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In re: The EXXON VALDEZ, GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class, Plaintiffs-Appellees, v. EXXON CORPORATION, et al., Defendants-Appellants

No. 97-35191

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1997 U.S. 9th Cir. Briefs 35191; 1999 U.S. 9th Cir. Briefs LEXIS 26

April 2, 1999

On Appeal from the United States District Court for the District of Alaska.

Amicus Brief

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TITLE: BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

TEXT: STATEMENT OF INTEREST

The American Tort Reform Association (ATRA) files this brief principally to emphasize to the Court the need to require "clear and convincing evidence" as a predicate for punitive damages liability in maritime cases and to ensure exacting and meaningful post-trial and appellate review of punitive damages awards.

[*2] ATRA, founded in 1986, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system [**14] with the goal of ensuring fairness, balance and predictability in civil litigation. For over a decade, ATRA has filed *amicus curiae* briefs in cases before the United States Supreme Court and state courts of last resort that have addressed important liability issues, including the recent landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

SUMMARY OF ARGUMENT

Virtually every survey of jury-determined punitive damages has noted that trial and appellate courts often reverse or substantially reduce such awards. Indeed, opponents of tort reform often cite this phenomenon as evidence that reform of punitive damages is not needed. But, in fact, the high reversal and reduction rate for such damages raises very troubling questions. In particular, **the survey data suggest that juries have inherent difficulty deciding punitive [*3] damages questions in accordance with governing legal standards in many jurisdictions.**

Until recently, the social science literature on jury decisionmaking had devoted little attention to punitive damages awards. But, **a new study** led by Professor Reid Hastie of the University of Colorado [**15] Department of Psychology now provides dramatic confirmation of what the survey data imply. In a large-scale simulation, Professor Hastie and his colleagues asked over 120 randomly-selected mock juries to decide liability for punitive damages in case scenarios drawn from decisions in which appellate courts had held such damages unsustainable as a matter of law. A substantial majority of the experimental juries nevertheless would have assessed punitive damages, returning an overall error rate of sixty-seven percent. As striking as the high error rate was the overall low level of comprehension of the jury instructions explaining the key legal distinction between "recklessness" (which can support punitive damages liability) and mere "negligence" (which cannot). Although the instructions carefully delineated that distinction in accordance [*4] with the legal authorities, the experimental juries for the most part simply ignored it in their videotaped deliberations.

The Hastie study does not (and could not) purport to identify all possible factors contributing to the high punitive damages error rate. But, the existing empirical literature, again much of it recent, documents a number [**16] of systematic biases that likely contribute to this phenomenon. These include "hindsight" and "outcome" biases that skew *ex post* evaluation of the *ex ante* foreseeability of highly adverse events, as well as "zero risk" bias that leads juries to draw unrealistic conclusions about the avoidability of major accidents. Other documented biases that likely influence punitive damages liability decisions include anti-corporate biases and biases resulting from juror identification with local plaintiffs who would benefit from an award. Finally, biases may result from the intense negative media coverage that often attends the events underlying large punitive damages cases. Jurors exhibiting these biases typically are not aware of them, a fact that helps explain why even the most well-intentioned juries have difficulty correctly applying the legal standards for punitive damages.

[*5] This case, involving a local jury determination of punitive damages for a highly publicized major oil spill, is a textbook example of a case in which the foregoing biases are most likely to operate. It is thus a particularly important

case in which to consider and ultimately insist upon safeguards to [**17] counteract the problematic tendencies documented in the social sciences literature. Such safeguards should at a minimum include the "clear and convincing evidence" burden of proof requirement urged by Appellants, as well as stringent post-trial and appellate review of the legal sufficiency of the evidence supporting both punitive damages liability and amount. These safeguards are, in fact, closely intertwined, since imposition of a stricter evidentiary burden raises the standard against which reviewing courts must assess the legal sufficiency of the evidence to support the verdict. n1 The district court in this case failed to provide these safeguards. Accordingly, *amicus* calls upon this Court to set aside the jury's award and insist that the requisite safeguards be implemented.

n1 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[*6] ARGUMENT

I. Jury Decisions on Punitive Damages Are Error Prone

While there is much debate in the punitive damages literature [**18] about the incidence and impact of punitive damages in general there is no debate that when juries award such damages, trial and appellate courts frequently reverse or substantially reduce them. Virtually every survey of actual punitive damages cases conducted in the last ten years has noted this phenomenon.

One of the earliest such studies, a 1986 sampling by Professor William Landes and Judge Richard Posner of federal product liability cases tried between 1982 and 1985, reported that appellate courts reversed (and in one case sharply reduced) the awards in nine of thirteen cases in which punitive damages were appealed, upholding only thirty percent of the awards as made at trial. The authors noted that this reversal rate (seventy percent) was more than double the reversal rate for plaintiff verdicts not including punitive damages. n2

n2 *See William M. Landes & Richard A. Posner, New Light on Punitive Damages*, Reg. 33 (Sept-Oct. 1986).

