



Insight 5: New Scholarship on Punitive Damages

Two recent *Insights* examined the impact of 9/11 and “Enron” on jurors’ impulse to punish. In combination, the results suggest that for the foreseeable future we will be in a litigation context where corporate defendants are unusually vulnerable to punitive damages and to large awards that are quasi-punitive. This vulnerability makes the recent publication of “Punitive Damages,” by Cass Sunstein, et al. a fortuitous event.

Although “Punitive Damages” suffers many of the shortcomings that have traditionally limited the value of academic jury research for “real” litigation – e.g., the use of written case summaries as stimuli – it is, the best scholarship to date on the subject and offers a number of intriguing insights into the process by which mock jurors do – or do not – arrive at punitive damages. Exemplar insights, along with our view on their “real world” implications, include the following:

- Given a common set of facts, 80% of the research subjects agreed about whether or not to award punitives; however, only 18% agreed on a damages figure. **Implication:** We are working on research designs and analytical tools that, while not abandoning the traditional focus on distinguishing punishers and non-punishers, also focus more attention on learning how to better distinguish punitive minimizers from maximizers – i.e., vengeful misanthropes whose awards are motivated by diffuse anger rather than by the facts of the case before them.
- Judge’s instructions, which ostensibly impose a higher, “clear and convincing” standard for punitives impose few, if any constraints on the impulse to punish. This is partially a comprehension problem – the comprehension rate for punitive-damage instructions hovered around 5%. On the other hand, the higher a juror’s rate of comprehension, the lower his/her propensity to punish. **Implications:** Of course, some jurors choose not to comprehend instructions because instructions get in the way of their intuitive impulse to punish; however, this finding serves as a reminder of how important it is in today’s litigation climate to teach the instructions early and often, preferably with the help of pedagogical graphics, such as decision trees that break the instructions down into more comprehensible, discrete decisions.
- Defendants who had rejected an expensive, risk-reduction measure on the basis of cost-benefit analysis were punished more severely than were other defendants when jurors associated that policy with subsequent injuries to plaintiff(s). **Implication:** It is clear from our research in the real world that corporations are hurt less by cost-benefit analysis per se than by the dramatic, documented “revelation” of such analysis by plaintiffs. This academic research serves as a reminder of how important it is for corporate defendants to minimize the impact of such revelations by acknowledging and, where feasible, proactively embracing their cost-benefit decisions from a perspective that emphasizes benefits to consumers like the jurors (not to the company’s shareholders).

This book has a number of other findings and insights that are intriguing in this litigation climate. We recommend it to all of our clients.

Citation information:

Sunstein, C.R.; Hastie, R.; Payne, J.W.; Schrader, D.A.; & Visaisi, W.K. (2002).

“Punitive damages: How juries decide.” The University of Chicago Press: Chicago.