

In The
Supreme Court of the United States

—◆—
EXXON SHIPPING CO. and
EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF *AMICUS CURIAE* OF EXPERTS
ON ALCOHOL IN THE WORKPLACE
IN SUPPORT OF RESPONDENTS**

—◆—
VANYA HOGEN
COLETTE ROUTEL
Counsel of Record
JACOBSON, BUFFALO, MAGNUSON,
ANDERSON & HOGEN
1360 Energy Park Drive
Suite 210
St. Paul, Minnesota 55108
(651) 644-4710
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	5
I. Exxon Misrepresents Its Alcohol Policy and Its Enforcement Of That Policy	5
A. The Inadequacies of Exxon’s Alcohol Policy.....	6
B. Exxon Made No Attempt To Enforce Its No-Alcohol-In-The-Workplace Rule	10
1. Captain Hazelwood Drank Aboard the EXXON YORKTOWN After 1985.....	11
2. Captain Hazelwood Drank Aboard the EXXON VALDEZ	13
3. Captain Hazelwood Returned To The EXXON VALDEZ Drunk Just Days Before The Grounding	15
II. This Case Is Not The Appropriate Vehicle To Consider Whether Or Not To Craft A Special Punitive Damages Rule For Maritime Torts	17
A. While The Oil Spill Occurred At Sea, It Could Have Been Completely Prevented On Land	18
B. Exxon Was Culpable and Reckless	21

TABLE OF CONTENTS – Continued

	Page
1. Exxon Knew That A Captain Drinking On-The-Job Posed Enormous Safety Risks.....	22
2. Exxon Failed To Provide Any Assistance To Captain Hazelwood While He Was Struggling With Problem Drinking	24
3. Exxon’s Corporate Culture Tolerated On-The-Job Drinking And Enabled Captain Hazelwood’s Addiction.....	27
CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page
FEDERAL STATUTES AND REGULATIONS	
46 U.S.C. § 8502	19
33 C.F.R. § 95.045	7
46 C.F.R. § 15.812	19
OTHER AUTHORITIES	
Oddvar Arner, "The Role of Alcohol in Fatal Accidents Among Seamen," 68(2) <i>The British Journal of Addiction to Alcohol & Other Drugs</i> (June 1973).....	22
Ronald Casper, "Drinking as Conformity: A Critique of Sociological Literature on Occu- pational Differences in Drinking," 40(9) <i>Journal of Studies on Alcohol</i> (Sept. 1979).....	28
Kaye Middleton Fillmore, " <i>Occupational Drink- ing Subcultures: An Exploratory Epidemiologi- cal Study</i> ," in <i>Alcohol Problem Intervention in the Workplace</i> (Paul M. Roman ed. 1990)	28
Michelle Fine, et al., "Cultures of Drinking: A Workplace Perspective," <i>Social Work</i> (Sept. 1982)	29
Robert G. Heath, "Group Psychotherapy and Alcohol Addiction," 5 <i>Quarterly Journal of Studies on Alcohol</i> 555, 558 (1944-45)	20
Danielle Hitz, "Drunken Sailors and Others: Drinking Problems in Specific Occupations," 24 <i>Quarterly J. Stud. Al.</i> (1973).....	28

TABLE OF AUTHORITIES – Continued

	Page
Stefanie Ritz-Timme et al., “What Shall we do with the Drunken Sailor? Effects of alcohol on the performance of ship operators,” 156 <i>Forensic Science International</i> 16 (2006)	22, 23
Paul M. Roman, “Employee Alcoholism Programs in Major Corporations in 1979: Scope, Change, and Receptivity,” in <i>Prevention, Intervention and Treatment: Concerns and Models</i> (U.S. Dep’t of Health and Human Services 1982)	26
Paul M. Roman & Terry C. Blum, “Alcohol: A Review of the Impacts of Worksite Interventions on Health and Behavioral Outcomes,” <i>The American Journal of Health Promotion</i> (1996).....	26
William J. Sonnenstuhl & Harrison Trice, <i>Strategies for Employee Assistance Programs: The Crucial Balance</i> (1986)	2, 25
William J. Sonnenstuhl & Harrison Trice, “The Social Construction of Alcohol Problems in a Union’s Peer Counseling Program,” 17(3) <i>The Journal of Drug Issues, Inc.</i> 223 (Summer 1987)	25, 28
William Sonnenstuhl, Samuel Bacharach & Peter Bamberger, <i>Member Assistance Programs in the Workplace: The Role of Labor in the Prevention and Treatment of Substance Abuse</i> (1994).....	2

TABLE OF AUTHORITIES – Continued

	Page
William J. Sonnenstuhl, <i>Working Sober: The Transformation of an Occupational Drinking Culture</i> (1996)	2, 26, 28
Harrison Trice & Paul Roman, <i>Spirits and Demons At Work: Alcohol and Other Drugs on the Job</i> (2d ed. 1978)	25
Harrison M. Trice & William J. Sonnenstuhl, 51(3) “On the Construction of Drinking Norms in Work Organizations,” <i>Journal of Studies on Alcohol</i> 201 (1990)	25, 30
Harrison M. Trice, <i>The Alcoholic Employee and His Supervisor: A General Management Problem</i>	28

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae Dr. Paul M. Roman and Dr. William J. Sonnenstuhl are experts on alcohol abuse and treatment in the workplace. They have conducted numerous studies to ascertain the causes of workplace problem drinking, and to determine the structure, content, and effectiveness of various employer alcohol policies and employee assistance programs. Dr. Roman and Dr. Sonnenstuhl have published extensively on alcohol and drug abuse, and have spent their professional careers teaching related courses.