[*7] Additional surveys by the Rand Corporation (1987) and the [**19] Government Accounting Office (1989) also reported high rates of reversal or reduction, especially among larger punitive awards. n3 More recent punitive damages surveys continue the pattern. In 1993, for instance, the Washington Legal Foundation studied decisions reported on LEXIS and WESTLAW and found that, on average, fifty-four percent of jury punitive damages awards were reversed, reduced, or modified. n4

n3 *See Mark Peterson, Syam Sarma & Michael Shanley, Punitive Damages: Empirical Findings*, Report No. 3311-ICJ, Institute for Civil Justice (Rand Corporation 1987); U.S. General Accounting Office, *Product Liability Verdicts and Case Resolutions in Five States* GAO/HRD-89-90 (Sept. 1989).

n4 *See Brief of the Washington Legal Foundation as Amicus Curiae in support of petitioner in Honda Motor Corp., Ltd. v. Oberg*, 114 S. Ct. 751 (1994).

Survey data of this type is, of course, fragmentary by definition, reflecting the case samples chosen by the various researchers. Unavailability [**20] of records, settlement of large numbers of cases and other factors all hamper systematic study. n5 Nevertheless, the [*8] consistent observation of high rates of reversal and reduction raises serious questions about the ability of juries to decide punitive damages fairly and correctly under the prevailing legal standards. The apparently high rate of disagreement between judges and juries on punitive damages stands in sharp contrast to the much lower rates of disagreement (typically around twenty percent) reported in the literature on jury verdicts generally. n6

n5 See Neil Vidmar, *Making Inferences About Jury Behavior from Jury Statistics: Cautions About the Lorelei's Lied*, 18 Law & Hum.

n6 See, e.g., Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883 (1993); Kevin M. Clermont & Theodore Eisenberg, *Trial by Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124 (1992); Edmund S. Howe & Thomas C. Loftus, *Integration of Intention and Outcome Information by Students and Circuit Court Judges: Design Economy and Individual Differences*, 22 J. Applied Psychol. 102 (1992); Harry Kalven & Hans Zeisel, *The American Jury* (Little, Brown 1966) Behav. 599 (1994); Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 Law & Contemp. Probs. 55 (1988).

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In recent years researchers in the field of psychology, sociology and other behavioral sciences have turned increasingly to experimental studies using mock juries both to test hypotheses suggested by fragmentary survey data and to gain greater insight into [*9] actual jury decisionmaking processes. n7 As indicated above, the first significant such study on punitive damages has recently been completed. In the wake of the high profile punitive damages trial in *Exxon Valdez*, Professor Reid Hastie of the University of Colorado and two other leading researchers in the field of behavioral psychology, Professors David Schkade of the University of Texas School of Management and John Payne of the Duke University Business School, conducted a large scale experimental jury simulation designed specifically to evaluate jury decisionmaking on liability for punitive damages. n8 The results strongly confirm what the surveys of punitive [*10] damages reduction and reversal rates imply, i.e., that juries are indeed prone to err when called upon to make determinations about punitive damages liability and amounts.

n7 Federal law prohibits behavioral researchers (or anyone else) from observing the deliberations of actual juries. 18 U.S.C. § 1508. No similar restriction applies to jury simulations, however, which have gained widespread acceptance among both social science researchers and legal practitioners as a means of studying jury decision processes. See generally Robert M. Bray & Norbert L. Kerr, *Use of the Simulation Method in the Study of Jury Behavior*, 3 Law & Hum. Behav. 107 (1979).

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n8 Reid Hastie, David Schkade & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, Report No. 364, University of Colorado at Boulder, Center for Research on Judgment and Policy (January 1997). Copies of this study, which was supported by grants from the National Science Foundation and Exxon, are available from the Center for Research on Judgment and Policy, University of Colorado, Boulder, Colorado, 80309.

The study used 726 jury-eligible individuals from the Denver metropolitan area who were systematically recruited to simulate the demographics of the national juror pool. Through a combination of videotaped and written materials, the researchers gave each mock juror one of four case scenarios drawn from actual punitive damages trials. The four cases presented a variety of fact situations, with the common thread that in each case an appellate court (in one case a trial court) had ruled that the evidence was *legally insufficient* to support punitive damages liability. n9

n9 The four cases were: (1) *Harper v. Zapata Offshore, Inc.*, 741 F.2d 87 (5th Cir. 1984), involving a shipowner's alleged bad faith treatment of an injured seaman; (2) *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1982), involving claims by relatives of crew lost in the sinking of an unseaworthy vessel; (3) *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988), involving product liability claims; and (4) *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987), involving claims that a mall owner knowingly failed to provide adequate nighttime parking lot security.

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[*11] The mock jurors received instructions on punitive damages liability identical to those used in the *Exxon Valdez* trial, which in turn were derived primarily from *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987). These instructions are noteworthy for their careful differentiation between "reckless disregard," which can support a punitive award, and mere "negligence," which cannot. The instruction on burden of proof (preponderance of the evidence) also paralleled the instruction given in *Exxon Valdez*.

The jurors deliberated in groups of six and answered post-deliberation questionnaires probing the reasons for their verdicts and testing their comprehension of the legal elements of liability, as set forth in the instructions. The researchers then analyzed the verdicts, the questionnaires, and videotapes of the deliberations themselves. n10

n10 As part of this analysis, the researchers transcribed the taped deliberations and coded juror statements into multiple categories designed to capture the decision-relevant elements of the deliberations. This in turn permitted detailed statistical analysis of the deliberation process across the 100-plus sample of juries.

