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**News Story**

## Jurors Seem Mostly Unaffected By Sept. 11

### Corporate Scandals Have More Impact

*By Michael M. Bowden*

One year after the Sept. 11 terrorist attacks "changed America forever," their effect on juror attitudes remains extremely subtle - when it's detectable at all.

Jury consultants and lawyers told Lawyers Weekly USA that the psychological impact of the attacks can still come into play when similar issues are involved - for example, cases involving firefighters, rescue workers or even architectural design - but beyond those specific sorts of parallels, the effect becomes more nebulous.

Jury consultant Howard Varinsky of Emeryville, Calif., said he doesn't "see it *directly* affecting any other cases."

The "initial emotions," he said, "have started to fade a little, and jurors are again deciding cases strictly on the merits - if, indeed, they ever stopped."

According to Richard Gabriel, co-founder of Decision Analysis in Los Angeles and president of the American Society of Trial Consultants echoed those feelings.

"There are certain kinds of defendants and plaintiffs and cases in which you could rightfully say, 'Gee, I'm really concerned. For example, if I had product liability case involving an airliner malfunction and what the airline company knew when, there's a fairly obvious concern there that juror sympathies might be inflamed by the memory of 9/11," Gabriel said. "But there are really no instances where you could say with any certainty, 'I can't take this case to

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trial."

Beth Foley, of the National Jury Project in Minneapolis, agreed.

"Obviously, there's been an impact on society as a whole, but we're just not seeing a discernable, identifiable impact on juror decision-making," said Foley said, noting that one possible change seems to be a marked increase in juror empathy - but also a higher threshold for accessing that empathy.

She said she has detected a willingness among jurors to be more generous in cases where the plaintiff has suffered a truly grievous injury, but a much lower tolerance for marginal cases in which the complaint could be construed as being "whiny" or frivolous.

Even in cases involving public servants, the 9/11 effect is very hard to pin down: Firefighters and fire departments seem to have maintained a certain degree of immunity nationwide - but the same cannot be said for the police.

"Generally, police aren't wearing the same halo that firefighters are," Foley said.

Law enforcement officers may remain sacred cows close to Ground Zero, but their status degenerates quickly as you move away from the Big Apple.

Racial prejudice against Arab-Americans is apparently not a significant factor, either.

Some lawyers with Muslim or Arab clients remain squeamish about taking their case before a jury; but the fact is that jurors haven't allowed their anger against an intangible enemy to degenerate into bigotry against a scapegoat, experts said.

According to most consultants, juror attitudes at any given moment are more strongly affected by *recent* current events than by any lingering memory of the burning towers. That means that right now, the Enron and WorldCom debacles are far more relevant factors in determining a jury's reaction to a given case.

"People are more affected by what they saw on the evening news last night than by what they were seeing a year ago," said Gabriel. "The corporate scandals we're seeing today are much more relevant to most cases the average lawyer or juror is likely to encounter - which very often involve corporate parties, expert testimony from accountants, lost and destroyed documents, and so on."

However, he noted, the terrorist attacks will again leap to the forefront of the public imagination this month as the media deluges us with "one year later" commemorations - some of which could break the media taboo on showing explicit gore or shots of people jumping from the towers.



As these images play and replay, experts say there may be a brief resurgence of the original passions of Sept. 11 - widespread feelings of vulnerability, demonstrative displays of patriotism and a new perspective on tragedy.

### More Sympathy For Good Cases

The events of Sept. 11 seem to have made jurors more likely to empathize with plaintiffs who've suffered severe losses. But it's also created a jarring sense of perspective that's raised the bar on what sorts of injuries actually *are* severe.

Savannah, Ga., plaintiffs' lawyer Clay Davis said one major effect of 9/11 is that small and borderline invisible injury cases are now more likely to be lost.

"Juries seem to be more sympathetic to catastrophically injured people, and less sympathetic to invisible cases - like fibromyalgia or even certain closed-head traumas, where they can't see and deal with the injury," he said.

Houston plaintiffs' attorney Howard Nations agreed.

"Most people now have a perspective on tragic death that they did not have before Sept. 11," said Nations. "I think any of us would look with more skepticism upon cases involving injuries that are not nearly as significant as those suffered in the attack. The bar has absolutely been raised on frivolous lawsuits."

Therefore, in cases lacking dramatic injury, said Nations, it's essential to develop a powerful body of evidence that shows why the injury is not frivolous.

"If you don't," he said, "your case becomes a very easy shot for the defendant."

But if a lawyer can succeed in convincing the jury that a claim is serious, cases can still yield record verdicts.

Howard Spiva, a personal injury attorney in Savannah, Ga., noted that "everyone in America now knows what post-traumatic stress syndrome is."

Whatever effect trial lawyers and jury consultants believe 9/11 has had on verdicts, they unanimously agree that the attacks should not be directly invoked.

"I strongly discourage lawyers from even *saying* 9/11," said Foley. "Don't do it! It just makes jurors mad."

Others concurred.

