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PART THREE

Punitive Damages

J. DONALD BOWEN

J. Donald Bowen is a partner in the law firm of Helm, Pletcher, Bowen & Saunders in Houston, Texas. Mr. Bowen is extremely involved in many trial lawyers associations and recently won a \$480 million settlement on behalf of Exxon Corporation against its insurers from claims relating to Exxon's liabilities and expenses arising from the Exxon Valdez oil spill.

J. Donald Bowen: Thank you all. I appreciate the invitation to speak with you. What I want to do is talk to you just a little bit about my bias, my philosophy, if you will, so you can judge for yourselves, as we go along, how much credence you want to give to whatever I say.

I consider myself to be one of the luckiest people in the world to get to do what I do. I have been a trial lawyer since I started practicing law twenty-seven years ago at Baker & Botts in Houston, Texas and I love it. I cannot imagine working for a living, frankly. It has been a terrific experience for me.

I was thinking during Judge Starr's comments at lunch that if you ask me, or you ask Ronnie Krist, or you ask any of the cadre of people who are day-in-and-day-out trial lawyers, jury trial lawyers, "Is our system broken?" I think the answer would be "no." No, the system works fine. We have got people occasionally in the system that do not do their part, that fail and are imperfect: judges, lawyers, jurors, witnesses, clerks, various things like that. There are always going to be failures in that regard. But for somebody like me, I guess I have picked well over 1000 juries in my life, and I have taken about 250 verdicts from juries, and I believe the system works. That does not mean I always win; I certainly do not always deserve to win, but I believe in the system.

I had a call this week from a writer who was doing a story on leadership among lawyers. He was asking me some questions, and I told him, "Look, let me tell you, where I start from is here. I'm a follower. I'm a follower of the teachings of Jesus Christ. That's the approach I take to my practice." I believe that I have an obligation to use the talents that I have been given as a lawyer, and I believe I have a deep obligation to

serve my clients, to serve my state, and to serve the system. And to do that you have got to do it honorably like Ronnie Krist talked about. You have got to be honorable. You have got to respect what you are doing. Judge Reavley said that the law should enable, not be a burden. I think lawyers too, Judge Reavley, should enable and not be a burden to society.

So with that in mind let me get into this a little bit.

It was about five minutes before midnight just before Good Friday, 1989, when the *Exxon Valdez* pulled the beam in Busby Island and should have begun to make a ten degree turn to the right, a right rudder turn. For a lot of different reasons, some of which will probably never be understood completely, the vessel did not begin its turn and instead continued on a dead south course. Seven minutes later the second mate on duty said it felt like they hit some speed bumps, and of course what happened was that the hull of the vessel struck the pinnacles of Blying Reef that extended under the water some tremendous height down into the Prince William Sound. That vessel, carrying so much crude oil, spilled 250,000 barrels, eleven million gallons of oil, into the very ecologically sensitive waters of Prince William Sound. Suddenly we had the nightmare that everybody had dreaded, and everybody knew about the *Exxon Valdez*. Captain Joseph Hazelwood became a household word, not just in our country, but around the world. You can go to Africa, you can go to Europe, and people know who Joseph Hazelwood is, the alcoholic captain of the *Exxon Valdez*. Thus began a great series of litigation, a great series of public relations problems for a major company in the world that ultimately led to the part that I was involved in.

Now, it is interesting to note that Exxon, of course, was well protected by insurance. They had what they called a "corporate global excess policy." What that meant to them was, on liability claims, they had a \$210 million deductible. That's a pretty healthy deductible. If they exceeded the deductible, then their coverage was \$250 million, underwritten by Lloyds of London and other companies around the world. On their property damage claims the deductible was \$410 million, with \$600 million worth of coverage on top of that. So after this accident occurred, Exxon was faced with a task of almost unbelievable magnitude. These eleven million gallons that flowed out of the *Valdez* were soon scattered and dispersed by a huge storm that roared in from the north. At the very top of Prince William Sound, the very north end, is Valdez, Alaska. Valdez is the termination of the Trans-Alaska Pipeline, built at the cost of \$11 billion, bringing oil from the north slope of Alaska down to where it could be transported on these huge super tankers.

And so the oil was pushed to the south by this big storm. The oil ultimately covered 470 miles, the equivalent of an area from the top of Texas, near Oklahoma, down to the Rio Grande river as you cut diagonally

across Texas. That sort of an area was covered with oil. The shoreline was not sandy; it was rocky, craggy countryside and as we said, very ecologically fragile in these waters. And so what are we going to do? Where do we go from here?

The chairman of Exxon was called into the White House to meet with John Sinunu, who told him that either Exxon would clean this up or we [the government] would send in the United States Military and we would send Exxon the bill. Exxon's chairman replied, "I expect Exxon can do it cheaper than the military can."

So a fairly remarkable effort was undertaken to clean up the oil spill. Ultimately, Exxon spent \$3.5 billion to clean up Prince William Sound. There were 11,000 people there at the height of the cleanup. Valdez was a city of about three or four thousand people. They had to provide housing. They had to do all sorts of things. They brought in huge ships and put people on them. They had to find a way to dispose of the oil-covered rocks and all the refuse that they had gathered. There was not enough technology available. While the cleanup was going on, Exxon's engineers were devising new ways to do things. They had to gather materials from all over the world. They had to fabricate materials. It was an amazing display of American ingenuity. It was the kind of thing, as my wife said, if they had shown it at the halftime of the Super Bowl everybody would have stood up and cheered. Exxon submitted their bill to Lloyds and said, "Okay, we've spent three and a half billion dollars. We'd like to get paid."

Lloyds sent it to their law firm in Philadelphia that reviewed things for them and they studied it for thirteen months, and then sent them back a letter and gave them twenty-seven reasons why they weren't going to pay. Exxon then engaged in a number of discussions trying to work out some way to get this resolved, in two different ADR proceedings. This went on for four years.