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As noted, the study's results strongly confirm the high rate of jury error implied by the survey data. Whereas courts had determined [*12] punitive damages to be legally unsustainable in all of the four stimulus cases, fully sixty-seven percent of the 105 mock juries that reached verdicts would have awarded such damages. n11 Considered separately for each of the four stimulus cases, the error rate ranged from a low of forty-six percent to a high of eighty-five percent.

n11 Sixteen of the mock juries did not reach verdicts, either because they could not agree or ran out of time. The researchers assumed, reasonably, that verdicts in hypothetical "retrials" of such cases would follow the same general distribution as the other 105.

Equally striking were the study's findings on juror comprehension of the legal prerequisites for punitive damages liability. Although jurors received both oral and written presentations of the jury instructions and had copies of the instructions on hand throughout their deliberations, [**25] they scored on average only nine percent (with a median of only five percent) on lenient post-deliberation comprehension tests designed to elicit their understanding of the substance of the legal elements distinguishing recklessness (subjective consciousness of grave risk and gross deviation from ordinary care) from negligence. On their post-verdict questionnaires explaining their decisions, only twenty-six percent of [*13] the jurors indicated any substantial degree of reliance on these instructions, and over forty-nine percent made no mention of the instructions at all.

The researchers' review of the deliberation videotapes likewise showed that juries regularly failed to draw conclusions about or even to discuss one or more of the prescribed elements of the term "recklessness" identified in the instructions. Not surprisingly, juries giving greater consideration to the instructions had a lower overall error rate, but even for this group the error rate was still an unreasonably high forty-five percent.

Based on these results, Professor Hastie and his colleagues concluded that poor juror comprehension of the legal elements of reckless disregard -- which appears to persist despite [**26] careful and reasonably succinct instructions -- was a major contributor to the high punitive damages error rate. On the crucial distinction between recklessness and negligence, a substantial percentage of jurors simply failed to apply, or applied incompletely, the legal criteria set forth in the instructions. In place of the criteria for blameworthiness specified [*14] by the law of punitive damages, they imported personal criteria of blameworthiness that led them to legally erroneous conclusions.

II. Systematic Biases, Well-Established in the Social Sciences Literature, Likely Contribute to the High Jury Error Rate on Punitive Damages

The Hastie study shows empirically that juries have difficulty understanding and applying the legal standards for punitive damages liability, but does not fully answer why their liability conclusions so often diverged from those of courts that did apply those standards. Moreover, as noted above, the study found that even the most careful juries -- *i.e.*,

those that attempted in their deliberations to cover all of the requisite legal elements -- still returned error rates exceeding forty percent.

Other recent behavioral research [**27] suggests several reasons why juries are inherently error-prone on punitive damages. In particular, the literature documents a number of systematic anti-defendant biases which likely influence jury decisions in such cases. Taken together, these biases go a long way towards explaining why punitive damages awards are frequently reversed or reduced post-trial or on appeal.

[*15] **A. Hindsight and Outcome Biases**

Hindsight bias refers to the tendency of jurors emboldened with hindsight to overestimate the *ex ante* foreseeability of harms found to have resulted from a defendant's conduct. This bias is a particular danger in punitive damages cases, which typically call upon juries to perform retrospective evaluations of conduct which, in hindsight, resulted in seriously adverse outcomes.

Behavioral researchers have shown consistently that retrospective (hindsight) probability assessments of known outcomes tend to be unrealistically high in relation to truly prospective probability assessments. n12 The bias is believed pervasive, for example, in suicide malpractice cases brought against psychotherapists and negligence cases brought against prison and mental health officials [**28] [*16] who released persons who subsequently harmed others. n13 Similarly, researchers have shown that knowledge of the outcome of a police search (*i.e.*, whether it resulted in seizure of contraband) significantly influences views on whether the searchers had probable cause at the outset. n14

n12 For a review of the voluminous behavioral literature on this point, see Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 *Psychol. Bull.* 311 (1990). The seminal paper on hindsight is Baruch Fischhoff, *Foresight ? Hindsight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 *J. Experimental Psychol.: Hum. Perception & Perf.* 288 (1975).

n13 See David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation*, 7 *Behav. Sci. & L.* 485 (1989).

n14 See Jonathan D. Casper, Kennette Benedict & Jo L. Perry, *Juror Decision Making, Attitudes and Hindsight Bias*, 13 *Law & Hum. Behav.* 291 (1989); Jonathan D. Casper, Kennette Benedict & Janice R. Kelly, *Cognitions, Attitudes and Decision Making in Search and Seizure Cases*, 18 *J. Applied Psychol.* 93 (1989); Dorothy K. Kagehiro, Ralph B. Taylor, William S. Laufer & Alan T. Harland, *Hindsight Bias and Third Party Consenters to Warrantless Police Searches*, 15 *Law & Hum. Behav.* 305 (1991).

