Punitive Damages: How Juries Decide by Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi

*By Deborah J. LaFetra**

Tort reformers look at outrageously large punitive damages as one of the most visible signs of a justice system gone awry. The rule of law depends on consistent remedies applied to tortious wrongs. Instead, the newspapers trumpet punitive damage awards in ever-increasing amounts, leading many pro-reform commentators to label the phenomenon, "Jackpot Justice." The anecdotes have become familiar: the old lady who got millions from McDonald's after she spilled hot coffee in her lap while driving; the BMW paint touch-up worth $4,000 in compensatory damages and $4 million in punitive damages, and the granddaddy of them all: the $145 billion tobacco verdict.

The most frequently suggested reform is a cap on the amount of punitive damages, either an absolute dollar amount or a multiple of the compensatory damages awarded in the case. Another suggested reform is to make punitive damages awards payable in whole or in part to the state or some fund other than the plaintiffs' pocket. The results of the studies in this book, however, suggest that these types of reform will, at best, remedy certain symptoms of a dysfunctional punitive damages award system, but still largely ignoring the root causes of wildly varying awards.

Authors Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi combine their expertise in law, economics and psychology with a series of controlled experiments to determine how individual jurors, juries, and judges approach the critical issues underlying an award of punitive damages. Their research takes them systematically through individual and group determinations of (1) liability; (2) whether punitive damages are appropriate, and (3) the amount of punitive damages. The book follows the authors through a series of studies, described in sufficient but not exhaustive depth, and including tables relating the statistical results. Fortunately for those whose education stopped short of regression analysis, the narrative fully explains the results without too much resort to statistical lingo.

Many of the results build on previous studies of individual and group decision-making processes, but the results in the punitive damages context bring an interesting twist. For example, it comes as little surprise that jurors engage in hindsight bias, given our fine national tradition of Monday-morning quarterbacking. The General Motors "Ford Pinto" memo comparing accident costs to investment costs before deciding where to place the gas tank in that ill-fated vehicle was an early, but often-repeated instance where jurors slam corporations for conducting cost-benefit analyses, even when those analyses are required by government regulations. Perhaps blinded by what jurors apparently view as "cold" corporate behavior, juror conduct veers even more perversely by awarding higher punitive damages to corporations that conduct cost-benefit analyses with placing a *higher* value on human life.

Some of the findings suggest that the conventional wisdom about juror behavior is flat out wrong. Sunstein et al conducted experiments on hundreds of mock juries to determine whether the act of deliberation worked to smooth out variances in the amount of punitive damages individual jurors were willing to award. As it turns out, the act of deliberation not only fails to adjust especially high or low damage amounts to a more moderate overall award, but there is a systematic shift to higher awards in all cases. In fact, in 27% of the juries studied, the final award after deliberation was higher than the highest award a juror found appropriate before deliberation. The authors attribute this phenomenon to two primary factors: First, once the jury has decided that some amount of punitive damages is appropriate, the jurors have little guidance to translating their outrage into a dollar amount. Second, the jurors favoring high awards have a rhetorical advantage in arguing for ever-increasing dollar amounts to "send a message."

The findings recounted here scratch only the surface of this in-depth treatment of jury behavior. The authors find jurors to be well-intentioned and serious about the task set before them. Nonetheless, the complexity of determining the appropriate amount of punitive damages (if any) is simply beyond the jurors' capabilities. Their erratic and unpredictable punitive damages awards prompted the authors to test an alternative: judges. Sunstein et al conducted empirical studies that demonstrate judges have at least three huge advantages over jurors when it comes to deciding whether punitive damages are appropriate and what the dollar amount should be. First, they actually understand the legal concepts (as compared to jurors, only 5% of whom could accurately recount the jury instructions containing the relevant legal principles). Second, they have a wealth of experience with comparable cases that gives judges a far better gauge of how to translate reckless behavior into a dollar amount. Finally, they are simply more accurate, coherent, and consistent in their reasoning about probabilities and application of the law.

In conclusion, the authors provide some very general suggestions for reforming punitive damages. The suggestions range from a modest proposal to make available to jurors the same sort of comparative data that would be available to judges to a more radical plan to create "damages schedules" that would function as something of a cross between criminal sentencing guidelines and workers' compensation valuation of injury. The ideas are presented in broad strokes, leaving to the tort reformers in the state legislatures the task of translating the authors' important empirical findings into a workable mechanism for awarding punitive damages.

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