Finally, at the end of that four years, no suit had been filed. Lloyds said that they would recommend a \$100 million payment in exchange for all claims being released. The Chairman of the Board of Exxon was outraged. He had been threatened by Lloyds, some of the leading people at Lloyds saying, "If you file suit, we'll see to it that nowhere in the world will you be able to get coverage."

You know, I had long thought, Ronnie, that it was just the people you and I represented that the insurance companies would not pay. I had no idea that they would treat a company like Exxon the same way. But they did, and fairly much with impunity.

So Exxon decided that they would get their smart lawyers together, their in-house lawyers and their outside counsel, and they engaged in forum shopping. How many of you think that is fair? You hear a lot about forum shopping. Ronnie, they think it is just you and that I do that. Well, Exxon does that, too, and they did a good job. They decided that they would file their case in the state court in Houston, Texas. Ultimately, I was offered an opportunity to work on the case and then take the case over just before the discovery began.

And so for about two years that is what Kim [Brown] and I did, we worked on that case. What I want to talk to you about is this, to try to tie back into our subject a little bit: Exxon, of course, was very eager to sue for punitive damages, but we had a decision by our state supreme court that Ronnie mentioned that makes it very difficult to recover punitive damages in a case like this in Texas. They also were very eager to assert their claims under our insurance code where we have an opportunity to collect treble damages, another form of punitive damages, if you will. And so that was all done. All the claims, the kind of things that Exxon lobbies against in Washington and complains about in Texas before the legislature, that we must have tort reform, well, they were only so eager to take full advantage of those rights. And I was happy to prosecute those rights on their behalf.

What happened is this: Ronnie is probably an exception to it, but in my twenty-seven years of trying lawsuits, I was telling Oliver before we started, that I think I've collected \$200,000 in punitive damages. It is not that you are going to collect those damages very often, or if you do collect them, you are not going to keep them very often, but they do provide a great deal of incentive sometimes to make a recalcitrant defendant a little more interested in trying to work out a case, and you can get your case resolved.

With Exxon and Lloyds settlement efforts failed, and so it became clear that we were going to try the liability coverage part of this case. Part of it was settled for \$300 million before we started that trial. Now, the thing that was most daunting to me, what I call the "sore back plaintiff's personal injury lawyer," was, in a case like this that I was really not suited to do, not skilled at doing, and had never done before, was to figure out how to do exactly what Judge Reavley says a trial lawyer has got to do, and that is simplify this case.

There were millions of pages of documents. I think we took 125 depositions. There were scores of expert witnesses. There were briefings filed on probably 100 different law points before we went to trial in this case—I mean a mass of material that you could hardly imagine its scope, and all the various reasons that Lloyds could think up for why they were not going to pay this claim of Exxon's.

And so I worried about how I was going to make Exxon into "the Widow Exxon." How was I going to get some sympathy for Exxon? You have got Exxon suing Lloyds and your first thought is, "Who cares?"

In addition to that, the Chairman of the Board of Exxon is a brilliant man, a brilliant man who is from a small town in South Dakota, but he is not the warmest of human beings. He had testified in the punitive damage phase of the trial up in Alaska that some of you followed, where there was a huge class action suit against Exxon up there, and the end result was a few hundred million dollars in actual damages and five billion dollars in punitive damages. And that case, I expect, will be very interesting to follow as it comes through the Ninth Circuit and then on into the United States Supreme Court, because in addition to that five billion dollars, Exxon is paying \$500 million a year in interest on that judgment. If my calculations are any good, at the time that game goes to the Supreme Court you are going to have about \$6.5 billion on the table: high stakes poker, clearly.

But the chairman had not made a good witness. He was put on by an outstanding criminal lawyer, Jim Neal from Nashville, but it was not done in a way that Ronnie would have put him on or that I would have put him on. He didn't come across as being very likable. The plaintiff's lawyer in Alaska used a brilliant strategy. They tried it in phases, and before the chairman testified there had already been a finding that Exxon Corporation was guilty of reckless conduct, of gross negligence, if you will. And so the first question that Mr. Neal asked the chairman was, "Will you now concede that your company was grossly negligent?" Of course, he was not prepared for that question and gave a very poor answer, and the same jury that had decided the earlier question was sitting there looking at him.

So things didn't go well from there. He was an integral part of my case; I had to put him on. I had to make the claim that Exxon as cargo owner—the vessel was actually owned by a subsidiary of Exxon—Exxon had believed that they had an obligation, under a unique Alaska statute, that makes the cargo owner strictly liable for any spill of its cargo. That is the reason then that Exxon spent \$2.5 billion in addition to one billion dollars that the shipping company spent before it went bankrupt.

So there were practical problems that you face every time you deal with a lawsuit, but it was on a little bit of a grander scale. There were probably 100 lawyers on the case: fifty on Exxon's side, fifty on the other side, people working night and day. As I said, motions being filed over some of the silliest things, Judge Reavley, that I believe I have ever seen,

and lawyers arguing for hours and hours about things that honestly would have no impact on the ultimate outcome of the case. The hourly fees were amazing. I would imagine that both sides probably spent a total of \$25 or \$30 million each in the litigation.

So what we decided to do was to put our case on very concisely. We wanted to have rested within five days, no longer than that. It took us four and a half days. Most of that time was spent on cross-examination, which I thought was a little bit long really, of witnesses we put on. Although we had retained scores of experts, we put on only one expert witness, a fellow who really just sort of told the jury how Exxon had let this accident happen, what had led up to the grounding itself. And so we had our game plan down.