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The most telling recent research on hindsight bias is a 1995 report by Professors Kim Kamin of Stanford University and Jeffrey Rachlinski of Cornell Law School of an experiment designed to test both the existence and extent of hindsight bias in determining tort liability. n15 Professor Kamin and Rachlinski asked parallel groups of [*17] mock jurors to decide the propriety of a city's taking or not taking a particular safety precaution -- the hiring of an off-season draw-bridge operator to protect against the possibility of flooding caused by debris that might lodge under the bridge while it was closed for the winter. n16 One set of jurors determined whether to hire such an operator in the purely *ex ante* context of a hearing on whether flooding was sufficiently probable to warrant the expenditure. A second set of jurors determined whether the failure to hire such an operator was negligent in the *ex post* context of a liability trial held after flood damage had occurred. A third set had the same task as the second, but received a cautionary "debiasing" instruction advising the jurors to "recognize the influential effects of hindsight and to consider alternative outcomes as [**30] had the city in foresight." All three groups received the same evidence relating to *ex ante* probabilities and were instructed that their decisions should turn on the same question, *i.e.*, [*18] whether the *ex ante* probability of flooding multiplied by the likely (or actual) damages exceeded the cost of hiring the off-season operator. n17

n15 Kim A. Kamin and Jeffrey J. Rachlinski, *Ex Post? Ex Ante: Determining Liability in Hindsight*, 19 *Law & Hum. Behav.* 89 (1995).

n16 The researchers modeled this scenario on the facts of the well-known maritime tort case, *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964).

n17 This formulation of the negligence standard is of course the well-known "Hand formula" stated in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (L. Hand, J.).

The experimental results showed clearly what one distinguished judge recently called the "hydraulic force" of hindsight on liability decisions. n18 While only twenty-four [**31] percent of the jurors in the foresight-only group judged the precaution worth taking, nearly fifty-seven percent of those in the hindsight groups found the failure to take it negligent. The "debiasing" instruction made no statistically significant difference. This last finding comports with other empirical findings that hindsight bias is resistant to most debiasing techniques and persists even when jurors are alerted to its potential influence. n19

n18 See *Carroll v. Otis Elevator Corp.*, 896 F.2d 210, 215 (7th Cir. 1990) (Easterbrook, J., concurring) ("The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment").

n19 See generally Baruch Fischhoff, *Debiasing*, in Daniel Kahneman, Paul Slovic & Amos Tversky (Eds.), *Judgment Under Uncertainty: Heuristics and Biases* 335-51 (Cambridge Univ. Press 1982), and other references cited in Kim Kamin & Jeffrey Rachlinski, *supra* note 15, at 92.

[*19] Closely related to hindsight bias is "outcome bias, [**32] " which refers to bias in the evaluation of the quality of decisions having adverse outcomes. Here, researchers have found that people tend to judge actions resulting in negative outcomes more harshly than actions not having negative outcomes, even when *ex ante* prospects and information were the same. n20

n20 See Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. Pers. & Soc. Psychol. 568 (1988); Raanan Lipshitz and Dalya Barak, *Hindsight Wisdom: Outcome Knowledge and the Evaluation of Decisions*, 88 Acta Psychologica 105 (1995).

Hindsight and outcome biases influence not only judgments about *ex ante* foreseeability and decision quality, but also judgments about causation and blameworthiness. According to the behavioral literature, jurors assessing causation tend to engage in counterfactual reasoning (*i.e.*, speculating whether different antecedent events would have avoided the known outcome) in which they overemphasize actions that, in hindsight, could have been [**33] changed. n21 A tendency [*20] labelled the "counterfactual fallacy" causes jurors to judge episodes in which bad outcomes can easily be "undone" in this fashion to be morally blameworthy. n22 Bad outcomes thus both distort probability judgments and tend to elicit morally negative explanations regardless of cause. n23 Since most punitive damages cases involve events having especially bad outcomes, one would expect these biases to be amplified in such cases.

n21 See C. Neil Macrae, Alan B. Milne & Riana J. Griffiths, *Counterfactual Thinking and the Perception of Criminal Behavior*, 84 Brit. J. Psychol. 221-26 (1993); C. Neil Macrae & Alan B. Milne, *A Curry for Your Thoughts: Empathic Effects on Counterfactual Thinking*, 18 Person. & Soc. Psychol. Bull. 221 (1992); Dale T. Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory*, 12 Person. & Soc. Psychol. Bull. 513 (1986).

n22 See Dale T. Miller, William Turnbull & Cathy McFarland, *Counterfactual Thinking and Social Perception: Thinking About What Might Have Been*, in M.P. Zanna (Ed.), *Advances in Experimental Social Psychol-*

ogy, Vol. 23 (New York: Academic Press 1990); Dale T. Miller & William Turnbull, *The Counterfactual Fallacy: Confusing What Might Have Been With What Ought to Have Been*, 4 Soc. Just. Res. 1 (1990).

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n23 See John D. Cunningham & Harold H. Kelley, *Causal Attributions for Interpersonal Events of Varying Magnitude*, 43 J. Person. 74 (1975); Hillel J. Einhorn & Robin M. Hogarth, *Judging Probable Cause*, 99 Psychol. Bull. 3 (1986); Richard E. Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 115-18 (Prentice Hall 1980).

