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CIVIL PROCEDURE IN SUBSTANTIVE CONTEXT: THE EXXON-VALDEZ CASES

KEITH E. SEALING*

“Lawyers yet to be born will work on this case.”¹

I. INTRODUCTION

I am told that many students come into Civil Procedure thinking that the subject is, first, either the hardest course in the first year or, alternatively, tied with Property for that honor, and, second, the most boring course in the first year curriculum. Regardless of whether either of these beliefs is true, Civil Procedure is clearly the course with which 1Ls have the least familiarity. The students’ journey to the conclusion that Civil Procedure is not only fascinating, but vitally important begins on day one. But how to start?

Most Civil Procedure casebooks provide an introductory overview of civil actions before moving on to topic by topic, in-depth coverage of the material. There appear to be two basic approaches to this process. In many instances, the casebooks use a series of short cases to introduce each topic area. For example, Professor Cound (the casebook I utilize) uses twelve cases,² Professor Yeazell uses nine³ and Professor Friedman uses six.⁴ In my view, the weakness of this approach is that the authors must drastically shorten the cases used, and many of them are neither particularly important nor interesting. Further, because of the large amount of material that must be covered in a short period of time,⁵ there may be a tendency to move through the cases too quickly, developing bad habits for first semester students. I prefer to select one major case of intrinsic interest to begin each of my first year courses.⁶ I use

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1. Unnamed member of the oil industry quoted in J. STEPHEN PICOU ET AL., *THE EXXON VALDEZ DISASTER: READINGS ON A MODERN SOCIAL PROBLEM* 118 (2d ed. 1999).

2. JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* (8th ed. 2001).

3. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* (5th ed. 2000).

4. JOEL WM. FRIEDMAN, ET AL., *THE LAW OF CIVIL PROCEDURE* (2002).

5. At Syracuse, Civil Procedure is a one-semester, four-credit course.

6. My description of how I use *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), to introduce property law is included in last year’s edition of this annual symposium dedicated to teaching techniques. See Keith Sealing, *Teaching Fundamental*

the series of cases that arose from the *Exxon Valdez* disaster when I teach Civil Procedure.⁷

In using only cases arising out of this single event, I attempt to achieve at least five goals: first, introducing the field of Civil Procedure itself; second, demonstrating the breadth and complexity of modern civil actions; third, demonstrating the crucial relationship between procedural and substantive law; fourth, capturing the students' interest with a fascinating and timely case; and, finally, showing my students, who will spend most of their first year reading shortened, tightly edited casebook appellate opinions, a lengthy, tough, lightly edited set of "real world" cases.⁸

As a result of the extensive litigation, the cases yield fruitful discussion of pleadings, facts and how they are discovered, subject matter jurisdiction, venue, forum non conveniens, the appeals process, the jury trial, the use of expert testimony, how evidence is obtained and presented to the jury, the court's power to overturn a jury's decision, class actions and the interests of various parties, ADR and settlement, the relationship of state and federal law, and a dose of professional responsibility. I also like to incorporate at least some discussion of the issues raised by indigenous peoples, and the peculiar damages caused to Natives living indigenous lifestyles presents this opportunity.⁹ By careful reference to various actions, it is possible to include an introduction to almost every aspect of the civil action that is included in most casebooks' introductory chapters.

Learning Techniques with Moore v. Regents of the University of California, 46 ST. LOUIS U. L.J. 755 (2002).

7. Other similar approaches should be noted. First, I would include Jonathan Harr's extensive, reads-like-a-novel coverage of *Anderson v. Cryovac*, 862 F.2d 910 (1st Cir. 1988). See JONATHAN HARR, *A CIVIL ACTION* (1995), which also includes a companion volume of extensive (more than eight-hundred pages) documentation; LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* (rev. ed. 2002). Second, see NAN HUNTER, *THE POWER OF PROCEDURE: THE LITIGATION OF JONES v. CLINTON* (2002), where the author covers much of the realm of Civil Procedure in slightly under 200 pages. Third, Professors Silberman and Stein devote forty-one pages to *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that First Amendment limits a state's power to award damages for libel against a public official in his official conduct; Alabama libel law unconstitutional; the state law does not survive merely because it allows truth as a defense, honest error must also be protected). See LINDA J. SILBERMAN & ALLAN R. STEIN, *CIVIL PROCEDURE: THEORY AND PRACTICE* 13-54 (2001).

8. The full text of the most recent case, *In re The Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), prints out at about 63 pages, including headnotes. I cut down the various excerpts to about one hundred pages, which I make available for the students to download off Blackboard ©.

9. See Darrin J. Quam, Comment, *Right to Subsist: The Alaska Natives' Campaign to Recover Damages Caused by the Exxon Valdez Spill*, 5 GEO. INT'L L. REV. 177 (1992) (examining the litigation strategies of the Natives living subsistence lifestyles); Christopher V. Panoff, Chapter, *In Re The Exxon Valdez Alaska Native Class v. Exxon Corp.: Cultural Resources, Subsistence Living, and the Special Injury Rule*, 28 ENVTL. L. 701 (1998).

We will cover much that is not Civil Procedure—Torts, Property, Evidence, Environmental Law, Legislation—but that is not a bad thing. It is only in law school that the law is divided into neat little compartments.

II. DISCUSSION

The following sections discuss, first, the facts about the *Exxon Valdez* disaster, second, the legal proceedings flowing from the event that I use to introduce Civil Procedure to my students, and, finally, two collateral topics that I use the cases to introduce: professional responsibility and the rights of indigenous peoples.

A. *Factual background*

Most students are at least marginally familiar with the factual background. There are a number of useful web sites available, and I instruct my students to visit them before the first day of class.¹⁰ The cases demonstrate to students that the word “facts” will become for them a term of art and that even in an event which received as much scrutiny as this one, the facts are always murky.

My handout materials begin with the last (as of this writing) case for its explication of the facts: *In re The Exxon Valdez*,¹¹ which begins its discussion in 1794 with the discovery and naming of Bligh Island and Bligh Reef, the reef into which the *Exxon Valdez* crashed.¹² Because so much has been written about the disaster and because virtually all of the crucial facts found in the case law are disputed, many points can be debated. Students are asked to think about how lawyers for both sides developed these facts.

10. There are a large number of web sites either devoted to the disaster or else having at least some material on it. The two I would most recommend are, first, what could be called the “official” site, that of the Exxon Valdez Oil Spill Trustee Council and, second, that of the Anchorage Daily News. The Trustee Council, created as part of the state and federal settlement, consists of three federal representatives, the Secretaries of the Departments of Agriculture, Commerce and the Interior, and, on the state side, the Commissioners of the Department of Environmental Conservation and the Department of Fish and Game and the Alaska Attorney General. The Trustee’s site has a wealth of material including copies of the August 29, 1991, Memorandum of Agreement and Consent Decree and the September 30, 1991, Agreement and Consent Decree as well as downloadable photographs. See <http://www.oilspill.state.ak.us> (last visited July 22, 2002). The Anchorage Daily News site includes a very thorough archive of all its news stories related to the disaster and additional photos. See <http://www.adn.com/evos/index.html> (last visited July 22, 2002). See also PICOU ET AL., *supra* note 1, at 334-36 (listing websites available as of 1999).

11. 270 F.3d 1215 (9th Cir. 2001).

12. *Id.* at 1221. The reef was discovered by Captain George Vancouver, who named it after Captain William Bligh, later to gain notoriety from Fletcher Christian’s mutiny on his H.M.S. *Bounty*. *Id.* (citing 4 ENCYCLOPEDIA BRITANNICA (11th ed. 1910)). Ironically, the disaster occurred on the two-hundredth anniversary of the mutiny. *Id.*

Here, in summary form, are the facts as the federal court ultimately found them. On March 23, 1989, shortly before midnight, the oil tanker *Exxon Valdez* left the Alaskan port of Valdez bound for California. The Captain, Joseph Hazelwood,¹³ took the ship east of the normal sea lanes to avoid ice.¹⁴ Here occurs the first opportunity to teach students about the interpretation of facts. The Ninth Circuit concluded that Hazelwood acted “prudently” in avoiding the shipping lane,¹⁵ but others have argued that it was a timesaving measure and that it might have been safer to go slowly through the icy shipping lane.¹⁶ In any case, this put the ship on a course directly towards Bligh Reef.¹⁷ However, Bligh Reef was not difficult to avoid if the ship was handled properly.¹⁸ Nevertheless:

Considering the ice in the water, the darkness, the importance of turning the vessel away from Bligh Reef before hitting it, and the tricky nature of turning this behemoth, one would expect an experienced captain of the ship to manage this critical turn.¹⁹

However, Captain Hazelwood did several things wrong at this point. First, he put the ship, which held more than 53 million gallons of oil²⁰ on autopilot, which caused it to increase speed and make the turn more difficult.²¹ Then, with just two minutes remaining before the crucial turn needed to be executed, he left the bridge, leaving a less experienced, fatigued²² man in charge.²³

13. By all accounts, Hazelwood was an otherwise excellent Captain, who had become the youngest Captain in Exxon’s fleet at age 32. See JOHN KEEBLE, *OUTSIDE THE CHANNEL: THE EXXON VALDEZ OIL SPILL IN PRINCE WILLIAM SOUND* (1999).