Dr. Paul M. Roman has been a professor of sociology for 40 years and is currently the Distinguished Research Professor of Sociology at the University of Georgia and an adjunct professor at the Center for Alcohol Studies at Rutgers University. Throughout his career, Dr. Roman has conducted extensive research on alcohol abuse and treatment. He has been awarded more than \$15 million in extramural grants to fund this research, and he has written more than 100 books and journal articles on alcohol-related issues. Because he is one of the nation's leading experts on substance abuse, Dr. Roman has served as an Editor-in-Chief or Editorial Board member for

¹ Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than the *amici* and its counsel contributed monetarily to the preparation or submission of this brief.

numerous journals that publish peer-reviewed research, including the *Journal of Employee Assistance Research*, the *Journal of Workplace Behavioral Health*, the *Journal of Substance Abuse Treatment*, the *Alcohol, Health and Research World*, and the *Labor Management Alcoholism Journal*.

Dr. William J. Sonnenstuhl is an Associate Professor and Director of Graduate Studies at the School of Industrial and Labor Relations at Cornell University. He is also the Associate Director of the R. Brinkley Smithers Institute for Alcohol-Related Workplace Studies, where he conducts research on substance abuse in the workplace. Dr. Sonnenstuhl is a prolific author of dozens of books, chapters and articles relating to substance abuse, including *Working Sober: The Transformation of an Occupational Drinking Culture* (1996); *Strategies for Employee Assistance Programs: The Crucial Balance* (with H. Trice) (2d ed. 1990); and *Member Assistance Programs in the Workplace: The Role of Labor in the Prevention and Treatment of Substance Abuse* (with Samuel Bacharach and Peter Bamberger) (1994).

Amicus curiae the Employee Assistance Professionals Association (EAPA) is the leading membership organization for employee assistance professionals. Founded in 1971, the EAPA is a 501(c)(3) non-profit organization, whose mission is to promote the highest standards of employee assistance practice and the continuing development of employee assistance professionals, programs and services. Its membership includes substance abuse practitioners, professional

counselors and therapists, social workers, occupational health and wellness professionals, peer counselors, human resource professionals, risk management experts, benefits specialists and others dedicated to protecting and enhancing employee and workplace effectiveness through prevention, identification and resolution of personal and productivity issues, including alcohol, drug, health, marital, family, financial, legal, emotional, stress-related, and other personal or behavioral concerns. The EAPA sets and publishes professional standards for employee assistance programs, sponsors the Certified Employee Assistance Professional (CEAP[®]) credential, publishes the *Journal of Employee Assistance*, hosts professional conferences, and offers training and other resources to fulfill its mission.



INTRODUCTION AND SUMMARY OF THE ARGUMENT

Exxon argues that it should not be held liable for punitive damages for the massive oil spill that resulted when its supertanker, the EXXON VALDEZ, struck Bligh Reef in Prince William Sound, Alaska. In so arguing, Exxon attempts to absolve itself from the actions of its managerial employee – Captain Joseph Hazelwood – whose inebriated state was the cause of the spill. Exxon claims that its alcohol policies “conformed to industry standards,” and that “employers who implement and enforce proper policies should not be subject to . . . punitive damages” for the actions of

rogue employees.² It also asks this court to craft a general rule limiting the availability of punitive damages under maritime law to those cases where the employer itself acts culpably or recklessly. This rule is supposedly necessary because employers cannot closely monitor their employees' actions while at sea.

But Exxon did not have an alcohol policy that “conformed to industry standards.” In reality, Exxon’s “policy” only consisted of two rules: first, no drinking aboard ship, and second, no drinking within four hours of going on watch.³ Importantly, Exxon did not design the policies and procedures necessary to implement these rules. And in practice, Exxon did not enforce them. For years, Captain Hazelwood repeatedly drank just prior to boarding and while aboard the EXXON VALDEZ and the EXXON YORKTOWN, and Exxon knew about it. Yet Exxon did not relieve him of duty or take any other disciplinary actions against him.

The facts of this case also make it an inappropriate vehicle for this Court to determine whether or not to craft a special rule limiting punitive damages in maritime cases. First, on the night of the spill, Captain Hazelwood was already intoxicated when he boarded the EXXON VALDEZ. Thus, everything Exxon needed to do to prevent this disaster could

² Petrs. Br. 9-10, 15.

³ JA655; DX3614.

have been done on dry ground, where there is no doubt that Exxon could and should have properly supervised its employees. Second, Exxon's actions were culpable and reckless. Top company officials knew that Captain Hazelwood was drinking on the job, yet no disciplinary action was taken despite the obvious and serious safety risk. Exxon did not assist Captain Hazelwood in overcoming his addiction, even though it was in a position to do so. Rather, Exxon fostered a company culture that tolerated on-the-job drinking, thereby enabling and exacerbating Captain Hazelwood's alcohol problems.