[*21] **B. Zero Risk Bias**

Another common bias of particular concern in punitive damages cases is the so-called "zero risk bias," which refers to a tendency to believe unrealistically that society can and should reduce accident risks to zero. As shown in the behavioral literature, this attitude often manifests itself in overestimation (or overvaluation) of low probability risks and may result in unbalanced decisions. For example, researchers have found that consumers express willingness to pay substantially more to reduce minuscule health risks to zero than to achieve much greater safety improvements that still leave some residual risk. n24 Other studies have shown that many people pay (or express willingness to pay) [*35] irrationally high amounts to insure against low probability risks. n25

n24 See W. Kip Viscusi, Wesley A. Magat & Peter Huber, *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. Econ. 465 (1987); see also I. Ritov, Jonathan Baron & John C. Hershey, *Framing Effects in the Evaluation of Multiple Risk Reduction*, 6 J. Risk & Uncertainty 145 (1993).

n25 See Gary H. McClelland, William D. Schulze & Don L. Coursey, *Insurance for Low-Probability Hazards: A Bimodal Response to Unlikely Events*, 7 J. Risk & Uncertainty 95 (1993); Eric J. Johnson, John Hershey, Jacqueline Meszaros & Howard Kunreuther, *Framing, Probability Distortions and Insurance Decisions*, 7 J. Risk & Uncertainty 35 (1993).

[*22] The zero risk bias appears frequently in studies involving environmental hazards. Several studies report that probability estimates are unrealistically high because many people overestimate the probability of low-probability risks. n26 A substantial [*36] percentage of respondents (seventeen percent) in another study expressed the view that even wastes posing no health risks should be cleaned up *regardless of the cost*. n27 In response to questions designed to test zero risk bias, over forty percent expressed a preference for cleaning up a given waste site completely even when expending the same resources [*23] to clean up a two different waste sites partially would save more lives. n28

n26 See V. Kerry Smith & William H. Desvousges, *An Empirical Analysis of the Economic Value of Risk Changes* 95 J. Pol. Econ. 89 (1987); Gary H. McClelland, William D. Schulze & Brian Hurd, *The Effects of Risk Beliefs on Property Values: A Case Study of A Hazardous Waste Site*, 10 Risk Analysis 485 (1990).

n27 Jonathan Baron, Rajeev Gowda & Howard Kunreuther, *Attitudes Toward Managing Hazardous Waste: What Should Be Cleaned Up and Who Should Pay for It*, 13 Risk Analysis 183 (1993).

n28 *Id.* at 190; see also Robin Gregory & Sarah Lichtenstein, *A Hint of Risk: The Tradeoff Between Quantitative and Qualitative Risk Factors*, 14 Risk Analysis 199 (1994) (finding that the mere suggestion of a low probability risk to the environment significantly reduced willingness to pay for new technology to reduce automobile and bicycle accidents).

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Leading thinkers from the late political scientist Aaron Wildavsky to present United States Supreme Court Justice Stephen Breyer have decried the pernicious effects of zero risk attitudes on social welfare. As they and others have persuasively argued, unrealistic pursuit of zero risk leads to less safety, not more, by diverting resources from where they would do more good and by stifling innovation. n29 In the context of punitive damages litigation, one would expect those same zero risk attitudes to bias liability decisions against defendants, especially in cases involving unusual events like [*24] oil spills, air crashes, or other accidents having inherently very low probabilities of occurrence, but potentially tragic adverse outcomes.

n29 See generally Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard Univ. Press 1993); Aaron Wildavsky, *Searching for Safety* (Transaction Books 1979); see also W. Kip Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk* (Oxford Univ. Press 1992); Aaron Wildavsky, *No Risk Is the Highest Risk of All*, 87 Am. Scientist 32 (1979); Richard J. Zeckhauser & W. Kip Viscusi, *Risk Within Reason*, 248 Sci. 559 (1990).

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C. Anti-corporate Bias

A further bias often implicated in punitive damages cases is anti-corporate bias. This bias is well documented, and while not all punitive damages cases involve corporate defendants, the many that do (as did all of the stimulus cases used in the Hastie study) are prime candidates for its operation.

Statistical analyses of jury verdicts consistently find that juries are likelier both to assess liability and to award higher damages when the defendant is a corporation rather than an individual. n30 Even analysts skeptical of the overall reliability of conclusions drawn from [*25] verdict statistics have singled out anti-corporate bias as a persistent finding that cannot be "explained away." n31

n30 See Randall R. Bovberg, Frank Sloan, Ari Dor & Chee R. Hsieh, *Juries and Justice: Are Malpractice and Other Personal Injuries Treated Equal?*, 54 Law & Contemp. Probs. 5 (1991); Audrey Chin & Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (RAND Corp. 1985); Brian J. Ostrom & David B. Rottman, *Does Plaintiff and Defendant Status Matter? A Comparison in Tort Litigation* (Working Draft, National Center for State Courts 1991).

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n31 See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?*, 140 U. Pa. L. Rev. 1147, 1278-80 (1992).