14. *In re The Exxon Valdez*, 270 F.3d at 1222.

15. *Id.*

16. See KEEBLE, *supra* note 13. See also ALASKA OIL SPILL COMMISSION, *FINAL REPORT*, available at <http://www.oilspill.state.ak.us> (1990) (abridged version) [hereinafter ALASKA OIL SPILL COMMISSION].

17. *In re The Exxon Valdez*, 270 F.3d at 1222.

18. *Id.* The mechanics of turning a ship of the *Exxon Valdez*’s size are illustrated by a portion of the trial transcript in which expert witness Captain Michael Clark discusses how one turns a tanker. I leave this portion of the case in my abbreviated version, and also use it as an opportunity to mention the role of expert witnesses.

19. *Id.*

20. ALASKA OIL SPILL COMMISSION, *supra* note 16.

21. *In re The Exxon Valdez*, 270 F.3d at 1223.

22. “If the congressionally mandated requirement that officers have six hours’ off-duty time within the 12-hour period prior to departure had been adhered to, the *Exxon Valdez* would never have cast off that night.” KEEBLE, *supra* note 13, at 35.

23. *In re The Exxon Valdez*, 270 F.3d at 1222-23. This was not merely poor judgment but also violated the law. A special license is required to navigate the portion of Prince William Sound which contains Bligh Reef and only Hazelwood of the *Exxon Valdez* crew held that license. *Id.* at 1222. Further, two officers are required to be on the bridge, and, without Hazelwood, there was only one. *Id.* at 1223.

Why? Anyone who is even passingly familiar with the accident will give the following answer: Hazelwood was drunk. The jury apparently believed that Hazelwood, who was unquestionably an alcoholic, had quit his Alcoholics Anonymous program, fallen off the wagon and resumed drinking, and was, to at least some degree, impaired. "Testimony established that prior to boarding his ship he drank at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars in Valdez."²⁴ Another key fact in the coming litigation: the highest executives in Exxon Shipping were aware that Hazelwood had fallen off the wagon and was drinking on board its ships and in waterfront bars.²⁵ However, the facts are a bit more complicated than this.²⁶ Further, from a publicity perspective, the demonization of Hazelwood tended to shift the blame away from the oil industry, the governments and the oil-hungry consumers.

As a result of Hazelwood's actions and inactions, the *Exxon Valdez* grounded on Bligh Reef and eleven million gallons of oil poured into the delicate ecosystem of Prince William Sound.²⁷ Ultimately, more than 3,000 square miles were devastated, 250,000 birds and thousands of marine animals were killed, twenty animal species were affected (many of which have not yet rebounded), entire fishing communities were affected, fishermen were forced into bankruptcy and native subsistence communities were disrupted.²⁸

24. *Id.*

25. *Id.* After a 1984 arrest for drunk driving, he entered into a rehabilitation program at the urging of an Exxon supervisor. An Exxon official wrote a memo to the Exxon law department warning that Hazelwood had admitted to returning to his vessel intoxicated. He resumed heavy drinking and was arrested a second time for drunken driving. Just two weeks before the accident, he was seen drinking in San Francisco. KEEBLE, *supra* note 13, at 39-40.

26. Hazelwood claimed to have had two beers. Hazelwood's blood alcohol test was not administered until ten hours after the accident. At that time his blood alcohol content was 0.061%, not high enough for a drunk driving conviction in Alaska but above the Coast Guard's 0.04 limit for ship operators. At trial it was argued to the jury that this figure meant that Hazelwood would have had an alcohol level of 0.22% (fall-down drunk) at the time of the accident, but this analysis did not reflect the fact that Hazelwood could have had drinks *after* the accident, but before the delayed test. Two other events further complicated the issue. First, one investigator reported that Hazelwood had no alcohol in his cabin, but admitted that his search was incomplete; another first said he saw a bottle of Jack Daniels in Hazelwood's cabin, but later admitted that the image may have been in his mind from another event in his life. Second, the blood samples followed a circuitous route to the lab and may have been misidentified. KEEBLE, *supra* note 13, at 38.

27. *In re The Exxon Valdez*, 270 F.3d at 1223. The amount of the spill further demonstrates the *Rashomon*-like nature of the facts. Keeble argues convincingly that the actual spill amount was between 23 and 35 million gallons. See KEEBLE, *supra* note 13, at 59 n.24. See also Lee Clarke, *The Wreck of the Exxon Valdez*, in *CONTROVERSY: POLITICS OF TECHNICAL DECISIONS* 80-96 (3d ed. 1992), reprinted in *PICOU ET AL.*, *supra* note 1, at 55, 65 ("Like many official statistics, the 11 million gallon figure is more ambiguous than appears at first glance.").

28. Evelyn Nieves, *Court Overturns Jury Award in '89 Exxon Valdez Spill*, N.Y. TIMES, November 8, 2001, at A14.

Many factors exacerbated the spill. First, although the *Exxon Valdez* was the newest ship in Exxon's fleet it was a single hull design, despite Alyeska's promise that all ships coming into the delicate Prince William Sound ecosystem would be of double hull construction.²⁹ Second, there were the alleged delays and incompetence in the clean-up process.³⁰ Who was to blame? It was more than just the matter of a possibly drunken Captain. As the State of Alaska put it: "Industry's insistence on regulating the Valdez tanker trade its own way, and government's incremental accession to industry pressure, had produced a disastrous failure of the system."³¹ Then, too, the unending demand for oil and the environmentally questionable decision to build the pipeline itself are also fodder for brief class discussion, even if not Civil Procedure *per se*.³²

29. See KEEBLE, *supra* note 13, at 21. A double hull could have reduced the spill by 60%. *Id.* at 166 n.47 (citing Coast Guard experts). The Clean Water Act of 1972 mandates conversion to double hulls. The 1990 Oil Pollution Act requires that all new tankers have double hulls and that existing single hull tankers be retrofitted or taken out of service by 2015. *Id.* at 310.

30. The Alaska Oil Spill Commission found:

The response capabilities of Alyeska Pipeline Service Company to deal with the spreading sea of oil would be tested and found to be *both unexpectedly slow and woefully inadequate*. The worldwide capabilities of Exxon Corp. would mobilize huge quantities of equipment and personnel to respond to the spill—but not in the crucial first few hours and days when containment and cleanup efforts are at a premium. The U.S. Coast Guard would demonstrate its prowess at ship salvage, protecting crews and lightering operations, but prove *utterly incapable of oil spill containment and response*. State and federal agencies would show differing levels of preparedness and command capability.

ALASKA OIL SPILL COMMISSION, *supra* note 16 (emphasis added). The National Response Team's Report to the President concluded that neither the government nor any part of the industry other than Alyeska had planned for a spill of the size that occurred, that Alyeska's plan was otherwise inadequate and, in any case, Alyeska did not carry out its plan in a manner that assured a rapid response and that there were a variety of other inadequacies, such as in training and equipment availability. NATIONAL RESPONSE TEAM, *THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT* (1989), reprinted in PICOU ET AL., *supra* note 1, at 46-47. See also Maurie Cohen, *Economic Impacts of the Exxon Valdez Oil Spill*, in PICOU ET AL., *supra* note 1, at 133, 136 ("After the supertanker ran aground managerial chaos ensued and emergency-response personnel were initially unable to mobilize the appropriate oil spill-containment equipment.")