ARGUMENT

I. Exxon Misrepresents Its Alcohol Policy and Its Enforcement Of That Policy

In its petition for certiorari, Exxon claimed that this case was about whether “punitive damages [can] be imposed under maritime law against a shipowner . . . even when the [employee] conduct [at issue,] was contrary to polices established and enforced by the owner.”⁴ Similarly, Exxon claims in its opening brief that its alcohol policies “conformed to industry standards,” and that “employers who implement and enforce proper polices should not be subject to . . . punitive damages.”⁵ At the time of the spill, however,

⁴ Exxon Cert. Petition at i.

⁵ Petrs. Br. 9-10, 15.

Exxon did not have an alcohol policy that conformed to industry standards, and regardless, it did not enforce that policy.

A. The Inadequacies of Exxon's Alcohol Policy

Exxon's alcohol policy, as it existed in 1989, primarily consisted of two basic rules. The first rule, contained in a document entitled "Policy Statement on Employee Alcohol and Drug Use," stated as follows:

Possession, use, distribution, or sale of alcoholic beverages on Company premises is not allowed without prior approval of appropriate senior management. Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment.⁶

Exxon Shipping President Frank Iarossi confirmed this policy in his trial testimony, and acknowledged that "company premises" included ships.⁷ The second alcohol-related rule was based on Coast Guard regulations, and provided that officers and crew "shall not perform or attempt to perform any scheduled duties

⁶ DX3614.

⁷ Tr. 2891 (all such references are to the trial transcript).

within four hours of consuming any alcohol” and “shall not be intoxicated at any time” while onboard.⁸

It has long been common knowledge, however, that a “policy” must consist of more than printed rules. It must include a course or method of action. For safety-sensitive positions, a standard alcohol policy, even in 1989, would have included procedures to determine whether an employee was fit for duty, procedures for reporting violations of the alcohol policy, procedures governing enforcement of that policy, and finally, procedures for monitoring employees returning to work after undergoing alcohol or drug treatment. But Exxon’s alcohol “policy” consisted only of bare bones rules; there were no written procedures to explain how these rules would be implemented.

1. *Fit for duty.* The captain and crew of a super-tanker hold safety-sensitive positions. Even the smallest amount of alcohol can impair their ability to perform their job, and endanger the ship and the lives of everyone on it. For that reason, a standard alcohol policy would have established a procedure for ensuring that each member of the crew was fit to assume his post. For example, Exxon could have required that each crew member pass through a check point prior to boarding the ship. At that check point, an Exxon official could have evaluated their fitness for duty through simple observation and by asking

⁸ JA324; Tr. 1135-36. *See also* 33 C.F.R. § 95.045.

questions. If that official noticed bloodshot eyes, smelled alcohol on the crew member's breath, or detected slurred speech, an individual (non-random) alcohol test⁹ could then be used to confirm or disapprove the suspicion of alcohol use.¹⁰ Exxon's alcohol policy did not include any procedures relating to employee fitness for duty.

2. *Reporting violations and enforcement procedures.* A standard alcohol policy would also have included a procedure for reporting and confirming violations of the no-alcohol rule. That procedure could have mandated that employees witnessing or suspecting violations of the no-alcohol rule report such violations to the company. The procedure should have spelled out the person or persons designated to receive reports and should have guaranteed confidentiality to

⁹ *Amicus curiae* American Maritime Safety, Inc.'s lengthy discussion of the legality of random alcohol and drug testing in 1989 is a red herring. The parties to this brief are not advocates of random alcohol and drug testing. But such testing is not the only means an employer has for determining whether its employees are fit for duty, nor is it the most effective. Personal observation, proper supervision, and performance testing should be used for all employees in safety sensitive positions.

¹⁰ Obviously, this is not the only way for determining whether an employee is fit for duty. Today, for example, an employer may wish to have all ship officers take a computerized test when reporting for duty, which could measure each officer's judgment and response time. This test could be an effective means of detecting not only any impairment caused by alcohol or drug use, but also other common problems such as fatigue, abnormal levels of stress, or mental-health issues.

the informant making the report, thereby protecting him from retaliatory action. A standard alcohol policy should also have explicitly stated the progressive disciplinary actions (verbal warnings, written notices, suspension, and discharge) to be taken by management if the no-alcohol rule was violated. Exxon's alcohol policy did not include any procedure for reporting violations,¹¹ and with respect to enforcement, it simply claimed that violation of the rule would be "grounds for termination."¹²

3. *Monitoring procedures.* Finally, a standard alcohol policy would have established some monitoring program for employees who returned to work after completing an alcohol treatment program. Typically, an employee would meet with his designated monitor, who would reiterate the company's alcohol rules. Then, that monitor would meet regularly with the employee to discuss how he was readjusting to his job, and to address any concerns. The length of this monitoring period could be tailored to the particular employee, depending on the depth of his substance abuse problem and the type of position he held within the company. Usually, monitoring programs last for a minimum of 90 days to one year. Some companies in the maritime industry, however, required far longer monitoring periods, even in

¹¹ Additionally, testimony established that Exxon did not encourage reporting violations. JA434, 707, 721-22, 742-43.

¹² DX3614.

