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Business on trial: the true story

by Richard O. Lempert

Business on Trial: The Civil Jury and Corporate Responsibility, by Valerie P. Hans. Yale University Press. 2000. 288 pages. \$35.

Jury trials are very much an affair of stories. Lawyers tell stories to juries. Evidence is more convincing when presented in story order. Jurors use stories to make sense of evidence. And litigants, particularly losing litigants, tell stories about juries. One of the favorite stories of losing business litigants, second only to the irrational jury story, is the Robin Hood story. Juries love to play Robin Hood, to steal from the rich (businesses and insurance companies) and to give to the poor (individual litigants, especially individual tort litigants). The storytellers see no mystery here. Jurors are "little guys," like the plaintiffs who bring cases against businesses. They are emotional human beings. It is only natural that their verdicts will be affected by sympathy for severely injured plaintiffs, that they will favor people over businesses, and that they will see virtue in taking money from rich defendants and giving it to plaintiffs whose injuries may have placed them in desperate financial straits.

It is similarly no mystery why losing business litigants tell the irrational jury and Robin Hood stories. People draw on familiar scripts when they have something to explain. Losing litigants have something to explain, for the very act of going to trial suggests they do not believe the evidence is against them. The irrational jury

and Robin Hood stories also allow lawyers to deflect the blame for losing from their own performance, and circulating these stories makes lawyers' jobs easier, for it helps them to persuade business clients to settle cases that the clients, but not the attorneys, expect to win.

These stories are plausible not just because they follow familiar scripts, but also because the publicity given seemingly outrageous verdicts, like that in the McDonald's coffee case, leaves the impression that such verdicts are common. It matters not that jury horror stories are rare or that when closely examined they are often unfounded. The business view of reality may well be a victim of business propaganda. Business people, like ordinary people, have their views of jury performance colored by stories that business interests spread.

Then again, the above analysis may be completely off the mark. It may be that business litigants believe the irrational jury, Robin Hood, and other anti-big business jury stories because they are true. It is this last possibility that Professor Valerie Hans explores in her book, *Business on Trial*. Her answer is delivered in a clearly written volume that is a "must read," not just for students of the jury, but also for lawyers, litigants, and policy makers. Yet I doubt that business litigants will seek out this book. People don't like to see their deeply held beliefs shattered, and Professor Hans shows that the Robin Hood or other anti-big business jury stories are, for the most

part, not just stories but myth.

Getting a handle

Professor Hans spent more than eight years studying the performance of civil juries in business cases, and her labor has borne considerable fruit. The book's greatest strength, apart from the clarity of Hans' prose, lies in the variety of approaches that are used to get a handle on how juries respond to business litigants. Professor Hans canvassed the literature on juries and business cases, examined relevant statistics, conducted survey and experimental research, and interviewed jurors. Her findings from all sources converge on a conclusion: There is little reason to believe that business defendants in tort cases are systematically disadvantaged by jury biases, sympathy, or incompetence, and the likelihood that anti-big business sentiments will determine jury verdicts is small.

Business litigants fear that juror attitudes toward injured plaintiffs will be dominated by one emotion—sympathy. Professor Hans' juror interviews and survey research indicate that whatever sympathy exists for injured plaintiffs coexists with other, often stronger, feelings, especially skepticism of greedy plaintiff's and a sense that people are, in large measure, responsible for the ills that befall them. Only a little more than a third of the jurors Hans interviewed, and only about half the respondents in a sample survey she conducted, agreed with the statement, "Most people who sue others in court have legitimate grievances."

In short, if sympathy is not absent from the jury room, it is also not a dominating presence. Jurors know their verdicts should not be affected by sympathy, and they remind each other of that fact. Moreover, not only can feelings of sympathy toward and resentment against plaintiffs who deny their own responsibility clash in the same person, but different jurors can have different sentiments, leading to airing of reasons for favoring one side or the other, reminders of what the law requires, and vigorous discussion of fact.

Although business people may themselves be misled by the images of sue-happy citizens and the litigation horror stories that business and insurance interests spread, the situation is not all bad from a business perspective. Ordinary people—the kind who become jurors—believe these stories as well. National opinion poll data reviewed by Hans as well as her own state poll data and the responses of 269 actual jurors and 450 mock jurors reveal widespread agreement that many law suits are frivolous and that litigation rates and tort awards have climbed dramatically in recent years. The data Professor Hans reviews tell, however, a different story. Injured plaintiffs with justified claims often never sue, and apart from suits for products liability, where “case congregations” like the asbestos litigation inflate litigation rates, Hans finds no evidence that the propensity to sue has increased over the years.