The thing that we did that I think had a lot to do with the case, and that really a trial lawyer has got to do, is the idea that we had for voir dire. I guess for two years I thought about voir dire every day. It was the one thing that I *know*, because I've done it so many times, that you do not get a second chance very often. If you do not do well when you start, when you get up and you first begin to interact with the jurors or potential jurors, it is hard to get out of that hole. You know, I was thinking today I do not know that I can tell you at the time when I got behind on the voir dire and later caught up and won the case. It is very difficult to do, and so the things we decided we would do were very simple things. We knew that even in that Houston community there was a lot of anger at Exxon. A lot of people had cut their credit cards up. A lot of people could not believe that a company that had such close ties to Texas had let this happen to our nation, and the embarrassment that went with it.

So the first thing that I wanted to do was to stand up and take responsibility, take on all of the responsibility for Exxon's failures in causing this grounding, for Exxon's shipping company's failure in having their crew and their captain cause this grounding. It was important to get that out on the table and say, "But for our negligence, we wouldn't be owed a penny by Lloyds of London. It's only for those reasons that we carry this liability coverage." We had a juror who filled out a questionnaire that indicated that she believed that Exxon was negligent. I asked that question of the jury. She raised her hand and said yes, and then I asked how many of the rest of them agreed with her. About sixty percent of the 120 jurors raised their hands. I told the rest of them to raise their hands up too; "All of you, raise your hand because she's exactly right. Exxon was negligent."

We talked about how many people believed that the captain was drunk, without hearing a word about the accident, just from what they heard, what they had read. "Do you believe that Hazelwood was drunk?" Eighty percent of the hands went up. "How many of you believe that he

was actually in charge of the vessel and steering the vessel when the accident happened?" Half the hands went up. Actually he was below in his cabin. As my partner said, if he was drunk, that was the place for him.

But those were the kind of things that we wanted to talk about: responsibility, and the fact that because we are responsible, we pay premiums for our coverage and now we would like to collect our coverage. Once we made the mistake, once we put the oil in the sound, Exxon then did what was responsible and did the right thing. They cleaned up, and it cost them a bundle. If you do not think they spent enough money, do not punish them here by not letting them have their coverage. Give them their coverage; let's enforce the coverage, let's enforce the contract that was made. That is a pretty simple position, when you boil it down to that, and that is your position. You just see the jurors sitting there thinking, "They did pay the coverage, they've got a written policy. It talks about cargo owner liability coverage. Why shouldn't they get the money?"

Lloyds then proceeded to try to talk about maybe as many as twelve or thirteen different defenses, and they could not ever strike a responsive chord. They could not get anybody to understand where they were going on it. The lawyer who represented Lloyds is an outstanding lawyer, a very intelligent fellow, but really he does not have and did not have the experience in picking juries. I don't know how many juries he has picked—maybe fifteen, I don't know, but he was not really experienced in that. While he could talk to you and to any appellate court, any federal judge ten times better than I could ever, he had difficulty in making his presentation to a group of 120 mixed people, some of them fairly ordinary. We had five or six lawyers on our panel who asked some good questions. We had clerks, and all sorts of people who had various experiences. He was trying to explain how there was coverage but really they did not owe the money because of some exclusions and that sort of thing. One lady raised her hand, and she was very serious, and she said, "Let me see if I have this right. You're saying that the oil was covered until it was spilled." And of course that was the essence of what we thought, that it was covered as long as we did not spill it. If there was a loss, too bad.

So we tried the case to a jury verdict. As I say, our case went on for only four and a half days. It took Lloyds four weeks to put on their various defenses. They must have called seven or eight different experts. I think they had forty-five witnesses and we had eight. Ultimately, the jury rendered a verdict in favor of Exxon. Because of some legal maneuverings, Lloyds had decided that they wanted a separate trial on

the violations of the insurance code and the potential trebling of the damages.

So during the time that we were—after the judgment had been entered and we were preparing for the second phase of the trial—there were some settlement negotiations that ultimately got the case resolved. Lloyds ended up paying \$70 million more than the judgment. Why would they do that? *Why* would they do that? Well, there really is not but one explanation for that, and that there was the threat of treble damages. But for that, there is no reason in the world for Lloyds to pay \$70 million more than the judgment that was entered against them by the trial judge.

So that is the practical impact of having the ability to talk about punitive damages or treble damages, whatever it may be, where you can say to the defendant, “Your conduct was such in this case that we believe you made your minds up instantly before you made any investigation, before you considered anything. You made your minds up that you were not going to pay this claim, and you didn’t have any good reason for it. You persisted in that. You dragged it out for seven years before we got to trial. You’ve had free ride of the money for that length of time, and now you’ve got to pay the piper. Now you’ve got to see that you’re going to have to be called to account for what you’ve done.”

So that is the impact. What would happen if we tried that, I do not know. It is hard to say. Would the jury have found they had absolutely no reasonable basis for denying the claim? Their defenses were what you probably picked up if you were reading the newspaper in 1989 shortly after this happened: drunk captain, therefore, the vessel is not seaworthy, and we do not pay; this one is not a fortuity because the jury in Alaska found that you [Exxon] were grossly negligent, that you were guilty of reckless conduct, and that keeps it from being a fortuity; a non-fortuity cannot be insured, we do not pay; you were the alter ego of the shipping company; they had their own insurance so we are not going to pay you; the statute in Alaska was unconstitutional; and on and on and on.

It is like a law professor was telling me, one of the things he says you might think about arguing in the case is like the story they tell you in law school. You know, you pay your \$100, you can have as many defenses as you want. You can say to the farmer who wants \$100 for his cabbages that your goat ate, you could say, “I don’t have a goat. And if I had a goat, he didn’t eat your cabbages. And if he did eat your cabbages, they weren’t worth \$100. And if they were, my goat was insane.”