1989.¹³ Exxon's alcohol policy did not include any monitoring procedures.

Without formal procedures to determine fitness for duty, to mandate the reporting of on-the-job drinking, and to establish monitoring of troubled employees, an employer is much less likely to detect employees with substance abuse problems. Exxon's alcohol "policy" presented only a false front of rules prohibiting certain alcohol use by its employees. It did not contain any written policies or procedures explaining how these rules would be implemented and enforced. Because many of Exxon's employees hold safety-sensitive positions, its failure to create these procedures endangered public safety.

B. Exxon Made No Attempt To Enforce Its No-Alcohol-In-The-Workplace Rule

Even without formal procedures, if an employee's alcohol problem is severe and extends over a long period of time, company management will *eventually* hear about it, whether that awareness comes from piecemeal reports or only after a workplace accident. Obviously, once an employer knows that an employee has been drinking on the job or reporting to work

¹³ For example, Jerry Aspland, the president of ARCO Marine, Inc., testified at trial that in his company, a captain who had returned to work after attending a substance abuse treatment program was monitored for the next seven years. JA284-85, JA368, JA369-71, 68sa.

intoxicated, it must then enforce its no-alcohol policy by imposing progressive disciplinary actions or terminating the employee.

Because Captain Hazelwood's drinking problem was severe, even without formal reporting procedures or guarantees of confidentiality, some Exxon employees¹⁴ reported his on-the-job drinking. What follows is a brief description of three such reports, taken from materials in the joint appendix filed with this Court. These reports illustrate that because Exxon had no procedures in place for implementing its no-alcohol rule, employees did not know to whom they should report violations of the policy. Reports were therefore made in a haphazard manner to individuals who did not believe it was their responsibility to investigate the incidents. Ultimately, although these reports made their way up the chain of command to top Exxon officials, no one took any disciplinary action against Captain Hazelwood.

1. Captain Hazelwood Drank Aboard the EXXON YORKTOWN After 1985

Jim Shaw was a port steward who regularly boarded Exxon vessels. He testified that on several

¹⁴ Those reports were *not* made by his fellow crew members. Crew members were reluctant to report alcohol violations by their commanding officers. Tr. 1631, 2153, 2175, 2207. As noted earlier, Exxon did not have any procedures in place to ensure confidentiality for the reporter and thus, reporting an officer "could come back to haunt you." Tr. 2183.

separate occasions while aboard the EXXON YORKTOWN, he smelled “the distinct odor of alcohol on [Hazelwood’s] breath.”¹⁵ Shaw reported this information to William Sheehy, the port captain of the Gulf Coast fleet, noting that Captain Hazelwood “had fallen off the wagon,” and that he had seen him “drunk.”¹⁶

Rather than investigate this report himself, Captain Sheehy tried to refer the matter to other Exxon employees. The first was Captain Pierce, who advised Sheehy that if Hazelwood was drinking again, he would be in serious trouble.¹⁷ Captain Pierce did not have any supervisory authority over Captain Hazelwood, however, and thus could not take any disciplinary action. Sheehy also contacted Dwight Koops, the Gulf Coast fleet manager. Koops did have supervisory authority over Captain Hazelwood, but rather than initiate an investigation or take enforcement action, Koops testified that he told Sheehy to go over to the EXXON YORKTOWN unannounced and “spend as much time as possible on board the ship and see if things are okay.” Sheehy claimed he spoke with Captain Hazelwood once, but admitted that he did not launch an investigation, and “did not specifically ask anybody if they had seen Captain Hazelwood drunk or anything like that.”¹⁸ Koops never

¹⁵ JA410, 413-14, 418, 422-24.

¹⁶ JA847-50.

¹⁷ JA852.

¹⁸ JA851.

spoke with Captain Hazelwood. Exxon's no-alcohol rule was not enforced.

2. Captain Hazelwood Drank Aboard the EXXON VALDEZ

Shortly thereafter, Exxon transferred Captain Hazelwood to fill a vacancy on the West Coast.¹⁹ This new assignment – to the EXXON VALDEZ – meant that Hazelwood would be piloting a larger ship on more treacherous routes. Just prior to the transfer, Koops told Harvey Borgen, his counterpart on the West Coast, that Hazelwood had a “clean bill of health” as far as drinking was concerned.²⁰ Likewise, Sheehy spoke to Captain Andre Martineau, a port captain on the West Coast. Martineau had heard rumors about Hazelwood's drinking and asked Sheehy about it.²¹ Sheehy simply responded by saying that Hazelwood's performance had been “above average,” even though Hazelwood now ranked near the bottom of all ship captains.²²

With the increased stress of operating a larger ship on more dangerous routes, Captain Hazelwood's relapse continued. In May 1988, an assistant repair superintendent named Steve Day heard Captain Hazelwood order Henry Weinhardt's beer over a

¹⁹ JA427-30, 437-38.

²⁰ Tr. 3630.

²¹ JA428-30, 860-61.