"The biggest [litigation] lesson I've learned about Sept. 11 is: Don't mention it!" said Spiva.

"Jurors have told us in focus groups and interviews that the first lawyer who brings up 9/11 loses," he said. "They're suspicious that the lawyer is 'using' that tragedy as part of their legal strategy in a deliberate play on their sympathies."

Instead, the emotions surrounding the event should be conjured indirectly.

"Take a patent case, for example," Foley said. "You can now say, 'The U.S. patent system is so central to capitalism and the American philosophy, the best way to live on the fact of the earth,' etc. Statements like that, which might have sounded hokey just a year ago, have in many cases regained their resonance."

### **Police Not Immune**

Conventional wisdom would have us believe that police, firefighters, rescue workers and other public servants now enjoy a kind of hero-worship that largely insulates them from legal attack.

There aren't enough firefighter suits to prove this hypothesis one way or the other - but most experts agree that, as far as the police are concerned, it simply isn't so.

"I don't think it's affected minority communities much, because they harbor a deep mistrust of the police in the first place," Varinsky said.

But it's not only minority juries that are coming down hard on law enforcement: Middle-class white jurors recently came together in California to level a large verdict against the Oakland Police Department for using excessive force in breaking up an Earth First environmental demonstration.

And as Gabriel pointed out, recent news events can quickly wipe away 9/11-related juror sympathy for police officers.

"A jury just awarded the plaintiff \$2 million in a police-brutality case in L.A. that I was recently involved in," Varinsky said. "The verdict came down right on the heels of the media releasing a videotape that showed a cop slamming a teenager into a car at a gas station."

But the story is different in New York City itself.

Before Sept. 11, a long and sordid series of police abuse scandals had caused the reputation of police officers to plummet in the eyes of New

Yorkers.

"In the old pre-9/11 days, every jury pool contained some people who - whether by personal experience or thanks to bad police P.R. - were immediately on our side," said Manhattan plaintiffs' attorney David Dean, who has lectured widely on the effects of the attacks on litigation. "That's no longer the case. Now we have to work for it."

But even in New York, said Manhattan plaintiffs' attorney Robert Simels, local changes in attitudes toward law enforcement are "not as endemic as the press and the police unions would make it seem."

"There's not such a feeling of goodwill that it's overcome the years of problems with the police," he said.

In some parts of the country, the way jurors treat police has less to do with 9/11 and more to do with the local values and political culture.

Police advocate Jeffrey Rosen of Virginia Beach, Va., and Robert Lindemeier, a plaintiffs' lawyer in North Platte, Neb., both operate in conservative jurisdictions where the police are generally respected.

"Law enforcement officers were already held in pretty high regard anyway, and that hasn't changed," Lindemeier said.

Meanwhile, in liberal Portland, Ore., police advocate David Lesh said the terrorist attacks had "absolutely no impact" on the pre-existing public animosity toward the police.

"It's been largely irrelevant," he said.

### **A New Scapegoat?**

Although the flow of very largest jury verdicts of 2001 slowed to a trickle after the 9/11 attacks, experts were reluctant to see any correlation between the drop-off and the terrorist attacks - and they remain reluctant to make a connection today.

Maybe the decline occurred because lawyers continued their highest-stakes cases, angling for a future hearing in less unsettled times. Maybe it was the slower economy or the Wall Street downturn that has made many small investors re-appreciate the value of a dollar.

"I'm not sure that has much to do with Sept. 11," Varinsky said. "I truly think it's just an anomaly, a blip on the radar screen that you can't really attribute to any particular cause. Just wait until the Enron and WorldCom lawsuits start rolling in."

In fact, the current rash of revelations concerning the misdeeds of domestic corporations could carry considerably more weight and relevance for jurors than the acts of the shadowy foreign organizations behind the 9/11 attacks.

"'Evil corporate America' has kind of stolen the spotlight away from Sept. 11," Foley said. "Just when we were feeling beaten and down [about not being able to find Osama bin Laden], a new group of evildoers miraculously popped up in our own society - and now we can be mad at *them*. The scoundrels at Enron and Arthur Andersen and WorldCom provide a more tangible focus for our anger."

Now, she said, "we can actively 'get the bad guys' here in America, rather than nurse this brooding, passive depression about not getting the bad guys overseas."

One group that hasn't become the victims of 9/11 patriotism and anger is persons of Middle Eastern descent who live in the U.S.

Varinsky said he knew of a lawyer who'd been scheduled to begin a trial on Sept. 13 for an Egyptian-American client, but continued it indefinitely in the wake of the attacks. A year later, however, such fears and precautions appear unwarranted.

"There is still some bias out there against Middle Easterners," said Gabriel. "But on the other hand, there's been so much fear of and consternation over hate crimes against these people - juror sensibilities are generally more sophisticated than that. They tend to realize, 'Hey, we can't jump to any conclusions just because they're Muslim or from a country that's now our enemy.'"

*Questions or comments can be directed to the writer at:*  
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