Experimental studies also confirm the existence of this bias. One such study, which asked mock jurors to decide otherwise identical personal injury claims brought against "Jack Holden . . . an average man" and "Holden Industries . . . an average corporation," found that jurors systematically awarded higher damages against the corporation than the individual. n32 Another study asking mock jurors to decide workplace injury cases brought against either "Mr. Jones" or "The Jones Corporation" produced the same result, finding that "even under conditions of identical actions and harm, the corporation is held more responsible than the individual." n33 Jurors judged the same conduct more morally wrong and awarded more than double the damages for [*26] intangible injury (pain and suffering) when the defendant was a corporation, suggesting that "people may have distinctive preferences for punishing the corporation." n34 [**40]

n32 David T. Wasserman & J. Neil Robinson, *Extra-Legal Influences, Group Processes, and Jury Decision-Making: A Psychological Perspective*, 12 N.C. Cent. L.J. 96 (1980).

n33 Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Hum. Behav. 151 (1989).

34 *Id.* at 164.

The behavioral literature suggests a number of explanations for anti-corporate bias. Ability to pay -- the "deep pockets" factor -- undoubtedly is a factor in many cases, n35 but is not the only explanation. n36 Further contributing factors suggested in the literature are juror distrust of the profit motive n37 -- even though profit motive logically provides a powerful incentive to *avoid* liability-creating conduct -- and juror tendency to believe that corporations can avoid [*27] accidents more easily without regard to the specifics of a given situation. n38 All of these factors, especially when combined with the zero risk attitudes discussed above, likely [**41] contribute to anti-defendant bias in punitive damages cases involving corporate defendants.

n35 *See, e.g.,* Valerie P. Hans & William S. Lofquist, *Juror Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 *Law & Soc. Rev.* 85, 106 (1992) (finding that a "clear minority" of surveyed jurors admit to basing liability decisions on ability to pay).

n36 One recent study, for example, found mock jurors more likely to hold corporations liable (or subject to greater damages) than even wealthy individuals described as having equal financial resources. *See* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the 'Deep Pockets' Hypothesis*, 30 *Law & Soc. Rev.* 121 (1996).

n37 *Id.* at 140; *see also* Hans & Lofquist, *supra* note 35, at 104.

n38 *See* Hans & Lofquist, *supra* note 35, at 100-03.

D. Plaintiff Identification Bias

Still a further potential [**42] source of bias in many punitive damages cases is juror identification with local plaintiffs who stand to benefit from a punitive award. Behavioral researchers have shown in a variety of settings that social groupings (such as nationality, race, gender and socioeconomic class) have a major influence on both altruistic and hostile responses to others. n39 Even trivial social groupings can produce dramatic tendencies towards "in-group" favoritism and "out-group" denigration. n40 In a study involving [*28] arbitrarily-created groups based on eye-color and even coin flips, subjects quickly came to exhibit a variety of negative attitudes and perceptions about "out-group" members while favoring "in-group" members in allocating rewards. n41

n39 *See, e.g.,* Marilynn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 *Psychol. Bull.* 307 (1979).

n40 *See* Michael Diehl, *The Minimal Group Paradigm: Theoretical Explanations and Empirical Findings*, in Wolfgang Stroebe & Miles Hewstone (Eds.), 1 *European Review of Social Psychology* 263 (Wiley 1990); Henri Tajfel, *Social Identity and Intergroup Relations* (Cambridge Univ. Press 1982).

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n41 *See* Jacob M. Rabbie, Jan C. Schot & Lieuwe Visser, *Social Identity Theory: A Conceptual and Empirical Critique from the Perspective of a Behavioural Interaction Model* 19 *Eur. J. Soc. Psychol.* 171 (1989).

In the litigation context it is no secret that jurors may favor plaintiffs (or other parties) with whom they identify. n42 Seeking out such jurors is a time-honored jury-selection tactic. n43 Professor Hastie and his colleagues recently tested for the effects of jury-identification bias in a second punitive damages study following up on their initial study of

punitive damages liability decisions. The follow-up study asked mock jurors to consider the appropriate amount of punitive [*29] damages in an environmental damage case modeled on a chemical spill in the Sacramento River which killed large numbers of fish. The lead plaintiff in the stimulus case was a fish hatchery that lost all of its stock. In one version the hatchery was a locally-owned corporation. In an alternative version the hatchery was a subsidiary of a distant corporation. Consistent with a hypothesis of plaintiff-identification [**44] bias based on locality, jurors systematically awarded higher punitive damages to the local plaintiff, even though the defendant, the misconduct and the harm were the same in both cases. n44

n42 See Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 *Am. U. L. Rev.* 703, (1991).

n43 See, e.g., Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore: What Works?*, 17 *Ohio N.U. L. Rev.* 229 (1990).

n44 Reid Hastie, David Schkade & John W. Payne, *Juror Judgments in Civil Cases: Assessing Punitive Damages*, Report No. 371, University of Colorado at Boulder, Center for Research on Judgment and Policy (April 1997). This study also found that a principal determinant of the amount jurors awarded as punitive damages was the range suggested by the plaintiff's counsel in closing argument. Higher suggested ranges produced significantly higher awards than lower suggested ranges, despite identical evidence and instructions and otherwise identical argument.