²² JA861-62.

company walkie-talkie while the EXXON VALDEZ was docked in Portland.²³ Day later saw empty Henry Weinhardt's beer bottles on board the vessel.²⁴

Day reported these violations to his boss, Herb Leyendecker, a repair superintendent from Houston headquarters.²⁵ Leyendecker in turn reported the incident up the chain of command to West Coast Fleet Manager Harvey Borgen.²⁶ Borgen did nothing.²⁷ Day also told Ship Group Coordinator Paul Myers, Captain Hazelwood's supervisor, about this incident.²⁸ According to Hazelwood, Myers talked to him about it "as an aside," and "just wanted to make sure that there was no violation of the alcohol policy."²⁹ When Hazelwood assured him there was no violation, Myers took no enforcement action and did not launch an investigation.³⁰

²³ JA708, 710-11.

²⁴ JA725-26.

²⁵ JA320-31, 712.

²⁶ JA1065-66, 717-18, 949-50.

²⁷ JA1073.

²⁸ JA321-23.

²⁹ JA718-19, 727.

³⁰ JA322-23.

3. Captain Hazelwood Returned To The EXXON VALDEZ Drunk Just Days Before The Grounding

Less than two weeks before the grounding, the EXXON VALDEZ was docked in San Francisco.³¹ Late one evening, a launch left the dock to transport Exxon personnel back to their vessels. Mary Williamson, assigned to the EXXON GALVESTON, was aboard that launch as was Captain Hazelwood.³² During the short trip, Captain Hazelwood loudly demanded that Williamson convey insulting comments to the EXXON GALVESTON's Captain Reeder. Williamson smelled alcohol on Hazelwood's breath. She told him "maybe in the morning if you feel better, you can relay that message" yourself.³³ When Captain Hazelwood arrived back on board the EXXON VALDEZ, however, he radioed the GALVESTON, calling Captain Reeder a "douche bag," and a "scum bag."³⁴ In light of this incident, Mary Williamson approached Steve Day, the officer supervising repairs on the EXXON GALVESTON, and requested that Hazelwood be investigated.³⁵ Of course, Day already knew of Hazelwood's drinking problems but had no supervisory authority over him. Day once again reported the incident to Captain Hazelwood's immediate

³¹ JA736, 894.

³² JA694-95.

³³ JA697.

³⁴ JA329-30.

³⁵ JA696-98, 705-06, 730-32.

supervisor, Ship Group Coordinator Paul Myers. But yet again, neither Myers nor any other Exxon official enforced the no-alcohol rule.³⁶

As these three incidents indicate, because Captain Hazelwood's alcohol abuse problems were so severe, even without procedures to require the reporting of violations of the no-alcohol rule, several reports were in fact made to Exxon officials. Just from the three incidents described above, four on-shore officers of Exxon Shipping who were Hazelwood's direct supervisors – Sheehy, Koops, Myers, and Borgen – had received reports about Hazelwood's drinking. And yet, other than obtaining Hazelwood's denials that there was any violation of the alcohol policy, none of them did anything to investigate the incidents or enforce the policy. Exxon was simply not an “employer[] who implement[ed] and enforce[d] proper polices.”³⁷ Rather, Exxon was an employer who, for years, allowed an employee who repeatedly violated federal law and the company's own no-alcohol rule to continue in command of a supertanker.

³⁶ JA332-36, 745-46.

³⁷ Petrs. Br. 9-10, 15.

II. This Case Is Not The Appropriate Vehicle To Consider Whether Or Not To Craft A Special Punitive Damages Rule For Maritime Torts

Exxon asks this court to craft a special rule limiting the recovery of punitive damages in maritime cases.³⁸ Exxon argues that in the maritime setting, employee conduct should not be imputed to the employer absent “some level of culpability” on the part of the employer, or unless “the acts . . . were those of an unfit master and the owner was reckless in employing him.”³⁹ This rule is supposedly required because employers cannot effectively supervise employees while they are at sea.⁴⁰

This court should not entertain Exxon’s request. As an initial matter, while the oil spill occurred at sea, it could have been completely prevented on land by stopping a noticeably intoxicated captain from boarding a supertanker. Thus, the main justification

³⁸ Petrs. Br. 18-27.

³⁹ Petrs. Br. 20.

⁴⁰ Petrs. Br. 18, 20. Exxon also points to lower court decisions that justified a special maritime rule because ship captains need to be able to make split-second decisions, and imposing liability on the employer for those decisions would supposedly “result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene.” Petrs. Br. 24. Captain Hazelwood made no split-second decision here because Bligh Reef was a known, stationary hazard.

for the creation of a special maritime rule for punitive damages is not implicated.

More importantly, even if this Court were to adopt the rule advocated by Exxon, it would not change the outcome of this case because Exxon was both independently culpable and reckless. During the years in which Captain Hazelwood was battling alcoholism, Exxon did not reach out at all to assist him in overcoming his addiction by referring him to its employee assistance program. Instead, Exxon enabled his behavior by fostering a culture of tolerance to on-the-job drinking. Exxon also failed to remove Captain Hazelwood from his command even though company management knew he was drinking while on duty. Even small amounts of alcohol can impair a captain's judgment and navigational skills. Exxon knew that, and more, Exxon knew that an accident involving a supertanker filled with crude oil could have devastating impacts. This was culpable, reckless conduct.