Anyway, that experience obviously was a very interesting experience from my standpoint: a great opportunity. It was also two years of the most unrelenting stress I believe I have ever been through. I was constantly convinced that I was going to screw up, that I was going to miss something, that there was going to be some document in those millions

of pages that I had not looked at that was going to undo my case and I would not even know it before it was too late. The fear of failure is a great motivator, and it certainly was in my case.

Some interesting things happened that I would say to you. You have heard a lot of theory here. You have heard a lot of people talking about the law and I do not know much about those things, but I know a fair amount about street smarts. What happened to us and to me was, I was called upon to be in charge of a lot of lawyers who did a different kind of practice than I did, lawyers from around the country that Exxon used regularly, and to try and figure out how we were going to divide the work up. I guess the thing, Ronnie, that I came to at the end of the experience as you have done with the major cases that you have handled, is that the things that work and what you have to do are no different in that case than they are in any other case, a dog bite case, or whatever it may be. They are no different. You have got to understand your case. You have got to know the facts. Judge Reavley said you have got to know what is in that record. Well, you have got to know what is going to be in the record. You are the one that has to create the record and there is absolutely no substitute for that. While I did not read all of the millions of documents, I read most of the documents. I looked at those documents and I knew what was in those documents. I took every deposition that I could until they started taking six a day in different parts of the country, because I believe that the trial lawyer, if you are going to be the one up in front of the jury, you are the one that needs to do the work. You are the one that needs to know what the witness looks like and what the testimony is, and there is absolutely no substitute for the detail work, I promise you. Is it easier to write a thirty-page paper on a complicated subject, or a five-page paper? Well, it is the same way trying the lawsuit. If you are going to make a lawsuit simple and understandable, you have got to know the guts of that case. You have got to know every millimeter of that case. You have got to know how everything fits together. You have got to understand their defenses better than they do. Only then will you be able to figure out how to make your case simple, because that is your goal if you are working with a jury. It is very seldom that you are going to have a jury that is all law professors or all college graduates. You are going to have a mixture. You are going to have some people on there who are very intelligent, and some who are not but who have good common sense. So there is no substitute for that. Like law school, if you do not do the work, if you do not study, you are not going to do particularly well.

Now, the good news is, those of you more like Ronnie and me who are not first in the class, there is hope out there. You do not have to be brilliant. The brilliant people sometimes end up teaching law in law schools or they end up doing something else. They end up on the bench. But the rest of us out there, as long as we can translate, that is what we really are—we are translators, performance artists, and I do not mean from that standpoint that we put on a show or that we do things that are insincere, but every time you are appearing on behalf of a client in a given case, the circumstances are going to dictate what you do and how you handle yourself. And the way you come across is the way your client is going to be perceived.

Some of you may have noticed I took my coat off before we started. It is a little warm in here. How did you feel about that? We did that in the trial. The judge would let me and my side take our coats off. The other side never did. They sat there in their blue suits, all thirty of them in the courtroom, very stiff. Before long there was this feeling that the jurors were relating to us, but they could not relate to the other guys. It was not because I was up there saying, "You know, these guys are from London, and over here in Texas we don't like foreigners." There was none of that; it was a lot more subtle than that.

It is a lot of little things. I am more comfortable with my coat off and I am more comfortable speaking informally than I am in some formal fashion, and so that is me. Now, somebody else is more comfortable in their coat and they are not going to do well with their coat off. You are going to come across, and if a case lasts very long, as Ronnie will tell you, if you are a phony, man, they will figure you out in a heartbeat. I have seen a few guys that could fool them for a few days, but about the time that third day starts, if they are phony, if you are trying to push something that is not right, you are not going to pull it off. So you have to be yourself. You have got to be well prepared so that you can make your case simple. You have got to do just what Judge Reavley said. Do not take the position that "look, if I can throw twenty theories on the wall, maybe one of them will stick." I have a law partner who thinks that way. He had amassed huge amounts of documents in a tire blowout case and he had done the best job in discovery you ever saw. So we are sitting down getting ready for trial and he said, "What do we do now?"

Well, that is the trick. That is what we have to do. You have got to pull all that together and you have got to figure out what is your case. Find the best part of your case and sell that. If you are not going to sell that, you are not going to win. That strategy made Exxon nervous. They were used to having a lot of different ideas out there on the table and they were uncomfortable giving up on some things. They thought we ought to fight over all of them. I said, "Look, I can't win your case and do that." They wanted me to fall on my sword to defend their monitoring program

of Captain Hazelwood, which was nonexistent. I said, "Look, it cost you \$5 billion in Alaska. I don't want it to cost you your insurance down here. You know, I'm not going to fall on my sword for you on issues we cannot win. Why do I care whether they believe that Hazelwood was drunk or not?" It turns out after they heard all the evidence, I do not think they thought he was drunk. Who cares? Drunks get covered by liability insurance just like the rest of us do. That is one of the risks you take when you write a general liability policy without an exclusion for drunkenness.

I am afraid I have not given you much on your topic, but I appreciate very much the opportunity to come to Pepperdine and I hope you will have some questions at the end. I would love to visit with you.

Thank you very much.

KIM BROWN

Kim Brown: I think you all know who the two qualified speakers are here. I am new at this, but I sure am having fun at learning how it all works.

We got involved in the Exxon case when I had been out of law school for about a year and a half, so it was the opportunity of a lifetime for a young lawyer. I was involved in the insurance broker depositions and I got to travel with Don to New York, to London and to Norway, which were some pretty exotic places for a girl from Jackson, Mississippi. Friends from law school started calling wondering whether our firm was hiring so they could go on some of these trips. I had to tell them was that most attorneys in our firm usually travel to Paris, Texas.