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E. Negative Media Bias

A final source of anti-defendant bias warranting discussion is negative pretrial publicity. Though not a factor in the results of the Hastie liability study discussed above, this factor obviously has [*30] potential impact in any punitive damages case involving high profile events. The law has long been concerned with bias due to pretrial publicity, n45 and the extensive behavioral literature on this subject contains many statistical and case studies suggesting that pretrial media coverage indeed influences jury verdicts. n46

n45 See, e.g., *Irwin v. Dowd*, 366 U.S. 717 (1961) (overturning verdict plausibly influenced by biased media coverage).

n46 See John S. Carroll, Norbert L. Kerr, James J. Alfini, Frances M. Weaver, Robert J. MacCoun & Valerie Feldman, *Free Press and a Fair Trial: The Role of Behavioral Research* 10 *Law & Hum. Behav.* 187 (1986); Edith Greene, *Media Effects on Jurors*, 14 *Law & Hum. Behav.* 439 (1990); Gary Moran & Brian L. Cutler, *The Prejudicial Effects of Pretrial Publicity*, 21 *J. Applied Soc. Psychol.* 345 (1991).

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As with the other biases discussed above, the experimental studies reported in the literature bear out the hypothesis suggested by the statistical studies. Mock jury studies designed to test the effects of pretrial exposure to prejudicial news reports by exposing some juries and not others show consistently that such reports influence the decisions of juries exposed to them. n47 The kind of news stories having [*31] the strongest effect on verdicts are those negatively depicting the defendant's character. n48 Studies also suggest that televised media produce stronger biases than print media, though both produce effects strong enough to influence verdicts. n49

n47 See Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 *Law & Hum. Behav.* 409 (1990); Hedy Red Dexter, Brian L. Cutler & Gary Moran, *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 *J. Applied Soc. Psychol.* 819 (1992); Amy

L. Otto, Steven D. Penrod & Hedy R. Dexter, *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 *Law & Hum. Behav.* 453 (1994).

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n48 See Otto, Penrod & Dexter, *supra* note 47 at 464-66.

n49 See James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 *Law & Hum. Behav.* 520-21 (1994).

An important finding of these studies is that the biasing effects of pretrial publicity are latent as well as patent. They exist even in jurors who profess not to be aware of any bias. n50 Thus, the experimental studies find that pretrial publicity bias persists even when jurors admitting such bias are eliminated through voir dire. n51 These findings reflect more generally a widely-observed property common to many, if not most, judgment biases: persons exhibiting [*32] them are unaware of their influence. n52 This makes them especially difficult to control.

n50 See *id.* at 512, 521-22.

n51 See Kramer, Kerr & Carroll, *supra* note 47, at 413; Dexter, Cutler & Moran, *supra* note 47, at 829-30.

n52 See generally Daniel Kahneman, Paul Slovic & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge Univ. Press 1982); Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231 (1977).

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Experimental studies cannot, of course, replicate the exceptional volume and duration of news coverage that accompanies high profile events like the oil spill from the *Exxon Valdez*. But, other behavioral research shows that constantly repeated messages and images have greater impact than isolated ones, n53 and emotion provoking images (e.g., oil-soaked wildlife) retain impact even in late repetitions. n54 Thus, it is likely that the pretrial publicity effects shown in mock jury studies would be amplified in such cases.

b53 See J. Lee McCullough & Thomas M. Ostrom, *Repetition of Highly Similar Messages and Attitude Change*, 59 *J. Applied Psychol.* 395 (1974).

n54 See Jacqueline Hitchon, Esther Thorson & Xinshu Zhao, *Advertising Repetition as a Component of the Viewing Environment: Impact of Emotional Executions on Commercial Reception* University of Wisconsin-Madison, School of Journalism and Mass Communication, Working Paper (1988).

[*33] As detailed in Journalism Professor Conrad [*49] Smith's case study of press and broadcast coverage of the *Exxon Valdez* oil spill and other high profile catastrophes, it is an unfortunate fact of life that much media coverage of events involving risks to public health or safety or the environment tends towards sensationalism, emotional imagery, oversimplification of complex causal factors, and vilification of parties singled out for blame. n55 Aaron Wildavsky, in his seminal survey of noteworthy public health and safety controversies spanning the last forty years, shows that media distortion of risks and hazards is virtually epidemic in such controversies. n56 Latent juror biases from negative media exposure thus pose a particular danger when such controversies reach the courtroom in the form of punitive damages cases.

n55 See Conrad Smith, *Media and Apocalypse: News Coverage of the Yellowstone Forest Fires, Exxon Valdez Oil Spill, and Loma Prieta Oil Spill* (Greenwood Press 1992).

n56 See Aaron Wildavsky & Brendon Swedlow, *Reporting Environmental Science*, in Aaron Wildavsky, *But Is It True? A Citizen's Guide to Environmental Health and Safety Issues* 375-95 (Harvard Univ. Press 1995).

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[*34] **III. Implications for Reform**

Behavioral science has its limits, and there is obviously more work to be done before the all of the elements that influence jury decisions on punitive damages liability are fully understood. Still, the considerable behavioral literature now available leaves no doubt of the need for reform. If, as this literature suggests, juries are susceptible to systematic biases that produce abnormally high error rates on punitive damages liability decisions, then courts have an obligation to make use of available safeguards to counteract such biases and reduce the risk of error. n57

n57 In focusing this discussion on punitive damages liability decisions, we do not mean to suggest that reform is not equally needed on setting punitive damages amounts. On the contrary, it is likely that many if not all of the biases discussed above influence punitive damages amounts as well as liability. Nevertheless, our focus here remains on liability decisions because that is where most of the behavioral research to date has concentrated.