31. ALASKA OIL SPILL COMMISSION, *supra* note 16.

32. The 800-mile long pipeline was pushed by the Nixon Administration following the 1973-74 oil crisis. Critics noted that the pipeline was built through an area known to be the site of potential earthquakes and ended at environmentally sensitive Prince William Sound. Alternative plans to pipe the oil through Canada to the United States were given little consideration. Because the pipeline carries 71 million gallons a day and Valdez has little storage capacity, 700 to 1100 oil tankers must pass through the Sound each year. The pipeline has never been shut down and it is not even clear whether it could be shut down and then restarted again because the friction caused by the movement of oil through the pipe may be the only thing that keeps the oil warm enough to flow, particularly in the winter. See Robert Gramling & William R. Freudenburg, *The Exxon Valdez Oil Spill in the Context of U.S. Petroleum Politics*, INDUS. CRISIS Q. 6 (1992), reprinted in PICOU ET AL., *supra* note 1, at 71, 80-81.

The first lawsuit was filed in less than a week.³³

B. Civil Procedure Illustrated in the Exxon Valdez Cases

The following sections examine the various procedural topics that arose during the thirteen years (and counting) of the *Exxon Valdez* litigation.

1. Parties and Joinder

Hundreds of cases were filed in Alaskan state court and the federal district court against Exxon³⁴ and Alyeska, a company owned by six oil companies,³⁵ which “owne[d] and operate[d] the Trans-Alaska Pipeline System and the Valdez oil terminal at which the *Exxon Valdez* had been loaded.”³⁶ It is helpful at this point to list all the potential plaintiffs. (As discussed below, it is also helpful to note that some persons sued in their individual capacity, while others sued as representatives of various classes.) The plaintiffs included fishermen, area businesses—those directly related to the fishing industry and otherwise—Alaskan Natives, land owners, the State of Alaska, the United States and environmental groups acting on behalf of the general public.³⁷

Here, then, in summary form are the various plaintiffs and the disposition of their cases, as the students will be asked to develop them for me:

1. *The United States* – The United States filed an action for injury to the environment, which settled for at least \$900 million (with the State of Alaska).³⁸ This settlement also included resolution of the potential criminal actions, which could have resulted in billion dollar fines, for a fine of \$150 million, of which \$125 million was remitted for Exxon’s prior clean-up expenses and cooperation.

33. Sheila Toomey, *2 Fishermen File First Lawsuit Over Spill; More Suits Likely*, ANCHORAGE DAILY NEWS, March 30, 1989, at C1, available at <http://www.adn.com/evos/stories/EV337.html> (last visited Aug. 30, 2002). Martin and James Goreson initiated a class action suit in Anchorage Superior Court against Exxon, Alyeska and the State Department of Environmental Conservation for gross negligence in both the spill and the botched cleanup efforts. *Id.*

34. For brevity and convenience, whenever I mention Exxon, I am referring to Exxon Corporation, Exxon Shipping Company, Exxon Transportation Company and individual and former Exxon employee/defendants, unless otherwise indicated. See, e.g., *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 774 n.1 (9th Cir. 1994), cert. denied, 513 U.S. 1002 (1995).

35. The owners (with percentile interests in parentheses) were BP Exploration (50.01%), ARCO Pipeline Co. (21.35%), Exxon Pipeline Co. (20.34%), Mobil Alaska Pipeline Co. (4.08%), Amerada Hess Pipeline Co. (1.5%), Phillips Alaska Pipeline Co. (1.36%) and Union Alaska Pipeline Co. (1.36%). These six companies also own the pipeline itself.

36. *Eyak Native Vill.*, 25 F.3d at 775.

37. *Id.* at 774-75.

38. *In re The Exxon Valdez*, 270 F.3d 1215, 1223 (9th Cir. 2001).

2. *The State of Alaska* – Alaska filed an action in Alaska state court for injury to the environment,³⁹ as well as in federal court, and settled for at least \$900 million (with the United States).⁴⁰

3. *Commercial fisherman*⁴¹ – Commercial fishermen numbered about 10,000 and were represented by some eighty law firms and would have received about \$2.9 billion of the \$5 billion punitive damages verdict that is now set to be reduced on remand.⁴²

4. *Alaskan Natives*⁴³ – The claims process for Alaskan Natives represented a complicated mix of state and federal law, as well as unique federal law applicable only to the natives,⁴⁴ in particular the Alaska Native Claims Settlement Act (“ANCSA”),⁴⁵ section 8301 of the Oil Pollution Act of 1990,⁴⁶ and factual complications caused by the subsistence lifestyle of many of the Natives.⁴⁷ When the spill drifted onto lands owned by three Alaskan Native Corporations—Chenega Corporation, Port Graham Corporation, and English Bay Corporation (“Corporations”)—they filed suit against Exxon and Alyeska, alleging not only damage to their lands but also damage to archeological sites and artifacts.⁴⁸ Prior to trial, Alyeska settled for \$5,689,079 and the Corporations sought and received damages from the Trans-Alaska Pipeline Liability Fund (“TAPL”) in the amount of \$23,266,884.⁴⁹ The Corporations and Exxon ultimately went to trial and a jury awarded the Corporations nearly \$6 million, although the story is far more complicated than that.⁵⁰ A separate class action involving 3,455 individual Natives is discussed below.⁵¹

39. *Alaska Sues Exxon, Pipeline Consortium for Oil Spill Damages, Restoration Order*, 20 Env’t Rep. (BNA) 691 (Aug. 18, 1989). The action was filed as *State v. Exxon Corp.*, No. 3AN-89-6852 (Alaska Super. Ct. 1989). *Id.*

40. *In re The Exxon Valdez*, 270 F.3d at 1223; *see discussion supra* text accompanying note 38.

41. *Eyak Native Vill.*, 25 F.3d at 775.

42. *Spillionaires*, ANCHORAGE DAILY NEWS, March 17, 1996, at B3, *available at* <http://www.adn.com/evos/stories/EV402.html> (last visited August 30, 2002).

43. *Eyak Native Vill.*, 25 F.3d at 774-75. *See generally* Quam, *supra* note 9.

44. *See* *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769 (Alaska 1999).

45. Alaska Native Claim Settlement Act, 43 U.S.C. §§ 1601-1629(f) (1994 & Supp. 1999). Discussed *infra* note 159-60 and accompanying text.

46. Oil Pollution Act of 1990, 43 U.S.C. § 1642 (1994).

47. *See* Quam, *supra* note 9, at 178-81 and sources cited therein for a discussion of subsistence living as a social and cultural way of life rather than just as hunting and fishing. *See also infra* note 161.

48. *Chenega Corp.*, 991 P.2d at 774.

49. *Id.* at 775.

50. *Id.* As noted, the lands that were damaged were lands given to Native Corporations under ANCSA. Other lands that were injured by the spill had been selected by the Corporations for acquisition, but because of the slow process involved, were still titled to the federal government. Section 8301 of the Oil Pollution Act of 1990 gave the Native Corporations the right to sue for damages to these lands that had been selected by the Corporations but not yet

5. *Fish processors*⁵² – There were about thirty-five commercial seafood processors who lost money as a result of the spill, not including the Seattle Seven,⁵³ and they would have been entitled to \$80 million of the punitive damage award.⁵⁴

6. *Employees of fish processors*⁵⁵ – Some 5,000 cannery workers were affected and would have taken \$20 million of the punitive damages.⁵⁶

7. *Area businesses*⁵⁷ – Affected businesses included such diverse entities as seafood brokers, sportfishing lodges and net menders; less than 200 of these entities would have been eligible for \$10 million of the punitive damages award.⁵⁸

8. *Land owners*⁵⁹ – There were 2.3 million acres of real estate affected, not including government land, some of which was owned by twenty Native Corporations.⁶⁰

9. *Environmental organizations* – The “trust plaintiffs,” so designated by the federal court, included the National Wildlife Federation, the Wildlife Federation of Alaska, and the National Resources Defense Council, which filed a complaint in *National Wildlife Federation v. Exxon*,⁶¹ and the Alaska Sportfishing Association, which filed *Alaska Sportfishing Association v.*

titled to them. *Id.* at 774-75. The federal and state governments entered into a consent decree which provided that their settlements would not include damages to these Native lands in 1991. *Id.* at 775 n.4 (the action was filed as *Native Vill. of Chenega Bay v. State*, No. A91-454 Civ. (D. Alaska Sept. 24, 2991)). In addition, the court dismissed the Corporations’ punitive damages claim as a result of the federal court’s order creating a mandatory punitive damages class, as discussed below. *Chenega Corp.*, 991 P.2d at 775. The jury’s award of nearly \$6 million was offset against the Alyeska settlement and previously received TAPL payments by the lower court, so the Corporations took nothing. *Id.* The state supreme court affirmed this decision after a lengthy discussion of Alaska’s collateral source rule and after noting that TAPL had sued Exxon for subrogation of its payment to the Corporations. *Id.* at 789-92. However, the lower court failed to properly instruct the jury as to the Corporations’ right to sue for damages to lands they had claimed but had not yet received title to. *Id.* at 781-88. Thus, this case ended in a remand for retrial of that issue. *Id.* at 799.