The case was a great learning experience. I got to work with top lawyers from around the country and learn from them. I became familiar with the broker testimony and the documents involved in those depositions throughout the discovery process, which also prepared us for the trial. I guess you could say that I developed a specialty in the broker insurance deposition area of the case. That is where we went on all the trips and took the depositions, and so I learned about the testimony and the documents involved in that portion of the case.

Toward the end of the deposition schedule, like Don mentioned, we were getting spread pretty thin. Depositions were being taken every day all over the world. So Don decided that he was going to send me, newly out of law school, to be in charge of a round of depositions in London and in Norway. So I was pretty excited about this. I prepared quite a bit

and had an outline of what I wanted to develop through the depositions. I knew what we had been doing with the other brokers and what testimony I needed to get.

Another attorney from the firm that was assisting us in Houston went with me on the trip, in part to get up to speed on the case in preparation for trial. He had not been traveling with us, so he came in part to be there for his experience, and in case anything went wrong.

The first hurdle of the trip was informing him that I was in charge of the depositions and he would just be learning. But after we did that, we got on our way. In the middle of the first round of depositions during a break I went over some of my questions with him, and I learned a real important lesson. I told him some of my ideas, some of which we had been doing with other brokers all along which he did not know about, and some other questions that I developed that I knew were good questions and I knew I could get an answer that would respond to those. But he did not like the questions. He said they were risky and might not get the answer that I liked.

So I deferred to his wisdom and to his experience and I did not ask the questions. We finished that first round of depositions and I went back to the hotel and went over my notes. I was so disappointed in my performance and in the response to the questions that I had gotten from those witnesses. I knew in my gut and I knew my instinct that those were the right questions to ask, but I deferred to someone who I thought I was supposed to be learning from and who knew more than I knew. But the truth was that I knew the broker testimony better than he did, and I knew what our goals were in terms of trial for getting testimony during the broker depositions.

I learned that even though I am young and inexperienced, I knew the documents and I knew that part of the case, and I should have trusted my instincts and asked those questions. So for the next round of depositions, while I still asked him questions, regardless of his response, I went ahead and asked what I thought needed to be asked and I had a much better result. So for those of you that are about to graduate or those of you that have just graduated and are new at this, do not be afraid to trust your gut. If you have done your homework and you know the case, you are probably doing what is right.

We did a couple of things throughout the case to help us make it simple and to get ready for trial; we kept summaries ongoing of the deposition testimony each night when we finished depositions and we would make a summary of what we had learned that day from those witnesses. It helped us to narrow the issues, to think in terms of what we wanted to present at trial from those witnesses and also to develop ideas and concepts for the depositions that were yet to come. We had our own set of exhibit documents, deposition exhibits, that we took with us and we

would mark on these when the other side used a particular document with a particular witness who we would like to use it with in the future. That helped us to keep a running focus throughout the trial.

One thing that was real important was to pay attention to what the other side was getting from each witness; "What are they going to play at trial and what do we have from that particular witness to counteract that?" So we were always thinking in terms of trial and how to make it simple even if we just got a couple of good points from each witness.

I was also in charge to some extent of the exhibits, and there were plenty of them. There were thousands of documents. While that might not be the most glamorous aspect of the case, it sure helps you get up to speed on the case, learn the players, and learn the information; that is a must. If you learn them during the discovery process, you will already know them by the time of trial. And when you start marking your trial exhibits, then you will know what's going on and you'll have a better feel for the case.

OLIVER S. HOWARD

Oliver S. Howard is president and managing partner of the Tulsa, Oklahoma, law firm of Gable Gotwals Mock Schwabe, and an adjunct settlement judge of the United States District Court for the Northern District of Oklahoma. During 1996, Judge Howard helped his client, Cities Service Company, which was acquired by Occidental Petroleum Corporation, win a \$742 million judgment against Chevron Corporation in a breach of merger agreement.

Oliver S. Howard: It is a pleasure to be here. It is always a great joy to come to Pepperdine University. I was sitting in a Sunday School class last Sunday morning, and the teacher of the class asked us to turn around to the person behind us or beside us and take five minutes to talk about some person that had been a major influence on our lives.

I turned around and started talking about Dean Ron Phillips, who is a person who has meant as much to me as anybody in my life over the last thirty years. It is always a pleasure to get to see Ron, and it is a great joy for me to see the masterful work that he and Jarnie and the staff and the faculty and students and this whole university body have performed here at Malibu, California. So it is a pleasure to be here.

Are punitive damages good or bad? Let me give you two stories.

First is the story of a doctor who is sixty-two years old. He has given his entire life working in a small, rural town in Oklahoma. He has done thousands and thousands and thousands of operations. He has never made a mistake. He has never been sued. He is getting ready to retire. He gets sued on a quirky claim for something that should never have been brought. Compensatory damages would not exceed, under any stretch of the imagination, \$50,000.

But the plaintiff was asking for another five million in punitives. The doctor says, "I'm ready to retire, and my insurance says if I get hit with punitive damages they won't pay. Should I settle? I didn't do anything wrong. I don't want to end my career by admitting that I did something wrong by paying. But if the jury doesn't like me, and I get hit for punitive damages, I will have forfeited my retirement for me and for my family."

Are punitive damages good things or bad things?

Next is the story of a doctor who was fifty-five years old. He lived in Tulsa, Oklahoma, was one of the outstanding eye surgeons in the world, practiced in every continent, and operated on kings and queens. In his work as a young man he had developed a brilliant device called an interocular lens. He had entered into an agreement with a large company for the sale and the manufacture and royalties based upon the sale and the manufacture of that lens. He had been told by one of his mentoring professors at the University of Chicago that it would be unethical to patent. He entered into this contract with a handshake agreement in San Francisco in 1979. Nobody really knew if his invention would work or not. But, when the royalty payments reached \$70,000 a month, the company decided they didn't want to pay anymore.