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This is an especially appropriate case to consider such reforms, since it contains virtually all the elements that, according to the literature, would implicate such biases: hindsight evaluation of blameworthiness of a rare event which produced significant harm, [*35] local plaintiffs pitted against a large out-of-state corporate defendant, and massive negative television and other media publicity of a continuous and emotion provoking nature. The size of the award alone raises legitimate questions as to whether the jurors in this case operated impartially and dispassionately as the law requires.

One point that emerges clearly from the literature is that careful jury instructions defining the legal requirements for punitive damages are not -- as the district court in this case seemed to believe -- by themselves a sufficient safeguard. Legal commentators have long expressed concern that the legal standard for punitive damages, particularly the distinction between recklessness and negligence, is inherently difficult for juries to apply. n58 The Hastie liability study strongly bears this out. Juror comprehension of the recklessness/negligence distinction was strikingly low, with [**52] most juries simply failing to consider the requirements of conscious awareness of grave risk and extreme departure from ordinary care -- the key legal elements that distinguish recklessness from negligence.

n58 See, e.g., Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 *S. Cal. L. Rev.* 1, 33-39 (1982).

[*36] When juries fail to recognize and apply the legal constraints governing their decision, the danger that they will return "lawless, biased and arbitrary verdicts," *Honda Motor Corp., Ltd. v. Oberg*, 512 U.S. 415, 433 (1994), is not only real but acute. What is needed if the law is to continue to allow punitive damages under the present standards are mechanisms first for reducing the likelihood of jury errors and second for ensuring that courts subject the jury's decisions to meaningful and thorough review.

The "clear and convincing evidence" burden of proof requirement urged by Appellants is an important first step in this direction. As noted [**53] at the outset, the requirement is favored by the United States Supreme Court and has been adopted either judicially or legislatively in a substantial (and continually growing) majority of jurisdictions that allow punitive damages. n59 There is no reason why this Court should not recognize it as a requirement for punitive damages under federal maritime law (as the Court plainly has power to do).

n59 See Victor E. Schwartz and Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 *San Diego L. Rev.* 263, 268-70 (1993).

[*37] One principal function of a heightened evidentiary standard is to reduce the risk of erroneous liability decisions, n60 precisely what the behavioral evidence suggests is necessary. A "clear and convincing evidence" requirement would serve as an "important check against unwarranted imposition of punitive damages," *Honda Motor Corp.*, 512 *U.S. at 433*, [**54] by signalling to jurors that they are considering quasi-criminal punishment. 6

n60 See, e.g., *Addington v. Texas*, 441 *U.S. 418* (1979).

Equally important, a heightened evidentiary standard serves as a tool for more exacting and effective judicial review. Under the rule of *Anderson v. Liberty Lobby, Inc.*, 477 *U.S. 242* (1986), a court reviewing the legal sufficiency of evidence may (indeed, must) do so in light of the applicable standard of proof. Thus, if the standard is clear and convincing evidence, the reviewing court must determine whether the evidence would permit a reasonable jury to conclude that the plaintiffs proved their case by the "quality and quantity of evidence" required to meet that standard, i.e., evidence which demonstrates the legal requisites for punitive damages with "convincing clarity." *Id. at* [*38] 247, 254-55; see also *Klepper v. First American Bank* 916 *F.2d 337, 342-43* (6th Cir. 1990) (dismissing punitive damages [**55] claim under *Anderson* analysis).

The behavioral findings further suggest that review of punitive damages liability decisions must focus especially on whether the evidence satisfies the key legal elements of recklessness, which juries are prone either to ignore or to evaluate in biased fashion. These include in particular (1) whether the defendant consciously disregarded a grave danger or risk of harm, and (2) whether the defendant's conduct involved an extreme departure from ordinary care. In conducting such reviews, trial and appellate judges can bring to bear important qualities that jurors lack: good comprehension of the relevant legal standards, knowledge of the precedents that give them shape, and practical experience applying them on a regular basis.

[*39] **CONCLUSION**

For all the reasons stated above, *amicus* urges this Court to set aside the punitive award in this case and to adopt meaningful safeguards for the imposition of punitive damages, including at minimum requirements that (1) plaintiffs prove the legal requirements for punitive damages by clear and convincing evidence, and (2) trial courts afford defendants meaningful and thorough post-verdict review [**56] of the sufficiency of the proof under the clear and convincing evidence standard.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32, the undersigned hereby certifies that the proposed brief submitted on behalf of *amicus curiae* complies the requirements of Circuit Rule 32. This brief is proportionately spaced, uses a 14 point Century Schoolbook typeface, and has a word count of 7155.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for the proposed *amicus curiae* and that he served a copy of the foregoing **MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLANTS** on counsel of record, by causing said copies to be delivered by United States Mail, first class, postage prepaid, addressed to all parties on the attached service list:

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[EDITOR'S NOTE: Link to In re: The EXXON VALDEZ, GRANT BAKER, et al., as representatives of the Mandatory Punitive Damages Class, Plaintiffs-Appellees, v. EXXON CORPORATION, et al., Defendants-Appellants, No. 97-35191, UNITED STATES COURT [**58] OF APPEALS FOR THE NINTH CIRCUIT, April 2, 1999]