51. *See infra* notes 163-68 and accompanying text.

52. *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 775 (9th Cir. 1994).

53. *See infra* notes 143-51 and accompanying text.

54. *Spillionaires*, *supra* note 42.

55. *Eyak Native Vill.*, 25 F.3d at 775.

56. *Spillionaires*, *supra* note 42.

57. *Eyak Native Vill.*, 25 F.3d at 775.

58. *Spillionaires*, *supra* note 42.

59. *Eyak Native Vill.*, 25 F.3d at 775.

60. *Spillionaires*, *supra* note 42.

61. *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994). The action was filed as *National Wildlife Federation v. Exxon Corp.*, No. 3AN-89-6957 (Alaska Super. Ct. 1989). *Id.*

*Alyeska Pipeline Service Co.*⁶² The four groups then sought a conservation trust fund class to include “all persons whose use, enjoyment, aesthetic and environmental interests in the protection and enhancement of the ecosystem, wildlife and other natural resources of Prince William Sound” were damaged.⁶³ These interests were deemed separate from the already certified commercial and subsistence use classes.

A month after the four plaintiffs filed for class certification, the United States and Alaska reached their settlement, which included payment for natural resource damages. The plaintiffs, thereafter, argued that the consent judgment was not binding on them since the State had a conflict of interest in negotiating the settlement and that the damage amount, negotiated in secret, did not contain adequate funds to cure the environmental damages. Exxon then removed all cases involving the environmental claims, including *National Wildlife Federation v. Exxon*, *Eyak Native Village v. Exxon* and *Wisner v. Exxon*⁶⁴ to federal court under 28 U.S.C. § 1441(c).⁶⁵ The trust plaintiffs sought remand to state court, but the District Court found a sufficient federal question to satisfy section 1441(a) in the form of either an action in equity or a motion under Rule 60(b)(3).⁶⁶ The Ninth Circuit upheld the removals, but on different grounds.⁶⁷

10. *Fifteen class actions originally filed in Alaska state court*⁶⁸ – With the exception of the Alaska Sportfishing Association, which joined with three other groups described above as the trust plaintiffs, these plaintiffs were removed to federal court pursuant to section 1441(c). In 1989, the classes filed a consolidated complaint seeking to consolidate into five new classes, discussed immediately below.⁶⁹

11. *The consolidated classes* – In 1991, the federal district court certified four classes, the Alaska Native Class, Commercial Fishing Class, Processor/Distributor Class and Area Business Class, and denied a Use and Enjoyment Class.⁷⁰

62. *Id.* The action was filed as *Alaska Sportfishing Ass'n v. Alyeska Pipeline Serv.*, No. 3AN-89-5188 (Alaska Super. Ct. 1989). *Id.*

63. *Eyak Native Vill.*, 25 F.3d at 776.

64. *Id.* This action was filed as *Wisner v. Exxon Corp.*, No. 3KO-89-265 (Alaska Super. Ct. 1989). *Id.*

65. *Id.*

66. FED. R. CIV. P. 60(b)(3) (party may be relieved from a final judgment or order where it has been reached due to fraud).

67. *Eyak Native Vill.*, 25 F.3d at 779.

68. The Eyak Native Village, Cordova District Fishermen United, Prince William Sound Setnetters Association, Philip McCrudden, Samish Maritime, Inc., Randall Babich, Albert Carroll, Ina Thorne, Edward Gregorieff, Kent Herschleb, Mark Van Driessche, Keith Gordaoff, Tom Copeland, Sea Hawk Seafoods and the Alaska Sportfishing Association. *Id.* at 779-80.

69. *Id.* at 780.

70. *Id.*

12. *The Wisner v. Exxon Corporation class* – Originally a separate class, these plaintiffs became part of the consolidated classes above.⁷¹

13. *The “Seattle Seven”*⁷² – Immediately after the spill, a group of private companies which process seafood caught in Prince William Sound settled with Exxon for \$64 million. It was a bit more complicated than that, however, as discussed below.⁷³

14. *The Mandatory Damages Class* – Judge H. Russel Holland of the District Court for the Federal District of Alaska certified a mandatory punitive damages class in 1994. Alaska’s state courts agreed that this class was the only mechanism through which any plaintiff in any court could recover punitive damages.⁷⁴

Even California motorists who claimed injury due to increased gasoline prices sought to get into the act.⁷⁵ The action was brought as a class action in Alaska, properly removed under section 1441(b)⁷⁶ to federal court because jurisdiction was “founded on a claim or right arising under the Constitution, treaties or laws of the United States”⁷⁷ because it invoked the strict liability provisions of the Trans-Alaska Pipeline Authorization Act (“TAPAA”), and then was dismissed in the first 12(b)(6)⁷⁸ motion, which my students will see.⁷⁹

2. Class Actions

The Exxon Valdez disaster hurt many people in many different ways, but the injuries fell into a manageable number of different classes: commercial fisherman, sport fishermen, subsistence hunters, etc. In addition to the many individual suits, class actions were initiated under both state⁸⁰ and federal law,⁸¹ classes were removed,⁸² consolidated,⁸³ dismissed⁸⁴ and, finally, the

71. *Id.* at 781.

72. *See In re The Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000).

73. *See infra* notes 80-87 and accompanying text.

74. *See, e.g., Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 775 (Alaska 1999).

75. *Benefiel v. Exxon Corp.*, 959 F.2d 805, 806 (9th Cir. 1992). This case also presents an interesting proximate cause analysis for the torts professor: plaintiffs alleged that the spill caused the Coast Guard to close the port of Valdez reducing the flow of oil to refineries, the refineries decided to raise the price of oil rather than tap into reserves, wholesalers passed the increases along to distributors, distributors passed it along to retailers and the retailers increased the price of gas for plaintiffs! *Id.* at 807.

76. 28 U.S.C. § 1441(b) (2000).

77. *Benefiel*, 959 F.2d at 807 (quoting 28 U.S.C. § 1441(b)) (emphasis added).

78. FED. R. CIV. P. 12(b)(6) (motion for dismissal for failure to state a claim upon which relief can be granted).

79. *Benefiel*, 959 F.2d at 806.

80. *See supra* note 68.

81. *See supra* notes 43-44 and accompanying text.

82. *See supra* note 65 and accompanying text.

83. *See supra* note 70 and accompanying text.

84. *See supra* note 79 and accompanying text.

federal court created a single mandatory punitive damages class.⁸⁵ Thus, there are many opportunities to introduce the class action mechanism.

It is hard to deny the importance of class actions, and I will spend as much time as I can spare on class action suits during the course of the semester.⁸⁶ Class actions are, of course, controversial in some circles as well. Alleged abuses of the class action process are driving a process that would force all class actions into federal court.⁸⁷ The proposed Class Action Fairness Act would shift any class action to federal court where there was minimal diversity and claims of more than \$2 million—a small threshold amount in modern mass tort actions. These reforms are before the Senate Judiciary Committee as this is being written. What are the politics behind the Act? Who would benefit by its passage and who would be hurt?

3. Federal Subject Matter Jurisdiction and Removal

Now is the time for an introduction to subject matter jurisdiction and Title 28 of the United States Code.⁸⁸ For the cases originally filed in federal court, jurisdiction is based on section 1333 for the maritime law claims,⁸⁹ and section 1331⁹⁰ for the private remedy allowed under the TAPAA.⁹¹ Students should also be able to parse through the Code to find provisions describing the United States and Indian tribes as plaintiffs.⁹² The claims brought originally under state law invite a look at the Code's removal provision, section 1441.⁹³ Further, in one instance, students must cross-reference between the general

85. See *supra* note 74 and accompanying text.

86. I include class actions in my Civil Procedure class for the same reason that I try to include, at least, a taste of products liability in my torts class. In both cases, I can only introduce the subject, but encourage students to take upper level courses in the topic if I have whetted their interests. For a casebook for upper level class action courses, see ROBERT H. KLONOFF & EDWARD K.M. BILICH, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* (2000).