A suit was brought for actual damages and for punitive damages for fraud, for breach of fiduciary duty, and for oppression.

I represented both of those people. How do you advise people whether punitive damages are good or bad? Like Don, I have had very little experience in court with punitive damages. I have never won a dollar and I have never lost a dollar on such damages. I have had many, many claims for punitive damages brought against my clients. I have signed petitions very few times asking for them on behalf of my clients. In the latter doctor case I was able to win for my client the largest settlement of any individual in the history of the Northern District of Oklahoma Federal Court, partly because we had a claim for punitive damages and partly because the magistrate judge told the board of directors of that west coast corporation that although the judge in the case hardly ever, ever instructs on punitive damages, he would this time. He told them that juries in Tulsa hardly ever grant punitive damages, but they would this time. And we settled.

Are punitive damages good or are they bad? Let me give you some expert opinions.

First the negative. The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence deforming the symmetry of the body of the law. Thus says the Supreme Court of New Hampshire in an opinion in 1872.

Or consider the following: "Like the other side of the issue, speaking for myself only in this paragraph, the law giving exemplary damages is an outgrowth of the English love of liberty, regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the rights of the weak, and encourages recourse to and confidence in the courts of law by those long oppressed by acts or practices not cognizable in or sufficiently punished by the criminal law."

Thus says Judge Kemlin of the Wisconsin Supreme Court in an opinion debated in 1914. And the debate lingers.

What we want to talk about for a few minutes today are some issues of federal due process as they are involved in punitive damages claims. Unbelievably, the issue as to whether the Fourteenth Amendment is implicated in the size of punitive damages was an issue that had never been squarely addressed by the Supreme Court of the United States as of 1991. It had been skirted. It had been hinted at. It had been put off until another day.

Finally the day came for the Court to turn its attention to the issue. Why had the issue been so long in getting the attention by the Court, and why is it that in 1991 it finally did get that attention? In fact it got such attention not only in 1991, but again in 1993, and in 1994, and in 1996, all in landmark opinions involving punitive damages.

There probably are a lot of reasons for it. Part of it may have been the media hype: reports of major kinds of colossal punitive damages awards that boggle the mind. There was some statistical basis for saying that punitive damages were on the rise. One of the amicus briefs filed in the *BMW* case cited some statistics that were somewhat interesting. That brief stated, for example, that in Alabama, aggregate punitive awards affirmed on appeal grew from \$400,000 during a five-year period in the middle 1970s to approximately \$89 million during the same five-year period in the 1980s. Similarly, in Texas, according to that amicus brief, during a four-year period in the late sixties, the aggregate punitive awards affirmed on appeal were approximately \$85,000. In the eighties, that had grown over a four-year period to \$128 million.

In any event, for whatever reason, by 1991 punitive damages did in fact capture the attention of the Court, if not all society. The Court be-

gan to raise serious questions about whether the size of punitive damages awards in fact called into question certain due process issues. Some of the particular issues that began to be raised and questions that began to be raised by the Supreme Court are the following: Punitive damages are quasi-criminal in nature. Yet since they are imposed without the safeguards as such, are there due process issues? The amount to be granted in punitive damages awards is largely undetermined and not subject to legislative estimates and maximum penalty controls. Does this raise constitutional issues? Punitive damages are imposed by juries impaneled to act as decision-makers in a single case. Does this raise due process concerns? Punitive damages have the potential to be used to punish the unpopular defendant. Does this raise federal due process concerns? Jurors have no information regarding criminal fines for comparable situations. Does this raise federal due process concerns?

During the 1980s, the Court got close to addressing some of these issues. It talked about some of these issues but left them for another day. Then we have the case of *Pacific Mutual v. Haslip*.¹ Finally the Court addressed the issue of whether or not the size of a punitive damage award can in fact run afoul of substantive due process under the Fourteenth Amendment of the United States Constitution. The Court answered it resoundingly yes—maybe. *Haslip* opened about as many questions as it answered.

For the majority, Justice Brennan held that not of its essence, not of its essential nature, does the award and the magnitude of the award necessarily call into question issues of the Fourteenth Amendment—but it might.² Because it is possible as a matter of substantive due process to have an award that is so unreasonable that it could be said under certain conditions that yes, it does involve due process and it does impinge upon a person's right to due process of law. Now mind you that the Court says it did not in *Haslip*. And there the punitive damage award was about four times as much as the compensatory award. And the Court raised an eyebrow and said, "Well, this is pretty close to the line, but we're not at the line yet. But we want to tell you that there is a line out there. But while we tell you that there's a line out there, we want to tell you something else—that is, it's not a bright line. It's a fuzzy line. It's a dotted line. It's a broken line. But it's there." Justice Scalia went through the roof. How could you talk about this hazy, fuzzy, dotted, broken, twisted line? What do you mean by talking about things being reasonable and unreasonable and things that are unreasonable being a violation of due process? Punitive damages were around before the Fourteenth Amendment was ever enacted and nobody said a word about it in

1. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

2. *Id.* at 1043.

the Fourteenth Amendment. The only due process that's involved in punitive damages awards is strictly procedural. Did you have a right to fair process? Look at the common law, says Justice Scalia. In a concurring opinion he concurred because obviously the Court did not think there was any violation in *Haslip*. But he brought into question the fact that what we are dealing with here is something which has been going on for hundreds and hundreds of years. People have been getting punitive damages awards in the United States and in England for centuries. How dare you say that this type of a process somehow denies somebody due process, said Justice Scalia. And therefore look at the historical analysis. Let's get out of this business. The Supreme Court shouldn't be out here trying to determine whether something is reasonable or not, and if it is reasonable or unreasonable it may call into question due process.