A. While The Oil Spill Occurred At Sea, It Could Have Been Completely Prevented On Land

The disastrous oil spill that caused millions of dollars in damage occurred because Captain Hazelwood, the only person authorized under federal law to steer the EXXON VALDEZ through Prince William

Sound,⁴¹ was so drunk⁴² that he chose to put the ship on autopilot, leave the bridge, and return to his cabin, all just moments before a change in course was required to avoid Bligh Reef.⁴³ Exxon admitted at trial, through a stipulation with the plaintiffs, that Captain Hazelwood's decision to leave the bridge caused the oil spill:

The Exxon Defendants admit that Hazelwood was negligent in leaving the bridge of the EXXON VALDEZ at or about 11:53 p.m., local time, that such negligence was a proximate cause of the Spill, and that the Exxon Defendants are responsible for this act of negligence.⁴⁴

⁴¹ Coast Guard regulations require that vessels passing through Prince William Sound be directed by a person holding a Prince William Sound pilotage endorsement. PX1793 (SER 280). Captain Hazelwood was the only member of the EXXON VALDEZ's March 23, 1989 crew that possessed such an endorsement.

⁴² In its brief, Exxon preposterously claims that Captain Hazelwood was not drunk on the night in question. *Petrs. Br. 9 n.3*. Yet Exxon's top officials admitted that he was drunk in testimony before Congress. *Tr. 1589-90* (Exxon CEO Lawrence Rawl testified to the Senate that Hazelwood's "impairment apparently . . . created the spill"); PX184 (Rawl admits on *Face the Nation* that Hazelwood was not on the bridge at the time of the accident because "he was drunk").

⁴³ 46 U.S.C. § 8502; 46 C.F.R. § 15.812. *See also* JA801-02; *Tr. 1590-91*.

⁴⁴ JA894.

No captain would have left the bridge at this critical juncture if his or her reasoning were not significantly impaired by alcohol. And Captain Hazelwood's reasoning was undeniably impaired on that night.

On March 23, 1989, at 9:21 p.m., Hazelwood boarded the EXXON VALDEZ, which was loaded with a cargo of more than 53 million gallons of oil.⁴⁵ Before boarding, he drank between 10 and 18 single shots of vodka in port bars.⁴⁶ As a result, his blood alcohol level at the time of the accident was approximately 0.241, which is six times the legal limit.⁴⁷

One of the main justifications proffered for imposing a special punitive damages rule in maritime cases is that employers cannot properly supervise their employees while at sea. But most problem drinking in the maritime industry occurs when ships are in port. Robert G. Heath, "Group Psychotherapy and Alcohol Addiction," 5 *Quarterly Journal of*

⁴⁵ PX18; PX86 (SER 137); JA1248, 1253; Tr. 422, 898, 4729.

⁴⁶ JA249-50, 252-55, 334-35; Tr. 202-04, 2729, 2730, 2766-67.

⁴⁷ When the Coast Guard and the Alaska Department of Environment arrived at the scene of the accident at approximately 11:50 a.m. *the next morning*, they were still able to smell alcohol on Hazelwood's breath. JA266-67; JA268-71, 489-92, 1015-16. This observation gave the Coast Guard reasonable suspicion to perform a blood alcohol test. That test indicated that Captain Hazelwood presently had an alcohol level of 0.61, which, based on standard retrograde analysis, established that his blood alcohol level was approximately .241 at the time of the accident. JA575-79.

Studies on Alcohol 555, 558 (1944-45). And here, Captain Hazelwood was intoxicated *before* he boarded the ship. As explained in section I(a) *infra*, Exxon should have had policies and procedures in place to determine whether an employee in a safety-sensitive position was fit for duty. This accident was caused by Exxon's failure to craft and enforce those policies, and thus, its failure to supervise even its employees' land-based actions. Furthermore, Exxon had numerous prior opportunities to relieve Captain Hazelwood of his command due to alcohol policy violations that occurred while the EXXON YORKTOWN and the EXXON VALDEZ was in port. Under these circumstances, it is entirely appropriate to hold Exxon to the same punitive damages standard that generally applies in all tort actions.

B. Exxon Was Culpable and Reckless

Exxon knew that it was dangerous to have a captain with a drinking problem commanding a supertanker.⁴⁸ Exxon also knew that a major oil spill in Prince William Sound would have devastating effects on the local community.⁴⁹ Yet during the years in which Captain Hazelwood was battling alcoholism, Exxon did not reach out at all to assist him in overcoming his addiction by referring him to its employee assistance program. Instead, Exxon *enabled* his

⁴⁸ Pet. App. 121a-122a (District Court order).

⁴⁹ *Id.*

behavior by fostering a culture of tolerance to on-the-job drinking.

1. Exxon Knew That A Captain Drinking On-The-Job Posed Enormous Safety Risks

Exxon knew that Hazelwood was repeatedly drinking on the job, yet it allowed him to continue to command supertankers.⁵⁰ This is extraordinarily reckless behavior because even small quantities of alcohol can have a significant impact on nautical performance.

