

## **Jurors Show Post-Attack Effects**

Patterns from trials are elusive, and research is scanty

Gail Diane Cox

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In Knoxville, Tenn., the plaintiffs were presenting their catastrophic-injury case when terrorists crashed into the twin towers. The courtroom emptied as everyone went to watch the clerk's television.

The judge offered a postponement. But, plaintiffs' attorney Sidney W. Gilreath recalls, "I talked to a jury consultant who said people were being kinder to each other" -- and who could be more deserving than his client, little Ashley Manes, left a ventilator-dependent quadriplegic following an accident in which she slipped under her seat belt?

But while Gilreath assumed the national transformation would automatically benefit Ashley, defense lawyer Lawrence A. Sutter of Cleveland's Reminger & Reminger had other plans.

Representing the seat belt maker, DaimlerChrysler, he asked the jurors in closing arguments to override their hearts and use their minds as an affirmation of the American way of life.

"At this time in our country," he said, "when things are being attacked -- our way of life, our system of government and our system of justice -- more than ever, these types of decisions are important."

On Sept. 20, 2001, a unanimous jury gave DaimlerChrysler a total victory. *Manes v. DaimlerChrysler Corp.*, No. 2-537-00 (Knox Co., Tenn., Cir. Ct.).

A year later, jury consultants are divided on whether Sept. 11 translates into a boon for plaintiffs or defendants. For every one who counsels that juries turned right -- becoming more conservative, friendlier toward American institutions and less tolerant of civil suits -- another has at least some preliminary evidence that juries are more compassionate and increasingly punitive toward companies that inflict harm.

### **SUBTLE FLAG-WAVING**

What's left are stories like Gilreath's. They suggest that the advantage goes to the attorney who chooses to seize it, who can wave the flag cleverly enough that jurors don't see that their new vulnerabilities are being exploited. And the length of the reach of the flag is limited only by the litigator's imagination.

Take the strategy of Thomas J. Nolan, who, on Sept. 11, 2001, represented plaintiffs in a suit as factually unrelated to the Middle East as was Gilreath's.

When the news hit his San Francisco courtroom, the jury pool had just turned in its written questionnaires.

"My first impulse was to settle," says Nolan, the managing partner of Washington, D.C.-based Howrey Simon Arnold & White. His client was a company suing its insurer not paying to defend it in an Alabama-based products liability trial. "Our thinking was that people would say, 'Hey, this is only about money. One for-profit company suing another for-profit company,'" he says. "We were telling each other that people would resent us, that they'd want to be home with their families watching TV."

The fear that their clients' complaints had been overshadowed was widespread among plaintiffs' attorneys.

"Suddenly everything seemed trivialized, and I know part of it was my own mindset because a cousin was killed in the World Trade Center," says Patrick J. Coughlin, a senior trial counsel at New York-based Milberg Weiss Bershad Hynes & Lerach. He decided not to try a suit set for trial in federal court in Southern California in which shareholders had hoped to up their compensation in a corporate acquisition.

Richard T. Boyette of Raleigh, N.C.'s Cranfill, Sumner & Hartzog, an officer at the Defense Research Institute, says there was a corresponding optimism among the defense bar, especially in minor cases.

"It just stands to reason that jurors would see a whiplash injury and think to themselves that more important things were going on in the world," he says, acknowledging no research has backed that up.

Nolan ignored the conventional wisdom, and his initial doubts, to try his case. And he took the post-Sept. 11 zeitgeist as his starting point.

Nolan says he elicited sympathy for his clients by drawing a parallel -- subtly -- between them and the World Trade Center victims.

A traditional plaintiff's theme is that all society can ask of a company is that it do the right thing. Nolan says he stressed that, keying into the judge's speech to the jurors to the effect that while we all can't be New York firefighters and policemen, we can be patriots by fulfilling the roles we are given.

"Describing the scene in Alabama, I told the jury that the insurers sat on the sidelines, watching people in trouble and not rushing in to help when they could have -- when they should have," Nolan recalls.

It seems to have worked -- something did. The jury awarded the compensatory damages requested. As to punitives, Nolan asked for \$46 million, and the jury awarded \$68 million. *International Paper Co. v. Affiliated FM Insurance Co.*, No. 974350 (San Francisco Super. Ct.).

In an intellectual property case in federal court in Delaware last December, Terrence J. McMahon of the Silicon Valley office of Chicago's McDermott, Will & Emery was worried that Sept. 11-inflamed patriotism would upset his case for the defense. Again, the facts had nothing to do with foreigners. Intel Corp., the nation's leading chip maker, wanted \$82 million in damages from McMahon's client, Broadcom Corp., for patent infringement. *Intel Corp. v. Broadcom Corp.*, No. 00-796 (D. Del.).

"We were going after the U.S. government by challenging the validity of the patents," McMahon says. "We were afraid the jurors would be thinking, 'My patent office, right or wrong.'"