And then there was an interesting opinion by Justice O'Connor in which she said, "You know, the problem here is that it is all so vague. It is all very vague. It's all so vague." I really believe she said that this really does impinge upon substantive due process. I don't think the laws of Alabama, even with all of the procedural niceties of the instructions and of the appellate review including the seven-part test that's exercised in appellate review, give enough to get your fingers on and to get your teeth into to understand whether or not somebody is getting a fair shake. And I think we have to look further at the issue in the future.

Well, two years later the Court looked at the issue again, and many people were waiting with bated breath for the Court to finally answer not only yes—maybe, but yes—yes. But the Court said no—no the next time around in the *TXO* case.³ What had appeared to be a slam-dunk, for-sure win for people who were against punitive damages because the Court had said in *Haslip* that four-to-one was a ratio that began to raise questions about the reasonableness of the award, now in *TXO* we had one that had a 526-to-one ratio, and if four-to-one was close, 526-to-one must not be too close; it must be way off over the horizon. But the plurality decision was that in fact, believe it or not, it didn't cross the line. *TXO* simply didn't advance the ball very much. It raised as many questions as it answered. It is more notable really for what it doesn't say than what it does say. It is more notable for the colorful quotations that are in it, such as Justice Scalia's quotation about if anybody looks at this case, all they're ever going to see about punitive damages is—it ain't as bad as *TXO*, therefore it must be okay. And he was dead right.

3. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

And so we go through another term of the Supreme Court with a real indecisive mish-mash. Yet there is that dissent there again by Justice O'Connor, there is this question about reasonableness, there is this reassertion we have in *Haslip*. We did talk about the fact that substantive due process rights can be in fact involved in the size of punitive damages awards—not just the process, not just the fair procedures, but in the size of the award. For this day it is not going to be determined in this Court at this time on these facts, says the Court in *TXO*.

And I'm going to, for the sake of time, skip the *Honda*⁴ case, which doesn't again advance the ball too much, because, as you know with the *Honda* case, all that was really involved was a constitutional amendment in the state of Oregon which was found to be unconstitutional because of the review limitations that it put on punitive damages awards.

Then we come to the third case, and that is the *BMW*⁵ decision.

In the *BMW* decision, we have another doctor case just like my older surgeon and my younger ophthalmologist. Now we've got the young Dr. Gore, who buys a BMW. You talk about an unattractive plaintiff. He's a doctor and he drives a BMW. There is only one type of people in the whole world, perhaps other than lawyers, that are disliked more than doctors, and that is a car salesman. And the doctor just happens to be suing the big bad BMW company who is known to be dripping with all kinds of money, if not oil. He bought this \$40,000 beautiful car and he gets ready to send it out to have it shined to the max. And the serviceman comes back to him and says, "Doc, I have something that I need to tell you about." He says, "I believe this car has been repainted." This high-falutin' \$40,000 BMW is not even in its pristine state with respect to paint. BMW says, "Well, wait a minute. Now, we've got a policy all over the United States that if we need to do a little touch up and if it's under 600 bucks, we just touch it up. And nobody is the wiser. Nobody cares. It's no big deal."

To the folks in Alabama it was a big deal. Because they gave the doctor the full amount of compensatory damages, \$4000, and they added on for good measure the number four with three more zeroes—four million in punitive damages.

The Supreme Court of Alabama through remittitur reduced that to \$2 million. But nevertheless, now you have the situation of a \$4000 compensatory damage and now you're looking at \$2 million in punitives. Had the time now come where the Court was going to say in fact yes—yes, there really is an implication here of too much, and where you have too much, you are somehow denying somebody their substantive due pro-

4. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

5. *BMW v. Gore*, 116 S. Ct. 1589 (1996).

cess? And the Court said resoundingly this time yes, it's too much. It's too many times. The ratio is off. And now what we want to say is there must be a ratio that comes more into line with compensatory damages. Now you're going to have to start looking at, on a substantive due process basis, you're going to have to start looking at other comparable awards and you're going to have to start looking at what kinds of fines are out there by the legislatures. And you're going to see whether or not there is a compatibility between an award of punitive damages and what are being awarded by legislatures by way of criminal fines. And my goodness, the Court says, if you look at, for example, unfair or deceptive trade practices, BMW might get hit for \$5000 or so for doing what they did, but they sure as heck would not get tagged for \$2 or \$4 million. And therefore we think it's too much. It violates the substantive due process rights of BMW.

Now the Court, because of the perseverance of Justice O'Connor all the way back to the *Hastip* decision, even though it eschewed a bright line concept, began to move in the direction of some tests and some indicia that can be looked at and can be used to determine whether or not something in the award of punitive damages is too much.

Among other things, you must look at the following three indicia: One, the degree of reprehensibility of the defendant's conduct. If you are really a bad person, if you have really done something that is reprehensible, you might be able to be hit more than somebody else on the same circumstances in terms of compensatory damage.

Two, the ratio between compensatory damages and the amount of punitive damages. However, remember reprehensibility also comes into play, so that if you are just kind of a halfway bad guy, you might get a five-to-one ratio limitation, but if you are a really bad guy, it might be fifteen-to-one, thirty-to-one, or one-hundred-to-one. So nobody won completely on this except that there was beginning to be the assertion of more controls, more definite tests.

Three, the difference between the award of the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct. In other words, let's get some rationality into this process. Let's take a look at people who are in the business of setting up penalties, who do studies, who do estimates, who understand issues in a bigger magnitude than just the issues of one case before that tribunal, and who make decisions on that basis and that information as to what are the fair penalties. There ought to be some reasonable relationship between that and punitive damages.