87. John O'Brien, *Group Seeks Reform of Class-action Lawsuits; Class Action Fairness Coalition Wants All Cases to be Heard in Federal Court*, THE POST-STANDARD, July 24, 2002, at B3.

88. There are an array of supplements that include, inter alia, the Federal Rules of Civil Procedure and portions of Title 28. I use West's FEDERAL RULES OF CIVIL PROCEDURE (educational ed. 2002).

89. 28 U.S.C. § 1333 (2000) (admiralty, maritime and prize cases). This section is not seen often in first year Civil Procedure cases.

90. 28 U.S.C. § 1331 (2000) (federal question jurisdiction).

91. 43 U.S.C. § 1653(c) (1994 & Supp. 2000).

92. 28 U.S.C. §§ 1345, 1362 (2000). As discussed below, only a portion of Alaska's natives are classified as Indians; however, for many federal law purposes they are accorded the same rights and status. *But see* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) (lands held pursuant to ANCSA are not "Indian country" as defined by 18 U.S.C. § 1151(b)).

93. 28 U.S.C. § 1441 (2000) (actions removable generally). See *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994).

removal provisions of section 1441 and the specifics of removal in section 1446.⁹⁴

4. Settlements and Alternative Dispute Resolution

The cases also provide the opportunity to discuss various settlement mechanisms. The State of Alaska's and the United States' claims for injury to natural resources under the Clean Water Act⁹⁵ were resolved after Exxon agreed to pay \$900 million for environmental cleanup.⁹⁶ Exxon also spent \$2 billion on clean-up efforts and settled many claims for some \$300 million.⁹⁷ One settlement involving the "Seattle Seven" raised other issues that are discussed in the Professional Responsibility section below.⁹⁸

Exxon has just entered the "reopener" phase of the settlement; between September 1, 2002 and September 1, 2006 Exxon can be called upon to pay up to an additional \$100 million for damages which were uncovered after the agreement and which could not have been reasonably known or anticipated.⁹⁹

5. Venue and Forum Non Conveniens

*Seariver Maritime Financial Holdings, Inc. v. Pena*¹⁰⁰ is a fascinating case that illustrates the concepts of venue, dismissal or transfer for improper venue, and forum non conveniens in just a few pages.¹⁰¹ Recall that in September 1991, Exxon entered into a consent decree with the United States and the State of Alaska, which stated, inter alia, first, that Exxon would not sue with respect to any claims it might have arising out of the oil spill, and, second, that the United States District Court for the District of Alaska retained jurisdiction for any additional orders, relief or implementation of the agreement.¹⁰² Recall also that prior to the settlement, in August 1990, President Bush signed into law the Oil Pollution Act of 1990, section 5007, which stated that no ship that had previously spilled more than one million gallons of oil into the marine

94. *Eyak Native Vill.*, 25 F.3d at 782. The court did not reach the merits of Alyeska's attempts to remove a number of state claims to federal court because Alyeska's notice of removal was not timely filed under 28 U.S.C. § 1446(b) (requiring that notice of removal be filed within 30 days of receipt of a claim for relief upon which the removal is based).

95. 33 U.S.C. § 1321(f) (2000). Other federal environmental legislation was also implicated.

96. *Eyak Native Vill.*, 25 F.3d at 775.

97. *In re The Exxon Valdez*, 270 F.3d 1215, 1223 (9th Cir. 2001).

98. See *infra* notes 142-50 and accompanying text.

99. Agreement and Consent Decree at 18-19, available at <http://www.oilspill.state.ak.us> (last visited July 22, 2002) (on file with author).

100. 952 F. Supp. 9 (D.D.C. 1997).

101. See 28 U.S.C. § 1391 (2000) (venue generally); 28 U.S.C. § 1404 (2000) (change of venue); 28 U.S.C. § 1404(a) (2000) (statutory forum non conveniens); 28 U.S.C. § 1406 (2000) (cure or waiver of defects); 28 U.S.C. § 1406(a) (2000) (dismissal or transfer for improper venue).

102. *Seariver Mar. Fin. Holdings, Inc.*, 952 F. Supp. at 9-10.

environment could operate in Prince William Sound.¹⁰³ Let the students decide whether this seemed to be unfairly targeted at Exxon and, more specifically, the *Exxon Valdez*.

By the way, where was the *Exxon Valdez* and who was Seariver? Exxon Shipping had changed its name to Seariver Maritime, and the *Exxon Valdez* had been renamed the *S/R Mediterranean* and was operating in the Mediterranean Sea.¹⁰⁴ Seariver brought suit when it wanted to bring the former *Exxon Valdez* back to Prince William Sound to resume shipping oil from the Valdez terminal of the Alaskan Pipeline to California.¹⁰⁵ Here my students get their first taste of constitutional analysis, as Exxon/Seariver claimed that section 5007 violates no less than four constitutional provisions:¹⁰⁶ due process,¹⁰⁷ double jeopardy,¹⁰⁸ Bill of Attainder¹⁰⁹ and ex post facto laws.¹¹⁰

The substantive issue of the case was whether the consent decree, signed *after* the Oil Pollution Act was signed into law, constituted a waiver of these constitutional claims.¹¹¹ However, we are more interested in the venue and forum non conveniens issues. Exxon/Seariver first filed the case in the Southern District of Texas and the Texas court ruled that venue was not proper in Texas, but would be proper in either the District of Columbia or Alaska. The Texas court first dismissed the case—after which the plaintiff refiled in the District of Columbia—then reconsidered and transferred to the District of Columbia, holding that venue was proper there under section 1391(e).¹¹² Next, the United States moved for a transfer to Alaska pursuant to section 1406(a).¹¹³

103. Oil Pollution Act of 1990 § 5007, 33 U.S.C. § 2737 (2000).

104. *Seariver Mar. Fin. Holdings, Inc.*, 952 F. Supp. at 10. Exxon officials denied the name change had anything to do with the Alaskan disaster. KEEBLE, *supra* note 13, at 298. As far as I know, Hazelwood has not changed his name. According to most recent reports, Hazelwood has paid his \$50,000 restitution to Alaska, completed his community service requirements in Alaska (ironically the appeals process continued until after the clean-up ended, so he did not get to participate therein) and is attending AA meetings. *Valdez Captain Pays His Debt*, CHI. TRIB., May 17, 2002, at 18, available at 2002 WL 2655863.

105. *Seariver Mar. Fin. Holdings, Inc.*, 952 F. Supp. at 10.

106. *Id.*

107. U.S. CONST. amend. V (Due Process Clause). Students will, of course, spend a great deal of time on Due Process, primarily under the Fourteenth Amendment in the personal jurisdiction cases.

108. *Id.* (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .”).

109. *Id.* art. I, § 9, cl. 43 (“No Bill of Attainder or ex post facto Law shall be passed.”).

110. *Id.*

111. *Seariver Mar. Fin. Holdings, Inc.*, 952 F. Supp. at 10.

112. *Id.* (citing 28 U.S.C. § 1391(e) (2000) (proper venue where the defendant is the United States)).

113. *Id.* (citing 28 U.S.C. § 1406(a) (2000) (court may dismiss case or transfer to proper venue when case is filed in the wrong venue)).

However, because the Texas court had already held that the District was a proper venue, the District of Columbia court determined that it would transfer to Alaska not under section 1406(a), but rather on the basis of forum non conveniens.¹¹⁴ The court then gave a clear and brief explanation of the concept of transfer “for the convenience of parties and witnesses, in the interest of justice,”¹¹⁵ a concept we will explore in more detail later in the course.¹¹⁶

6. Discovery

As should be obvious, a complex mass tort case, such as this one, involving many people and a great deal of money required extensive discovery, but discovery is a topic about which students have probably given little thought prior to law school. In fact, discovery took almost five years; the defendants were required to produce millions of pages of materials; the plaintiffs took over one thousand depositions; Exxon deposed thousands of individuals and required them to produce tax records and other business records; and Exxon employed hundreds of expert witnesses, most of whom produced expert reports and most of whom were deposed by the plaintiffs.¹¹⁷

There are obviously many examples of the discovery process available in connection with these cases. For example, in *In re The Exxon Valdez*,¹¹⁸ the plaintiffs sought documents from the American Petroleum Institute (“API”), a Washington trade association, through a non-party subpoena. API resisted, arguing, inter alia, that the then-new Rule 45(c)¹¹⁹ required that the petitioners bear the cost of compliance. Here students need to not only read the Rule, but

114. *Id.* (construing 28 U.S.C. § 1404(a) (2000)).