Alcohol is reported to be involved in up to 40% of all U.S. fatalities on the water. Stefanie Ritz-Timme et al., “What Shall we do with the Drunken Sailor? Effects of alcohol on the performance of ship operators,” 156 *Forensic Science International* 16 (2006). See also Oddvar Arner, “The Role of Alcohol in Fatal Accidents Among Seamen,” 68(2) *The British Journal of Addiction to Alcohol & Other Drugs* (June 1973) (noting that seafaring ranked higher than any other occupational group with respect to fatal accidents in Norway, and determining, after studying official governmental reports, that at least 33% of the deceased were intoxicated when the fatal accident occurred). While many lay people believe that the impact of alcohol on drivers of automobiles is more

⁵⁰ *Id.* See also Pet. App. 4a (Ninth Circuit’s 2006 order); Pet. App. 83a (Ninth Circuit’s 2001 order).

severe than its impact on ship operators, the opposite is actually true. One expert recently explained:

Whereas the operations of drivers in road traffic are highly automated, skippers and commercial ship operators are confronted . . . with unpredictable outside influences such as weather and current. Options to react in case of imminent danger are limited in water traffic. Larger vessels may have stopping distances that take up kilometers and need a long time for course changes . . . The advancing technologic and electronic upgrade on-board of modern vessels requires a high level of intellectual capability and concentration. The complex process from the acquisition of information to adequate manoeuvres in water traffic demands a high degree of targeting foresight, attentiveness, flexibility, power of concentration, and sense of responsibility, which all may be impaired even by low [blood alcohol levels]. . . .

Ritz-Timme (2006).

Recently, a study was conducted to evaluate nautical performance in a ship-piloting simulator by captains before and after alcohol consumption. The study established that even very low blood alcohol levels bear high risks in water traffic. The most affected actions were the analysis of situations, foresight, concentration, navigation, risk disposition, and accurateness. None of the participants were able to operate the simulated ship with adequate safety after the ingestion of alcohol. Ritz-Timme (2006). This

study demonstrates that given the effect of alcohol on nautical performance, the maritime industry needs at least as much incentive as other industries to closely supervise their employees. For that reason, this Court should not limit the availability of punitive damages in the maritime setting.

Exxon officials acknowledged that an alcoholic captain presented “a potential for a disaster,”⁵¹ since the captain “is the most critical member of the crew.”⁵² To make matters worse, Exxon was well aware that an accident could have enormous implications if it occurred in Prince William Sound, because a major oil spill could not be contained in that area. Under these circumstances, it is obvious that Exxon employed an “unfit master” and that Exxon, as “the owner[,] was reckless in employing him.”⁵³ Thus, even if this Court were to apply the special maritime rule that Exxon is advocating for, Exxon would not prevail.

2. Exxon Failed To Provide Any Assistance To Captain Hazelwood While He Was Struggling With Problem Drinking

The principal means of helping alcoholic workers is through an employee assistance program (EAP). An EAP identifies “troubled employees,” (e.g., problem

⁵¹ JA530-31.

⁵² JA680, 692, 844-45, 869-70, 889, 898-899, 957.

⁵³ Petrs. Br. 20.

drinkers, drug users, etc.) motivates them to resolve their problems, and when necessary, either provides them with direct services or refers them to in-patient treatment facilities or community-based organizations such as Alcoholics Anonymous.

The core technology of an EAP is a strategy referred to as “constructive confrontation.” Constructive confrontation requires that supervisors confront employees with evidence of their unsatisfactory job performance, coach them on ways to improve their work, urge them to seek help through the EAP, and, at the same time, emphasize to them the job consequences of continued poor performance. If constructive confrontation is used in conjunction with progressive stages of discipline, the employee’s natural tendency to deny his addiction is gradually diminished until he finally recognizes the need to seek help. *See, e.g.,* William J. Sonnenstuhl & Harrison Trice, *Strategies for Employee Assistance Programs: The Crucial Balance* (1986); Harrison Trice & Paul Roman, *Spirits and Demons At Work: Alcohol and Other Drugs on the Job* (2d ed. 1978).

Several studies have been conducted to determine the effectiveness of constructive confrontation in a variety of work settings. These studies conclude that when properly implemented, an EAP program is very effective. William J. Sonnenstuhl & Harrison Trice, “The Social Construction of Alcohol Problems in a Union’s Peer Counseling Program,” 17(3) *The Journal of Drug Issues, Inc.* 223 (Summer 1987); Harrison M. Trice & William J. Sonnenstuhl, 51(3)

“On the Construction of Drinking Norms in Work Organizations,” *Journal of Studies on Alcohol* 201 (1990); Paul M. Roman & Terry C. Blum, “Alcohol: A Review of the Impacts of Worksite Interventions on Health and Behavioral Outcomes,” *The American Journal of Health Promotion* (1996). In fact, the typical recovery rate for employees using EAP programs is 70% or better. William J. Sonnenstuhl, *Working Sober: The Transformation of an Occupational Drinking Culture* (1996).