Well, this is kind of a quick overview of what is going on with the Court. But as a practitioner, what it means to all of us, I think, is the following: you have to keep up with what is going on in the law. As you know, a lot has happened now because of *BMW*. States are beginning to exercise more maximum caps. There are beginning to be more formulas that are important. One of the things that is very clear as you read these cases of the Supreme Court, and when you read any cases of the Supreme Court, is that lawyers must do their work. You must not leave unturned any stone to protect your client or to assert the rights of your client. Raise extraterritoriality problems. Don't let my client be blamed here in this state for what he or she may have done in some other state. Raise issues of procedural due process. Make sure the instructions are right. I, as a matter of course, when I involve myself in a case where there are punitive damages being asserted against my client, I move to strike them; I make a motion in limine against them; I move at the beginning of trial to keep them out of the pretrial order. I do everything I can and every procedural step to ensure the fact that I am preserving a record for which I can argue procedural due process as well as just simply civil procedure itself.

Keep in mind that your client is entitled to substantive and procedural due process. Think about doing comparative studies. Think about going outside of the case and looking at things that you could use statistically that would be helpful. Because sometimes in these cases the most important thing that it may come down to, even if not a trial, is before a federal magistrate or before a mediator or in any settlement context, is if you can show on behalf of your client, depending on whether you are the plaintiff or the defendant, either that you can or cannot get these damages, you can get an advantage in the settlement process.

Thank you very much.

Professor Cupp: Why don't we go ahead and open it up to the audience? If anyone has a question, I will be happy to acknowledge their question.

Question: I want to ask a question to you, Mr. Bowen.

In the *Exxon* case, how long did the jury deliberate? And— I'm assuming you had an opportunity to speak with them after—did you get the feel that it was more of a "who's right, who's wrong," or did they spend a lot of time actually reviewing the insurance policies?

Mr. Bowen: Good question.

They deliberated over a period of two days for about, I guess, twelve hours, and I think they had a good sense about the policy itself. We really had a policy that I carried all over the world with me. It went everywhere important with me. We just sort of wrapped ourselves in the policy. And I think they understood the policy well. I don't think they ever

understood all of the defensive issues. They were hard for *me* to understand at times. But yes, I thought they did. I thought they also had a strong sense of right and wrong about it. They made their mind up I think fairly quickly after they heard both sides. They didn't say that, but that was my sense about it.

Question: I have a question for Judge Howard on the *BMW* case.

To what extent does *BMW* replace the states in analyzing whether a punitive damage award will be upheld? Because I think part of the problem in that case was that Alabama just had a vague standard, and a lot of states already have a standard in place, such as California, which I think resembles *BMW* standards.

Judge Howard: That's an interesting question. And I think it's going to be played out and it is being played out right now as courts begin to apply *BMW*.

But *BMW* specifically says that one of the issues you have to look at is the legitimate state interest, so I think if you can show, if you are a plaintiff, that legitimate state interests of deterrents and retribution are there with some definitive guideposts, that a state probably is going to be able to continue to be able to utilize these damages for the purposes that they are intended. I don't think that the Court really intends to occupy the field here. I think the Court does intend to step in and say, "Yes, this can be an issue, but you individual states can do certain things to deal with this either through setting these maximum penalties by yourselves or taking a look at how you are dealing with fines and so forth; by yourselves setting up appellate procedures similar to what is in Alabama, although it is going to take more now than what is in Alabama to ensure that there is a real objective type of review." I think it is the O'Connor concept that is going to come through, but there has to be some objectification. I think the thing that really has bothered the Court, what bothers us, is how do you get there? But I think that the concern of the lack of objectivity and the lack of, in effect, bringing the objectivity into line with real state interest, that those are the critical things you have to deal with and that will be dealt with in these ensuing years in light of *BMW*.

Mr. Bowen: If you were Exxon, would you bet six and a half million dollars on the *BMW* case?

Judge Howard: I don't know the facts. Maybe I should save this for another day. It's a big risk. I haven't said anything about the case that I was involved in last summer in which we won a \$742 million judgment because we're on appeal, so mum is the word, I don't speak about that.

But I was close to another case involving a client that I was not representing in that case but I had previously represented, just to give you an example, I think, of the impact of *BMW*. There was a case that went to trial in the Western District of Oklahoma on purely economic grounds. It had to do with tortious interference with contract. It was between some oil and gas operators and really had to do with access to a gathering system in western Oklahoma. There were antitrust violations that were alleged against my clients as well as the state courts. It went to trial in federal district court in Oklahoma City. The jury entered a compensatory damage award of \$235,000 and then a punitive award of \$30 million. This was two times bigger than any punitive damage award ever granted or ever to go before the Tenth Circuit Court of Appeals. It was by several times the largest punitive damages award ever to come out of the state of Oklahoma either in federal or state court. *Haslip* was first argued on appeal before the Tenth Circuit. The Tenth Circuit affirmed, and you can see the ratio: \$235,000 compensatories and \$30 million punitives. There was a petition for cert. that was taken by the Court at the same time *BMW* was taken. On the last day of the term, that case was taken, and therefore it was there when *BMW* was decided. It was one of about six cases that was remanded by the Supreme Court to the circuits in light of *BMW*.

What happened in that case is that the Tenth Circuit then heard this evidence again in light of *BMW* and granted a remittitur of \$30 million down to \$6 million.

I don't know whether that helps you or not, but that's what they did in that one day.

PART FOUR

Alternative Dispute Resolution

PROFESSOR L. RANDOLPH LOWRY

L. Randolph Lowry is founder and director of the Straus Institute for Dispute Resolution and an associate professor of law at Pepperdine University School of Law. Professor Lowry teaches mediation, negotiation, and dispute resolution courses and has published books titled Collaborative Negotiation and Conflict Management and Counseling.

Professor Lowry: Good afternoon to you all. I have a unique position in this day-long program on civil litigation reform. I am the last speaker