

The Observer, January 2008

[return to this edition](#)

From the Executive Director: Punitive damages valuable for deterring oil spills

By John Devens

At about the time this Observer reaches you, our council will be filing papers in the punitive damages case arising from Alaska's most famous environmental disaster, the Exxon Valdez oil spill.

In 1994, a jury returned a \$5 billion judgment against the company and in favor of thousands of commercial fishermen and other individuals hurt by the spill. The case has been on appeal ever since, with the award reduced to \$2.5 billion, plus interest. Now it has reached the U.S. Supreme Court and our council is submitting a friend-of-the-court brief.

This doesn't mean we're becoming a plaintiff. A friend-of-the-court brief is advisory, and giving advice is at the heart of our mission of promoting safer crude oil shipping through Prince William Sound. If the court rules that Exxon must pay, we won't get a share. We're not even taking a position on what size award is appropriate.

Why, then, are we entering this case?

It's simple: Exxon is arguing that giant corporations that have giant oil spills like the Exxon Valdez should be immune from punitive damage claims.

The company's argument turns on the case of the *Amiable Nancy*, a precedent in maritime law that is now nearly two centuries old. It was born in 1814, when the *Nancy* was plundered by an American vessel called the *Scourge*. The privately owned *Scourge*, operating on behalf of the U.S. government during the War of 1812, was supposed to attack British ships. The *Amiable Nancy* was Haitian and Haiti was neutral in the war, so the *Scourge* was not authorized to attack it. The *Nancy's* crew and owners sued and won a damage award against the *Scourge's* owners.

The Supreme Court overturned it, reasoning that the captain and crew of the *Scourge* had so far exceeded their authority that the owners weren't liable. Exxon now argues that this logic protects it from liability for its spill in 1989 in Prince William Sound.

The first problem with Exxon's argument is that today's ships and operations bear little resemblance to those of 1814.

Ships are larger now. They carry more cargo. The cargo is more dangerous.

The 986-foot Exxon Valdez carried 53 million gallons of toxic North Slope crude; an estimated 11 million gallons escaped into Prince William Sound, fouling waters and shorelines as far away as Kodiak and the Alaska Peninsula.

The *Amiable Nancy* carried corn. Though the sizes of the vessel and its cargo went unrecorded, it seems a safe bet the *Nancy* was well under 986 feet in length and carried well under 53 million gallons of corn.

Ships today are also under much closer control by their owners. Two hundred years ago, a ship might be out of touch for months or even years as it traversed the seas at the speed of sail. Now, crews and owners are in essentially continuous contact thanks to radio and satellite communication.

So it's a stretch for Exxon to claim the captain and crew of the Exxon Valdez were beyond its control when the tanker pulled away from the Alyeska terminal and drove onto Bligh Reef.

Exxon knew about the captain's drinking problem, though it's never been clear how big a role that played in the grounding.

Exxon knew about, and bears sole responsibility for, manning practices that left the crew overworked and exhausted from the labor of docking the ship, loading it, getting it under way again, and steering it through the confined waters of Port Valdez and the northern part of Prince William Sound. Crew fatigue was among the causes of the accident cited by the National Transportation Safety Board.

If there's any doubt of Exxon's responsibility for the grounding itself, there surely can be none about its responsibility for what followed.

Alyeska Pipeline, which has responsibility for initial cleanup efforts after a spill, was utterly unprepared for what it had to deal with on March 24, 1989. Exxon was (and is) one of the owners of Alyeska. It helped determine Alyeska's budget, how much equipment Alyeska would have on hand, and how well Alyeska's people would be trained to clean up oil. If Alyeska wasn't ready, that's due in large measure to deliberate actions by Exxon itself.

Punitive damages are not the only deterrent to corporate misbehavior, but they are an important one. If the risk of punitive damages is removed from the decision-making process in the executive suites of Exxon and corporations like it, they will have one less reason to behave responsibly. The Supreme Court should make sure that doesn't happen.

www.pwsrccac.org