EAPs have been in existence for decades, and by 1979, a majority of Fortune 500 companies had created effective programs. *E.g.*, Paul M. Roman, “Employee Alcoholism Programs in Major Corporations in 1979: Scope, Change, and Receptivity,” in *Prevention, Intervention and Treatment: Concerns and Models* (U.S. Dep’t of Health and Human Services 1982). While Exxon had an EAP in theory, it never referred Captain Hazelwood to its program. Instead, in 1985, a friend and fellow Exxon employee, Captain Pierce, told Hazelwood that he had a drinking problem and told him to “see what you can do to fix it up.” Captain Hazelwood had to find a rehabilitation program in the Yellow Pages. Even though he completed the 28-day treatment program, he may never have actually reached the realization that he was an alcoholic without the assistance of constructive confrontation to overcome his denial. He “dropped out” of the outside treatment facility’s

aftercare program⁵⁴ fairly quickly, and began drinking once again.⁵⁵ Then, although Hazelwood continued drinking for the next three years, *Exxon officials never referred him to their EAP, never again suggested that he seek treatment for his disease, and left him in command of a supertanker even though they “knew that he was drinking and driving.”*⁵⁶ Instead, Exxon waited to act until after the oil spill, and then, simply fired Hazelwood for violating the company’s alcohol policy.⁵⁷

3. Exxon’s Corporate Culture Tolerated On-The-Job Drinking And Enabled Captain Hazelwood’s Addiction

Drinking behavior is learned within the cultural context of a group. Groups establish norms, rationales, and social controls about how, when, and where to drink. The workplace is an important place where drinking norms can be established because practically everyone wants to work, and most people spend

⁵⁴ Exxon’s EAP did not have its own aftercare program. In 1986, Exxon Shipping Company’s Medical Director, Dr. Wendell Nealy, told his supervisor that he would like to establish a company aftercare program “to give added motivation and support to people in recovery.” The response was “that’s not our job,” and thus, Exxon never created such a program. Tr. 1946-48.

⁵⁵ JA285, 413-15, 418, 562-63, 567-71, 647-50, 693-98, 708-11, 728-33, 736.

⁵⁶ Pet. App. 154a.

⁵⁷ JA198sa.

more time working than they do with their own families. See, e.g., Ronald Casper, "Drinking as Conformity: A Critique of Sociological Literature on Occupational Differences in Drinking," 40(9) *Journal of Studies on Alcohol* (Sept. 1979); Danielle Hitz, "Drunken Sailors and Others: Drinking Problems in Specific Occupations," 24 *Quarterly J. Stud. Al.* 496 (1973).

Most workplaces develop temperate drinking cultures that discourage heavy consumption of alcoholic beverages and confine all drinking to leisure time. A small minority of workplaces, however, develop intemperate cultures, where heavy drinking is seen as "normal" rather than "pathological." In these companies, the consumption of alcohol, even on-the-job, is tolerated by fellow employees and management. Oftentimes, drinking is actually seen as performing useful functions, such as easing group relations, establishing greater intimacy, or activating fraternalism. Sonnenstuhl, *Working Sober* (1996); Kaye Middleton Fillmore, "Occupational Drinking Subcultures: An Exploratory Epidemiological Study," in *Alcohol Problem Intervention in the Workplace* (Paul M. Roman ed. 1990); Sonnenstuhl & Trice, "The Social Construction of Alcohol Problems" (1987). Thus, fellow employees are reluctant to report their colleagues' drinking problems and supervisors refuse to act on any reports that are made. Harrison M. Trice, *The Alcoholic Employee and His Supervisor: A General Management Problem* 341-42 (Attributing gap between alcohol policies and actual practice of

supervisors to “strong group feeling among his immediate subordinates that drinking problems should be ‘kept between the boys’”).

Workplaces where on-the-job drinking is tolerated are especially problematic for individuals with existing alcohol problems. Workers returning from detoxification find themselves excluded from social groups by virtue of their abstinence from alcohol. This makes long-term rehabilitation that much more difficult. Michelle Fine, et al., “Cultures of Drinking: A Workplace Perspective,” *Social Work* 436 (Sept. 1982).

Exxon was one of those few companies with a culture that tolerated on-the-job drinking. The EXXON VALDEZ, for example, openly hosted parties, attended by almost all ship personnel, where liquor was present. The crew kept liquor in their cabins.⁵⁸ They shared drinks with each other on board the ship, on board launches returning to the ship, and in shipyards.⁵⁹ Officers confiscated bottles from the crew only to drink them themselves.⁶⁰ Exxon’s own Valdez agent repeatedly transported crew members to and from bars, often returning them to the Exxon tankers “noticeably drunk.”⁶¹ And when Captain Hazelwood returned to work after attending an out-patient

⁵⁸ JA568-71; Tr. 1406-09.

⁵⁹ JA231-33, 236-37, 562-63, 648-49.

⁶⁰ JA227-30.

⁶¹ JA746-48, 750.

treatment program, his supervisor actually held his back-to-work meeting at a bar, and ordered a beer.

Exxon's culture of tolerance to on-the-job drinking made its conduct in this case that much more culpable. The company itself not only failed to provide Captain Hazelwood with assistance through its EAP, but company culture actually served as an "enabler" of Hazelwood's alcoholism, and limited his chances for recovery. Trice & Sonnenstuhl (1990). That behavior was reckless and it warrants no special rule absolving Exxon or any other company from punishment.



CONCLUSION

For the foregoing reasons, punitive damages were properly imposed against Exxon, and we urge this Court to affirm.

Respectfully submitted,

VANYA HOGEN

COLETTE ROUTEL

Counsel of Record

JACOBSON, BUFFALO, MAGNUSON,

ANDERSON & HOGEN

1360 Energy Park Drive

Suite 210

St. Paul, Minnesota 55108

(651) 644-4710