115. 28 U.S.C. § 1404(a).

116. The Court text includes *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (where plane crash occurred over Scotland, dismissal of case in Pennsylvania was proper even where transfer would result in substantive law less favorable to plaintiffs) and a brief excerpt from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (even where venue is proper, a court may decline jurisdiction based upon a balancing test which weighs all factors, but granting plaintiff’s choice unless balance is strongly against that decision), which I supplement with my own cut-down version of *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987), another disaster case resulting from 2,000 deaths and 200,000 injuries from a release of cyanide gas in Bhopal, India, and which ultimately concluded with a \$470,000,000 settlement, and involved forum non conveniens analysis on an international scale.

117. William B. Hirsch, *The Exxon Valdez Litigation Justice Delayed: Seven Years Later and No End in Sight*, in PICOU ET AL., *supra* note 1, at 271-308, available at http://www.lieffcabraser.com/wbh_exxart.htm (last visited Sept. 1, 2002). This is the website of Lieff Cabraser Heimann & Bernstein, LLP, where Hirsch is of counsel. Lieff Cabraser is a multi-state firm that litigates, inter alia, plaintiffs’ side class action and mass toxic tort cases. The article, which generally takes a critical attitude toward Exxon’s handling of the situation, is recommended for its inside analysis of the legal maneuvering behind the decision-making involved in settlements, removals and delaying tactics.

118. 142 F.R.D. 380 (D.D.C. 1992).

119. FED. R. CIV. P. 45(c) (as amended in 1991).

also to parse through the Advisory Committee's Notes, hopefully finding the sentence that states: "A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court."¹²⁰

Adding to the confusion, API also argued that because the majority of the documents sought by the plaintiffs could also be obtained from the defendants, production should be shifted to them because it would be "more convenient, less burdensome, or less expensive," citing Rule 26(b)(1).¹²¹ If a student has done as she should and looked up the Rule she will not find that quote in Rule 26(b)(1), but rather in Rule 26(b)(2)(i) where it was moved in a 1993 amendment.¹²² The court held that because API was the industry-wide repository for safety information, API and its members had an actual interest in the litigation, twenty-nine percent of its income came from *In re The Exxon Valdez* defendants, and that because it had 1989 gross receipts of \$58 million and a net worth of \$17 million, API should bear twenty-nine percent of the costs of production.¹²³ Interestingly, API may have actively lobbied in Washington against the double-hulled tanker requirements (which were finally enacted into law as a result of the spill) and oil spill contingency plans.¹²⁴

7. The Role of the Jury

I want my students to understand our legal system's love-hate relationship with the jury. From Blackstone's "glory of the English law,"¹²⁵ to increasing criticisms such as Chief Justice Burger's 1985 article, *Thinking the*

120. FED. R. CIV. P. 45 advisory committee's note.

121. *In re The Exxon Valdez*, 142 F.R.D. at 382 (citing FED. R. CIV. P. 26(b)(1) (as amended in 1987, not reflecting 1993 amendments)).

122. The Advisory Committee's Notes report that, "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument of delay and oppression." FED. R. CIV. P. 26 advisory committee's note.

123. *In re The Exxon Valdez*, 142 F.R.D. at 382-84.

124. *Id.* at 384. However, API argued that these lobbying efforts were privileged as protected by the First Amendment right to "petition the Government for a redress of grievances." *Id.* (citing U. S. CONST. amend. I). This issue was not reached, as it was pending in the Alaskan court at the time of this hearing. *Id.* at 384-85.

125. Professor Cound cites this quote in his introductory materials to the chapter on trials. See COUNDET AL., *supra* note 2, at 953. Blackstone, after discussing the jury trial, stated:

Upon these accounts the trial by jury has ever been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!

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Unthinkable,¹²⁶ the proper role of the jury has prompted a great deal of debate. No one topic illustrates the debate better than the setting aside of allegedly excessive jury awards, such as the five billion dollars assessed against Exxon, which led to the Ninth Circuit's reversal and remand in *In re The Exxon Valdez*.¹²⁷ The case, the most recent in the *Exxon Valdez* line of cases as this is being written, was announced just after I had taught *BMW v. Gore* in a torts class¹²⁸ and became the basis of a final exam question in torts. The *Exxon Valdez* tragedy occurred before *BMW*, and the Ninth Circuit examined the punitive damages issue in *In re The Exxon Valdez* after *BMW* and after the Ninth Circuit had been reversed by the Supreme Court in a recent case which reaffirmed *BMW, Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*¹²⁹

The punitive damage award against Exxon (\$5,000 in punitive damages were also assessed against Captain Hazelwood) was, at the time, the largest punitive damages award in history.¹³⁰ But was it unreasonable? Because the jury apparently selected an amount equal to Exxon's annual net profit

126. COUND ET AL., *supra* note 2, at 954-55 (quoting Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210-11 (1985) (listing problems associated with civil jury trials)).

127. 270 F.3d 1215 (9th Cir. 2001).

128. 517 U.S. 559 (1996). In *BMW*, the car manufacturer had a policy that if pre-sale damages to a new car amounted to less than 3% of the car's value, it would repair the car and sell it as new without disclosure of the damage and repair to the retail dealer, and, thus, the consumer. *Id.* at 563-64. This was in keeping with the consumer laws of some twenty-five states. *Id.* at 565. Dr. Gore bought a BMW that had been repainted after acid rain damaged it in transit from Germany. This was a \$600 cost, 1.5% of the vehicle's price, and, thus, not disclosed. When he took the car to Slick Finish for detailing, Mr. Slick detected that it had been repainted. *Id.* at 567. Gore sued, winning a seemingly reasonable jury verdict of \$4,000 in compensatory damages. However, the jury then awarded \$4 million in punitive damages. The Alabama Supreme Court reduced the punitives to \$2 million. The Supreme Court held that due process requires that a person must have fair notice of conduct that will subject him to punishment as well as notice of the possible severity of the punishment. *Id.* at 574. Thus, a grossly excessive punitive damage award violates due process. Whether an award is grossly excessive is based on three factors: the degree of reprehensibility (violence versus economic harm, non-disclosure versus deliberate false statements); the ratio of actual damages to punitive damages (double, triple or quadruple damages were seen in the early English cases originating the concept, but in *BMW* the ratio was 500/1); and sanctions for similar misconduct (here the civil penalty authorized by the legislature was capped at \$2,000). *Id.* at 575. On remand, the Alabama Supreme Court ordered a remittitur of \$50,000 and Gore accepted. See VICTOR SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS CASES AND MATERIALS 554-61, 561, n.1 (10th ed. 2000).

129. 532 U.S. 424 (2001). In *Leatherman*, the Court held that the appellate court should conduct a de novo review of a jury's award of punitive damages. The level of punitive damages was not really a fact tried by the jury, because the appellate court was more institutionally competent to make the decision and, thus, taking the issue from the jury did not violate the Seventh Amendment. *Id.* at 436-437.

130. *In re The Exxon Valdez*, 270 F.3d at 1238.

worldwide, believing a year without profit to be an appropriate punishment,¹³¹ students may differ on the answer to that question. As the Ninth Circuit noted, when the jury returned its verdict, neither *BMW* nor *Leatherman* had been decided, and, thus, the court had no constitutional analysis by the District Court to review.¹³² Thus, the court remanded, but not before providing analysis of the three *BMW* factors.¹³³ Although it did not give specifics, the court determined that the \$5 billion amount was too high to withstand scrutiny.¹³⁴

8. The Trial

The trial lasted four and a half months.¹³⁵ The District Court tried the case in three phases. In the first phase, the jury found that Exxon and Hazelwood had been reckless and, thus, both were liable for punitive damages.¹³⁶ In the second phase, the jury found that two classes, the Commercial Fishing Class and the Native Class, were entitled to compensatory damages of \$287 million.¹³⁷ In the third phase, the \$5 billion punitive damage award that was later reversed and remanded by the Ninth Circuit was awarded.¹³⁸ There was to be a fourth phase involving landowners and other fisherman not included in the class, but those groups settled before the trial.¹³⁹

9. The Appeals Process

The *Exxon Valdez* cases are nothing if not illustrative of the potential for a never-ending string of appeals in the American legal system. There are numerous opportunities to explain the appeals process. For example, after the decision in *In re The Exxon Valdez*,¹⁴⁰ which was decided by a three-judge panel that included a replacement for one judge who had heard the oral

131. *Id.* at 1238-39.

