

PLUS What I learned in my first
Focus Group
CHUCK GEERHART

**Female Judges: What I've Learned
Since I've Been on the Bench**
WILDA L. WHITE

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IN THIS SPECIAL DIVERSITY ISSUE

**Who Will Take
Responsibility
for Raising the Next
Generation of Lawyers?**

BY SHAANA A. RAHMAN

What I learned in my first Focus Group



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I have been to many CLE seminars over the years and listened to attorneys and jury consultants sing the praises of the focus group as an invaluable tool for assessing the trial worthiness of a case. But I had never had quite the “right” case to justify the time and expense of a full-on focus group. Then one day I had the right case.

The Case

My client, a 48-year-old air traffic controller, was riding down the only elevator at the SFO air traffic control tower when it came to an abrupt halt, throwing her against the wall. She felt immediate neck pain, and sought treatment the next day. She eventually had a two level discectomy and fusion in her neck. Her surgeon said she was disabled from work as an air traffic controller.

The elevator had a well documented history of stopping between floors due to power surges (which would “trip” the elevator’s controller and cut off power to the elevator briefly). We felt that the owner of the elevator (City of San Francisco) and its maintenance company were undeniably on notice that this elevator was a problem. There was, however, a big issue in the case about how hard the stops actually were when power surges caused the elevator to stop abruptly. Experts on both sides tested the elevator with an accelerometer and were getting deceleration readings of about .3 g (units of gravity) – which would be characterized by the defense as akin to stepping off the curb or plopping into a chair. The plaintiff said the force felt quite a bit sharper than this. The treating spinal surgeon was a strong witness who said since the

only trauma was the elevator incident, it had to be the cause of the injury. He also said plaintiff experienced additional forces when she lost balance and fell against the wall.

The Mediation

Armed with a spinal surgery and substantial wage loss, we headed into mediation. There, after lengthy negotiations, we were offered the \$1M primary policy, but hit a brick wall with the excess carrier. We felt the case had the potential to exceed \$2M– or did it? We had trial coming up in about two months, and expert disclosure was about to occur.

Deciding to Do a Focus Group

It was at this point that we decided to do a formal focus group. We used Sonia Chopra Ph.D. of National Jury Project West. After discussing the case with her, we scheduled the focus group for a Thursday evening from 5-10 p.m. The panel goal was a cross section of 12 San Francisco jurors (we got 10, because sometimes people don’t show). The entire project cost about \$10,000. A big part of the cost is paying the jurors decent money to be there—this ensures a decent socio-economic cross section. Included in our panel were high school and college graduates, people working in blue collar jobs, artists, and some white collar workers, such as a real state agent, arts marketer, bank employee, and federal government worker.

The jurors fill out questionnaires before the project starts, and again after they have heard some evidence and argument. After jurors have

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filled out their initial questionnaires, the attorneys playing the roles of plaintiff and defense attorneys each spend 45 minutes talking about evidence and arguing the case. To avoid bias, the panelists are not told which party commissioned the focus group. They are told to believe all evidence that is shown to them, so you have to be careful to only use evidence you are confident would actually be admitted at trial, or you could skew the study.

Presentation of the Case

In addition to projecting key documents on a screen, we showed some video of the plaintiff's deposition. We really liked our client and thought she would be well-received. We also had videotaped defense depositions, so we showed about five minutes of the defense mechanic talking about what caused the elevator to fail (he was a nice guy whom the jury liked, and we felt this helped balance out the plaintiff's video

spinal surgeon's opinion) was the only evidence of what caused the need for surgery. (Jurors received abbreviated instructions based on CACI.)

In the defense case, I played the defense lawyer and used all the defense tricks. I said that the elevator was properly maintained, and that in any event the measurable force was so small it was like stepping off a curb. I argued that there was no way this type of force could cause the need for spinal surgery— that there must have been something wrong with the plaintiff before the incident. I also argued, as the defense had in mediation, that the force was so slight that there was no need to rush to make repairs to this elevator, as it did not pose a safety hazard.

Watching and Hearing the Deliberations

After the cases were presented, the jurors filled out another questionnaire and deliberated. And we got to listen and watch,

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presentation).

The major issue we wanted to explore was jurors' attitudes about the "minimal force" issue (injury causation). Two other issues we were interested in were (1) plaintiff's prior automobile accident six years before, in which she suffered soft tissue injuries (including her neck), and missed eight weeks of work and (2) her chiropractic treatment in the previous year before the elevator accident, which was primarily for her low back, but included some neck maintenance. Her last visit was about three months before the accident and the chiropractor's chart said she felt fine.

Although focus groups are said to be better at assessing liability issues than damages, we also asked for a dollar amount of about \$2M in the plaintiff's case, which was presented by my partner, Tom Paoli. He argued the extensive history of repairs and failures of this elevator, and also explained the heightened standard for common carrier liability, which we felt was our strong suit in the case. He also argued that in the absence of any other trauma, the elevator accident (plus the

through a two way mirror with audio hookup. This is the truly fascinating part of a focus group.

What we found was that this panel had a huge problem with the force issue (which was also the injury causation issue). We found that this was such a big concern for jurors it "bled over" into their liability analysis. All those damning documents showing poor maintenance did not mean so much once the jury decided the accident could not have caused the injury.

As you might expect, certain jurors were leaders. One former federal worker dominated proceedings. He was obsessed with the notion that as an air traffic controller, plaintiff must have had great insurance and workers compensation benefits— this despite the jury instruction that jurors here not to consider insurance. Other jurors also wanted to consider insurance. The "judge" (Sonia Chopra) had to go into the jury room and remind them not to worry about insurance.

We also found that the prior auto accident six years before was a big concern— even though plaintiff had not been symptomatic for years. The chiropractic maintenance treatment, which had been mostly for her low back, was considered a smoking gun that something must have been wrong with her neck all along.

We loved our client— but the jury by a vote of 7-3 thought she was a poor witness who was exaggerating her symptoms.

Another shocker was that the jurors did not understand the heightened duty of care of a common carrier at all— anyone trying a case under this theory should be sure to test the common carrier argument on others before trial. The CACI jury instruction is not a model of clarity either.

In addition to the questionnaires, we also got to keep the jurors' notes, which, when legible, were an additional window into their various thought processes.

The Bottom Line: Voting

The jurors voted, and we got their verdict form. The force/causation issue so poisoned the case that liability was only 6-4 for plaintiff. Causation was 8-2 for the defense. Damages ranged from about \$100,000 to a high of only about \$800,000. The \$1M offer already on the table was looking mighty good at this point. Shortly after the focus group, we settled the case for the primary policy limit.

Conclusion

Obviously not every case will justify the expense of a full blown focus group (Al Stoll and others have spoken on “focus groups for the frugal,” which you can do yourself using people from a temp agency). However, if your case has substantial value, paying to have a somewhat representative cross-section of the population, and for the facilities to watch deliberations anonymously, can prove invaluable . If we had proceeded to trial in an information vacuum, I think it is probable we would have lost (or received small damages) on the force issue, and our client would not have wound up with a large net settlement in her pocket as she tried to rebuild her life in a new career.

When winning is everything...

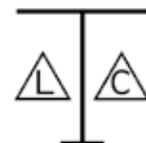


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