It may sound strange in retrospect, he acknowledges, but he found himself arguing that the hallowed founder of the U.S. Patent and Trademark Office, Thomas Jefferson, wouldn't want protection for invalid patents. The jury ruled unanimously for the defense. The absence of a coherent, scientific context to explain such stories isn't for lack of looking.

David A. Wenner of Phoenix's Snyder & Wenner has been conducting extensive focus groups and mock trials on the subject under the aegis of the Association of Trial Lawyers of America.

"I can tell you what I hoped I'd find," he says. "I hoped to find a greater empathy toward plaintiffs' emotional trauma as legitimate damages. I haven't. Our focus groups do not show jurors talking about 9/11."

Gregory S. Cusimano of Gadsden, Ala.'s Cusimano, Keener, Roberts, Kimberley & Miles, who has been working with Wenner, says, "We haven't done any studies in Manhattan yet. The social scientists suggest that whatever has happened, it might be exaggerated enough there for us to pick it up."

Doug Keene of Austin, Texas' Keene Trial Consulting says jurors and mock jurors are writing more than they used to when asked to discuss their emotions about, for example, what makes them angry.

That could be a first step toward documenting that people are more accepting of the reality of mental anguish than before, he suggests. But he says it's too much to expect to hear focus groups discussing Sept. 11, or to look for answers in straightforward polls.

Keene recalls a medical negligence case set for trial last year in a conservative rural county with a history of low awards. A focus group "trial" two weeks after Sept. 11 came back with an award three times greater than what the trial lawyer expected, he says, and at a trial in December the actual jury award was virtually identical.

"When debriefed," Keene says, "a male schoolteacher prompted widespread agreement when he said, 'I am not aware of Sept. 11 having changed me any, but I guess it makes me realize more clearly that we need to look out for each other.'"

Lawyers who want to know whether the attacks benefit the plaintiff or the defense are asking "exactly the kind of question that shouldn't be asked," says Professor Nancy Mander at Chicago's Kent College of Law, who has been studying juries for a decade. The variables make the question unanswerable, and such inquiries squander the opportunity to "reclaim voir dire in light of 9/11."

"If a criminal defendant is of Arab descent, or if any of the participants in a civil or criminal case is, this is an ideal time to supplement questions asked at large with individual voir dire and written voir dire," she says. "These have been good but underused practices all along. They elicit more information because they allow jurors to admit biases that aren't socially acceptable."

Biases were a subtext of a trial in Washington state, the winning lawyer claims.

"We put a lot of effort into our jury questionnaires because our clients are Sikhs who came here from India," says Erik Heipt of Seattle's Budge & Heipt.

He has represented Sikhs before and used questionnaires before, "and this time, we had a far higher proportion of jurors admitting to prejudice, as well as more challenges for cause."

His clients were three brothers who had a chain of gas stations. They sued Atlantic Richfield Co. (Arco) alleging that it had discriminated in its contract to supply them with fuel. Arco officials had allowed employees to call them "ragheads," "camel jockeys" and worse, they said.

As Heipt tells it, once his side had chosen a good jury, it was his opponent's attempt to capitalize on Sept. 11 that helped deliver a \$5 million award. *Flying B v. ARCO*, No. C01-02352 (W.D. Wash.).

Arco first argued that the contract was terminated for economic reasons, says Heipt. But after Sept. 11 and reports of violence against Sikhs, he says, the defense increasingly stressed safety violations.

"From our point of view, they were playing on public fears that it was somehow unsafe to have fuel trucks being driven around by men with turbans and beards," says Heipt. "The jury saw right through it."

Arco in-house counsel Nancy Doyle, who sat through the trial, says that account of the defense strategy is "absolutely false" and that the firm is a leader in racial and religious tolerance.

The news is full of cases in which criminal defendants said that they were convicted or forced to plead guilty because juries have become more punitive.

But it is hard to find a defense lawyer who says his or her practice has changed. "I haven't noticed it's any rougher," says veteran criminal defender Robert F. Alvarenga of Redlands, Calif. "Sure, there's a tendency among jurors to side with the police, but that was around long before last September."

## **SCIENCE TO THE RESCUE?**

Scientific guidance is on its way, insists C.K. "Pete" Rowland, a founding partner in the Overland Park, Kan., office of Litigation Insights. Data now being collected will provide something definitive on the trends in post-Sept. 11 awards, at least in personal injury awards, by the end of the year, Rowland has promised.

Others in the business say it's not too early, but too late.

Kelly Naylor of Golden, Colo.'s Naylor Trial Consulting suggests that any effect on jurors' mindset waned within months, and that it is the collapse of Enron rather than the collapse of the twin towers that provides useful themes for today's litigator.

"Corporate irresponsibility became the big issue this year," Naylor says. "Of course, all this first anniversary coverage in the media could revive some emotions. But in general, I think you're more likely to hear jurors talking about that lawsuit by the overweight guy against the fast food people than about 9/11."