But whether a litigation crisis exists or not, belief in one may influence jury verdicts. Hans’ poll respondents and mock jurors were less likely to judge a defendant negligent or to recommend a high award the more they saw the litigation system as out of control. But Hans’ data do not allow her to resolve the causal direction problem. It could be that having pro-defendant sentiments leads one to perceive a litigation crisis rather than the other way round.

Attitudes toward business

Professor Hans’ most interesting finding, derived largely from mock jury studies and by posing litigation scenarios to tort poll respondents, seems, if viewed superficially, to confirm the idea that jurors are prejudiced against business defendants. Business defendants fare worse than individual defendants when citizens are asked how they would resolve specific cases. For example, where a plaintiff trips on a loose carpet, the plaintiff is likely to be perceived as less responsible relative to the defendant and is likely to receive a larger award if the defendant is the Wilson Furniture Company than if it is Mr. Wilson, who was holding a garage

sale. Yet contrary to the Robin Hood story, Hans finds little evidence that this is a wealth effect. Wealthy defendants in her scenarios seem not to suffer on that account.

Hostility toward big business is also an unlikely explanation. Although Hans reports a correlation between attitudes toward business and mock juror rulings in scenarios with business defendants, most respondents are, on balance, not anti-big business, so hostility toward business can do little to explain group verdicts. Moreover, those more hostile toward businesses are also more likely than those less hostile to find against individuals when they are defendants. This suggests that attitudes toward business are a proxy for biases that are more closely related to a propensity to favor all individual plaintiffs over all defendants than they are to a propensity to hold specifically against business defendants.

Business defendants appear to fare worse than similarly situated individual defendants because different standards of responsibility are applied to both plaintiffs and defendants when big businesses are defendants than when ordinary people are. Mr. Plaintiff is more obligated to look where he is walking when he is at a garage sale in Mr. Wilson’s house than when he is in the Wilson’s Furniture Store, and the Wilson Furniture Store has a greater obligation to spot and immediately correct a recently loosened piece of carpet than does Mr. Wilson in his own home. Perhaps this reflects the jurors’ sense that Mr. Wilson is like them and that his home could be their home, while his furniture store is not their business. But it is also a reasonable view to take regardless of identification with a party or one’s attitudes toward business.

Businesses, particularly large ones, have capacities for anticipating problems, for learning of them, and for correcting dangerous situations that individuals lack. They also can injure more people by their carelessness, which means they should be particularly careful. This is the counterpoint to victim responsibility. On the one hand, corporations enjoy an advantage be-

cause despite their negligence, juries are reluctant to let plaintiffs deny all responsibility for their injuries. On the other hand, juries are aware that businesses have knowledge, abilities, and obligations that individuals lack, and in some circumstances will hold them more responsible than they would individuals when their behavior contributes to accidents.

A potential limitation

Professor Hans does not say in what courts the jurors she interviewed sat, in what state she conducted her poll, or where her mock juror subjects came from. But as she teaches at the University of Delaware, my hunch is that the original data she collects and analyzes disproportionately reflect the views of Delaware’s citizens.

This is potentially a major limitation. Local cultures, including local jury cultures, differ. A record-setting jury award in a rural Illinois county might not raise eyebrows in the city of Chicago. Juries in some areas like Detroit, Michigan or the Bronx, New York are anecdotally reported to be far more generous with other people’s money than jurors in other locations. One would suppose that Delaware juries might be more like David Engels’ Sander County residents* than they are like jurors in Chicago, New York City, or Detroit. If so, they might be more prone to be suspicious of people who sue, more likely to hold victims responsible for their injuries, and less generous in their awards than jurors in other places. Nevertheless, it is unlikely that research in a more urban state would paint a dramatically different picture of juror motivations and decision making in cases involving business defendants. Professor Hans’ findings are consistent with most other studies, both laboratory and statistical, that examine how business defendants fare before both actual and mock jurors.

Moreover, recent research indicates that the supposed generosity of Bronx juries may be exaggerated. Hence, it seems safe to conclude from Professor

* Engel, *The Ovenbird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC’Y REV.* 551 (1984).

Hans' research that many of the stories that circulate among business litigants about the anti-big business proclivities of juries have little factual basis. I also conclude that Professor Hans' *Business on Trial* provides us with the broadest and best empirical treatment to date of how jurors and juries respond when businesses are

sued. Whether facts can compete with as good a story and as familiar a plot as the Robin Hood story remains, however, doubtful. It is certainly less likely to happen in boardrooms and the policy arena than it is in the jury box. Outside the courtroom, powerful actors have a vested interest in spreading stories, true or not. In the jury

box, ordinary individuals appear to do a good job separating self-interested claims from reality. Professor Hans' work tells us that this is true even when businesses are defendants. ❧

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