132. *Id.* at 1241.

133. *Id.* at 1241-46.

134. *Id.* at 1246-47.

135. Hirsch, *supra* note 117, at 284.

136. *In re The Exxon Valdez*, 270 F.3d at 1225. The decision came after four weeks of testimony centering on Hazelwood's degree of intoxication at the time of the accident and Exxon's knowledge of his drinking problem. See Natalie Phillips, *Jury Finds Exxon, Hazelwood Reckless*, ANCHORAGE DAILY NEWS, June 14, 1994, at A1, available at <http://www.adn.com/evos/stories/EV388.html> (last visited Sept. 1, 2002).

137. *In re The Exxon Valdez*, 270 F.3d at 1225. The court reduced this award to a little over \$19.5 million for released claims, settlements and payments from the TAPL fund. *Id.* The plaintiffs had sought \$1.5 billion. Phillips, *supra* note 136, at A1.

138. *In re The Exxon Valdez*, 270 F.3d at 1225.

139. *Id.*

140. 270 F.3d 1215.

arguments, but died before the case was decided,¹⁴¹ the plaintiffs sought rehearing en banc, but were denied.¹⁴² Should the then-biggest punitive damages award in U.S. history have been evaluated by the full Ninth Circuit?

C. *Two Collateral Issues: Professional Responsibility and Indigenous Peoples*

The following two topics are not Civil Procedure *per se*, but, in the first instance, I believe it is important to introduce professional responsibility issues throughout the curriculum, and, in the second, I believe the use of indigenous peoples law helps students understand the underlying cultural and ethical assumptions of Western law. Environmental law is an obvious third collateral topic; it cannot help but diffuse throughout the discussion of the cases, but I do not discuss it separately.

1. Professional Responsibility

Most would agree that professional responsibility issues need to be addressed from time to time throughout the curriculum, not just in the course of that name.¹⁴³ The *Exxon Valdez* cases provide an interesting opportunity. Recall that the “Seattle Seven” seafood packers had settled early on with Exxon for \$64 million. This fact was known at the time of the district court trial for the mandatory punitive damages class, but what Exxon’s attorneys did not disclose to the court, the other plaintiffs or the jury, was that the “Seattle Seven” had agreed not to take any compensatory damages awarded them and to pay or “cede” back to Exxon any punitive damages awarded to the “Seattle Seven.”¹⁴⁴ Exxon’s President stated on the witness stand that Exxon had paid out over \$300 million to injured parties and had received “nothing of value in return.” Exxon’s attorney reiterated this point in his closing remarks. In fact, due to the agreement with the “Seattle Seven” and others like it, Exxon received about \$168 million of value in return.¹⁴⁵

Students are asked if they consider this unethical.¹⁴⁶ In an unreported district court opinion, the court held that the cede back agreement was not

141. *Id.* at 1220, n.*. Judge Wiggins heard the oral arguments on May 3, 1999, but died on March 2, 2000. Judge Schroeder replaced him and listened to a tape of the oral argument. *Id.*

142. *See Ninth Circuit Denies Appeal for Exxon Valdez Punitive Damage Rehearing*, PETROLEUM NEWS ALASKA, Jan. 11, 2002, available at <http://www.petroleumnewsalaska.com/nbarch/08-5-2.html> (last visited Sept. 1, 2002).

143. *See* DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 429-58 (2d ed. 1998).

144. *In re The Exxon Valdez*, 229 F.3d 790, 792 (9th Cir. 2000). The agreement was later modified to allow the “Seattle Seven” to keep a portion of the punitive damages. *Id.*

145. *Id.* at 794.

146. Judge Holland, the trial court judge, was not pleased, stating:

unethical, but the “Seattle Seven” were not permitted to receive any of the damages awarded, and “[t]he court had no doubt that the Exxon Valdez jury would be *outraged* if Exxon, through the Seattle Seven settlement agreement, rather than the claimants, were to wind up with almost 15% of the punitive damages award.”¹⁴⁷

However, the Ninth Circuit held that, in light of the twin goals of reaching settlements and maintaining fairness to all parties in mass tort class action litigation, cede back agreements are fair and appropriate.¹⁴⁸ Furthermore, the Ninth Circuit agreed with Exxon that, as a general rule, juries should not generally be told of cede back agreements because they would tend to offset them by increasing the amount of the damage award.¹⁴⁹ Finally, the Ninth Circuit decided that there were not special circumstances that warranted not following the general rule.¹⁵⁰ Thus, although the court did “not condone its conduct,” Exxon was not penalized, and the court felt it unfair to exclude the “Seattle Seven” from the settlement based upon Exxon’s conduct.¹⁵¹ What could Exxon have done differently? At the very least, fully disclose the agreements to the judge away from the jury.

2. Indigenous Peoples

The land and the water are our sources of life. The water is sacred. The water is like a baptismal font, and its abundance is the Holy Communion of our lives. Of all the things that we have lost since non-Natives came to our land, we have never lost our connection to the water. The water is our source of life. So long as the water is alive, the Chugach Natives are alive.¹⁵²

In all of my classes, I like to include references to issues raised by indigenous peoples from time to time, not necessarily to teach, for example, Indian law¹⁵³ for its own sake, but to help explicate the underlying cultural and

The court is shocked and disappointed that Exxon entered into such a repugnant agreement with the Seattle Seven. Although the court does not so find, it is probable that more than one of the many attorneys who represent Exxon and the Seattle Seven violated Rule 3.3 of the Alaska Rules of Professional Conduct requiring candor toward the tribunal.

KEEBLE, *supra* note 13, at 326 (quoting an unreported district court opinion).

147. *In re The Exxon Valdez*, 229 F.3d at 794-95 (emphasis added).

148. *Id.* at 795-96.

149. *Id.* at 797. Students may be surprised by this statement, “a jury should assess damages but not determine how much defendants should ‘actually’ pay or how much plaintiffs should ‘actually’ receive.” *Id.*

150. *Id.* at 800.

151. *Id.*

152. KEEBLE, *supra* note 13, at 231 (quoting Chugach Village Chief Walter Meganack).

153. Unlike those of the lower forty-eight states, the indigenous peoples of Alaska are most often referred to as Alaska Natives or simply Natives. For a discussion of the propriety of the term “Indian” versus “Native American,” see JAMES WILSON, *THE EARTH SHALL WEEP: A*

ethical assumptions of our Western law through a comparative look at how a different culture looks at concepts such as individual property ownership.¹⁵⁴

A brief bit of Alaskan Native history is in order. When the United States purchased Alaska from Russia in 1867, the treaty provided that all inhabitants who wished to remain would be entitled to the rights of citizenship with the exception of the “uncivilized native tribes.”¹⁵⁵ Thus began a period in which little attention was paid to the subsistence-living Natives’ land rights, and there was much less pressure to extinguish the Natives’ aboriginal title than in the lower forty-eight states.¹⁵⁶ However, the Supreme Court did hold in 1955 that Native land interests could be extinguished without compensation by the federal government.¹⁵⁷

The discovery of oil on the North Slope changed everything.¹⁵⁸ After many years of political debate at the state and federal levels regarding Native land rights in Alaska following the discovery of valuable oil deposits on the Alaskan North Slope and after development of the controversial Trans-Alaska Pipeline plan—necessitated by the fact that the Beaufort Sea adjacent to the oil fields was impassible much of the year but Valdez was passable twelve months

HISTORY OF NATIVE AMERICA at xv (1998) (discussing the difficulties in arriving at the proper terms for use in describing the indigenous peoples of North America). In fact, applying Western ethnological terminology, many of Alaska’s Natives are not Indians. The Alaskan peninsula and the Aleutian Islands are inhabited by Aleuts; Western and northern Alaska are inhabited by Yupik and Inupiat Eskimos; Tlingit and Haida Indians live in southeastern Alaska; and, finally, Athabascan Indians live in the interior. See DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 906 (4th ed. 1998). The Natives of the Prince William Sound area are a mixture of many Native groups with the Alutiiq the dominant group. Duane Gill & J. Steven Picou, *The Day the Water Died Cultural Impacts of the Exxon Valdez Oil Spill*, reprinted in PICOU ET AL., *supra* note 1, at 168.

