehabilitation would not break the habit. In the hours before his fatal voyage out of Valdez he had downed numerous beers and at least five double vodkas, a load that would fell most mortals.

Which became Exxon’s problem. It knew about Hazelwood’s drinking and set him out with a full cargo into a very dangerous strait. Shortly after leaving port Hazelwood turned over the wheelroom to a less experienced seaman, who soon started vectoring the vessel towards the rocks. The breach was monstrous, and in a blink eleven million gallons of heavy crude were pouring into the sea.

With haunting echoes forward to British Petroleum’s blowout in the Gulf, the government, too, had been asleep at the switch. The Coast Guard was charged with tracking ships through the strait on radar, but whoever was watching the radar had gone off for a cup of
coffee. When Coast Guard personnel finally reached the stranded vessel they had no blood alcohol testing equipment for Hazelwood (Valdez personnel did not bother to tell them that they had a kit on board), so the captain, whose breath reeked of alcohol, was not tested for another eleven hours, coming in still, at that late date, fifty percent over the permitted cap. Nobody was looking very good.

Into this mess came a team of lawyers from Faegre and Benson, a corporate defense firm in Minneapolis whose bread and butter was getting such clients out of trouble. One of its best young litigators however, Brian O’Neill, had an independent streak, somehow tolerated by the firm, which led him to successfully defend seemingly odd causes such as Minnesota’s resident wolf pack and the Boundary Waters Canoe Area. A West Point graduate with a homespun sense of humor and a ready tongue, O’Neill was itching to get into this case. It was bigger than anything he had ever done. It was going to be bigger than anything anyone had done, and the spill made him mad.

Exxon, for its part, hired the best attorneys money could buy, literally, which included ex-Watergate prosecutor James Neal, who would also defend Ford Motor Company’s crash-and-burn Pinto and Louisiana’s redoubtable Governor Edwin Edwards (“the only way I can lose this election is if they catch me with a dead girl or a live boy”). It also included Los Angeles’ O’Melveny and Myers, which had some 500 lawyers on tap at the time. Exxon also had the corporate defendant’s greatest asset, unlimited resources to file unlimited motions and extend proceedings until plaintiffs gave up, accepted small settlements, or died. Some of all three happened.

All of which is prologue to one of the longest, most complicated and absolutely hair-raising lawsuits ever seen. Its twists and turns of the Valdez trial were the stuff of melodrama. At other times its tedium resembled a stint in prison. Its organization and presentation required brilliant invention and the use of in-court technology that set a new standard for complex litigation. On one of the most desolate and isolated spots on earth. For five long years, before even getting to trial. I do not think any attorney involved would ever volunteer to do it again. Certainly not the plaintiff’s lawyers. Although we know that only in retrospect, because they won. Until, almost two decades later, the Supreme Court took it away.

The trial would unfold in three stages, liability, compensatory damages and punitives. Each was a saga (the jury was out on the second phase for a full month; can any imagine the strain of that experience alone?), but they were not the full saga. Two separate trial teams handled the motions and the merits, almost concurrently, in the plaintiffs’ case both reporting to O’Neill who was sheltered from the motions fray like a queen bee. (Can anyone imagine trying a case where the upshot of the motions was known, in some cases, a day or two in advance?). Exxon could file mountains of pleadings, and did. And the trial court, a former law partner of Senator Ted Stevens and a member of the Petroleum Club, seemed sympathetic to their cause.

Punitive damages, phase three, were the whole ballgame from the start. There was not enough money in compensation for the vast number of often-subsistence-level fishers to attract any lawyers able to take on something the size of the Exxon Corporation. O’Neill based his case here on two propositions: Exxon had not learned its lesson, only its public relations, and small
punitives would not affect its outlook or future conduct. Perhaps the most dramatic moment in the trial was O’Neill’s examination of Exxon’s CEO, who of course testified to great personal and corporate remorse. In machine gun fashion, O’Neill asked, had he ever visited the affected communities, had he ever visited a fisher, did he know any of their names, had he ever apologized to them? No, no, no, . . . no one asked me to. It was devastating.

For a while. The jury awards were $237 million in compensatory damages (the jury, inter alia, apparently refused to consider years of loss for which state fishing data were unavailable), and $5 billion against Exxon in punitives. The corporation was, in a way, fortunate. Only after the verdict was it discovered that Exxon had entered into settlements with several business plaintiffs which required them to return the settlement monies if the fisher plaintiffs prevailed at trial, so that they could piggyback on those awards. It was in effect a no-lose proposition for both parties, and the trial judge, consistently in Exxon’s corner throughout the trial, lost his temper, striking the secret agreement and calling the deal “a pernicious and flagrant violation of public policy”. Had these facts been known to the jury beforehand, who knows what effect they might have had on the learned-its-lesson element of punitive damages. Had they been known to the Supreme Court at a later date, the same question might be asked.

Of course it might not have mattered at all. The Ninth Circuit undertook to halve the award on no more apparent rationale than that half seemed like a good number. A fragmented plurality of the Supreme Court went it one better, inventing from whole cloth a no-more-than-compensatory damages ceiling for punitives, to avoid the frightening specter of awarding too much money to the victims of highly blameworthy corporate conduct. Nowhere in its opinion appeared any consideration of how much would be required to affect the behavior of an entity the size of Exxon. Five million dollars, at the time, represented Exxon’s profits for a single year. British Petroleum’s profits for the first quarter of 2010 amounted to $6.4 billion.

Thus we return to BP’s Deepwater Horizon, which continues to pour oil into the Gulf of Mexico at the time of this writing, three weeks following the blowout. Evidence of malfeasance by the corporation and its contractors – and its handmaiden agency, the Minerals Management Service – abounds. At a minimum, it seems that available safety precautions were consciously rejected for a high risk venture in one of the greatest seafood nurseries in this hemisphere. Assuming that more than mere negligence is shown, as it was in the case of the Valdez, are punitive damages really to be limited to the loss of income of some of the most low-end workers in America? Can the law really be that the poorer your victims, the less you pay for egregious conduct?

We may soon find out, and not only from the courts. Efforts are afoot in Congress to re-examine the liability scheme of the Oil Pollution Act, born in the Valdez spill, which traded strict liability for a $75 million cap. The coastal residents of South Louisiana will be out $75 million well before this year ends. Then what? The American taxpayer foots the bill?

Congress may also undertake to revisit the Supreme Court’s punitives cap in the Exxon case. It has the authority to do so, maritime tort law being its province. Unless, of course, the Court wheels out Due Process—normally anathema to its majority conservatives – to rescue corporate conduct, as has become its recent custom.
Finally, Congress might look at the idiosyncrasies of Admiralty Law itself, which begins with flags of convenience and gets more bizarre from there, a sample of which is a limitation of liability dating back to the 1800’s measured by the “value of the vessel”. In the BP case the vessel is a burnt and crumpled piece of junk lying one mile deep on the ocean floor.

Congress might find that result questionable too. Stay tuned. Bad events just might make better law.