154. The *Tulsa Law Review* recently devoted an entire issue to an excellent series of articles on integrating Indian Law into law school curricula. Melissa Tatum, *Foreword*, 37 *TULSA L. REV.* 481 (2001); Cynthia Ford, *Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later*, 37 *TULSA L. REV.* 485 (2001). See also Cynthia Ford, *Integrating Indian Law in a Traditional Civil Procedure Course*, 46 *SYRACUSE L. REV.* 1243 (1996). I have elsewhere discussed my use of Indian Law in Property. See Keith Sealing, *Dear Landlord, Please Don’t Put a Price on my Soul: Teaching Property Law Students That “Property Rights Serve Human Values,”* 5 *N.Y. CITY L. REV.* (forthcoming) (manuscript at notes 138-73, on file with author).

155. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 367 (3d ed. 1998) (quoting Treaty of Cession, 15 Stat. 539, 542).

156. GETCHES ET AL., *supra* note 153, at 906.

157. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

158. ARCO and Humble (now Exxon) discovered significant amounts of oil and natural gas at Prudhoe Bay on the north shore of Alaska in January of 1968. By July, they announced the find to be 9.6 billion barrels (small oil finds had been discovered as early as the beginning of the 19th century by the Russians). Robert Gramling & William Freudenburg, *The Exxon Valdez Oil Spill in the Context of U.S. Petroleum Politics*, *INDUS. CRISIS Q.* 6 (1992), reprinted in PICOU ET AL., *supra* note 1, at 76-77.

a year—the Alaska Native Claims Settlement Act was passed in December, 1971.¹⁵⁹ Although purporting to grant Natives land rights, it was clearly designed to remove legal obstacles to construction of the Trans-Alaska Oil Pipeline.¹⁶⁰ Native claims to some 365 million acres of land were extinguished in exchange for the right to select 44 million acres and receive payments of \$962.5 million. It placed title to all Native lands in the hands of Tribal Corporations with shares therein held by individual members of the tribes. After 1991, Corporations could sell their interests to developers.

As already noted, the disaster had a severe impact on the Native population, particularly those living a subsistence lifestyle.¹⁶¹ Humans have existed in the Prince William Sound area for at least 7,000 years and those affected by the spill numbered about 15,200. Subsistence harvests dropped by about seventy-seven percent immediately after the spill and had not yet fully recovered according to a tenth anniversary study.¹⁶² But how does one put a price on subsistence losses? For some 3,500 Natives the answer was \$20 million or about \$4,000 each.¹⁶³

But the Natives' path through the courts involved them in a system not of their own making or choosing. For a separate class of 3,455 Natives, a settlement was reached for damages to their subsistence harvest, but their attempt to recover for damages to their subsistence lifestyle or culture was rebuffed by the court.¹⁶⁴ The class presented two claims, one for cultural damage and one for harvest damage.¹⁶⁵ When the class settled on the harvest damage claim, Exxon moved for summary judgment on the cultural claim.¹⁶⁶ The decision hinged on whether the class had stated a public nuisance under federal maritime law, which, in turn, hinged on the "special injury law," which

159. 43 U.S.C. §§ 1601-1628 (2000).

160. See KEEBLE, *supra* note 13, at 10-11; GETCHES ET AL., *supra* note 153, at 907-12; CANBY, *supra* note 155, at 372-79.

161. See *supra* notes 43-50 and accompanying text. Subsistence means noncommercial, customary and traditional uses of fish, game, and wild plants for food, fuel, tools, clothing, handicrafts, and sharing. It is a vital component of the economy in rural Alaska and provides a means for passing on cultural values, traditional knowledge, and key survival skills from one generation to the next. In short, subsistence supports a distinctive, vibrant way of life.

James A. Fall, *Subsistence*, RESTORATION NOTEBOOK, Sept. 1999, at 1, available at <http://www.oilspill.state.ak.us> (last visited Sept. 5, 2002).

162. Fall, *supra* note 161.

163. Phillips, *supra* note 136, at A1.

164. Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997). The class originally filed suit in state court and included the Native villages and government entities. Exxon removed the action to federal court. Later, the villages and other entities were excluded, leaving the 3,455 individual Natives. *Id.* at 1197-98.

165. *Id.* at 1197.

166. *Id.*

states that a private individual cannot recover damages for a public nuisance unless she can show a special injury different in kind from that of the general public.¹⁶⁷ The district court held, and the Ninth Circuit agreed, that “the right to lead subsistence lifestyles is not limited to Alaska Natives,” and so they suffered no special injury.¹⁶⁸

III. CONCLUSION

The *Exxon Valdez* cases are still very relevant today not just because the \$5 billion punitive damages award is currently on remand to the United States District Court for the District of Alaska. For the second time, a Bush Administration is pushing for legislation to permit oil exploration in the Alaska Arctic National Wildlife Refuge.¹⁶⁹ The *Exxon Valdez* disaster played a large role in the scuttling of the first Bush attempt to open up ANWR, and although the new Bush proposal is blocked in the Senate as of this writing, “the issue is not going to go away.”¹⁷⁰ The western slope fields will eventually dry up and ANWR oil—possibly as many as 16 billion barrels—could then be diverted to the Trans-Alaska Pipeline and its utility extended.¹⁷¹ While the new Bush argues that OPA, signed into law by the old Bush in 1990, would protect the environment,¹⁷² environmentalists still point to the *Exxon Valdez* disaster and argue that another disaster is not just possible, but inevitable. Was the spill an aberration caused by a drunken Captain or the inevitable result of attempting to move so much oil through a narrow, dangerous and ecologically sensitive passage while cutting costs wherever possible? Has post-spill legislation, such as that mandating double-hulled vessels eliminated the dangers? *Exxon Valdez* will be with us for some time to come; perhaps the oil company official who

167. *Id.*

168. *Id.* at 1198. The court concluded:

While the oil spill may have affected Alaska Natives more severely than other members of the public, “the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings” is shared by all Alaskans.

Id. (quoting District Court Order No. 150 at 6). For a more complete look at the case in a well-written student note, see Panoff, *supra* note 9.

169. See Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is It Time To Change The Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97 (2001).

170. Walter Hickel, *ANWR Oil: An Alternative to War Over Oil*, AMERICAN ENTERPRISE, June 1, 2002, available at 2002 WL 8328146. Hickel, former United States Secretary of the Interior and two-term Alaska Governor, notes that the area could produce 600,000 to 1,900,000 barrels of oil per day, but does not mention that this oil would flow to Valdez and then through Prince William Sound. *Id.*

171. Robert Gramling & William Freudenburg, *The Exxon Valdez Oil Spill in the Context of U.S. Petroleum Politics*, reprinted in PICOU ET AL., *supra* note 1, at 82.

172. Lewis, *supra* note 169, at 31 (citing Statement by President George Bush Upon Signing H.R. 1465, 1990 U.S.C.A.N. 861-1).

suggested that lawyers not yet born would work on the case was not engaging in hyperbole at all.¹⁷³

In the course of working through the *Exxon Valdez* cases, students will have developed an appreciation of the fact that they must read a case with their rules supplement at their side and will have looked at a number of specific Rules and how they interact,¹⁷⁴ Advisory Committee Notes and history of the Rules,¹⁷⁵ provisions of Title 28 of the Code,¹⁷⁶ the Constitution,¹⁷⁷ and a variety of other federal statutes. But, more importantly, they will have learned that procedure is not an esoteric, dry sidelight to the real litigation, but rather a vibrant and essential part of the law with very real impact on people, their lives and their environment.

173. *See supra* text accompanying note 1.

174. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 1-279 (rev. ed. 2002). Rules discussed include 12(b)(6); old 26(b) and new 26(b)(1); 46(c); and 60(b)(3).

175. *Id.* Notes discussed include the Note to the 1991 amendments, *see supra* note 120, and Note to the 1993 amendments, *see supra* note 122.

176. 28 U.S.C. § 1-4001 as amended through Pub. L. 107-182, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 571-1080 (rev. ed. 2002). Code sections discussed include 28 U.S.C. §§ 1331, 1333, 1345, 1362, 1391, 1404, 1406, 1441(a)-(c).

177. U. S. CONST., *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, 1088-1105 (rev. ed. 2002). Sections and amendments discussed include U.S. CONST. art. I, § 9, cl. 4, *supra* note 108; U.S. CONST. amend. I; U.S. CONST. amend. V.