



# I dialed 911 a long time ago

## *Ways to avoid the compromise defense verdict*



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Our client and her husband were using their truck to tow an empty horse trailer. It broke down on the Bay Bridge. Her husband has gotten out of the truck to look at the problem when a drunk and uninsured driver struck the trailer. It pinned her husband between the truck and trailer. CHP was on scene in less than two minutes. They immediately called for paramedics. Thirty-five minutes later, our client's husband succumbed to blunt force trauma injuries. The ambulance still had not arrived. That's because the 911 dispatcher, after getting two calls from the CHP asking about where the ambulance was, never dispatched one.

In order to prevail, the jury had to determine that dispatch, a government agency, was grossly negligent. *And* that the negligence, i.e., the delay in the ambulance's arrival, was a substantial factor in causing the death.

### The compromise verdict, defined

You hear about the compromise verdict all too often. A jury finds a defendant negligent. *But*, the negligence was not a substantial factor in causing harm. The causes can be many. The plaintiff is unsympathetic. The defendant is a really nice person. The liability or causation elements are difficult. Or the jury simply dislikes the case. They recognize that the evidence requires them to throw the plaintiff a bone – the negligence finding – but they don't want to give the plaintiff any money.

An aside – many inexperienced lawyers believe they will win because the jury instructions favor their side. The instructions are nice – don't ignore them – but jurors tend to pick a side based on outside factors. They structure the evidence and interpret the instructions in a way that gets them to the decision they have already made.

### Identify the issue

In order to avoid a compromise verdict, you have to identify the issue that may cause it. This comes through case analysis and help from others. Talk about your case with your colleagues. That's what partners, colleagues, MCLEs and cocktail parties are for. Have other people meet or view your client (by *view* I mean watch the video deposition if there is one.) The old axiom is that the client is exhibit A and the client's lawyer is exhibit B.

A second way to identify the problems is to use a focus group. If you're going to take the time, effort and money to go

to trial, invest the time, effort and money to do a focus group. Not all cases can financially support one-way mirror, multiple jury consultant productions. But there are other ways. Some lawyers ask a few friends (non-lawyers or people unconnected to the case) over to watch a presentation. Others arrange low-cost focus groups. There are many good articles on how to do these – search and you will find them.

Doing a focus group will benefit your case in two ways. It will force you to be ready for opening statement (rather than cobbling your PowerPoint™ together at 2:00 a.m. the day of) and will provide a ton of feedback you would not otherwise receive.

### Address the issue

So you've got your feedback. Your client's history of back problems and the three-mile-per-hour impact makes causation an issue. Your client comes across as a whiner. The defendant comes across as a nice guy. And hopefully it is only one of these, not all three. Once you know the problem, you can take it on.

- **Causation problems.** You know that your doctor and biomechanic are going to be critical. A timeline to show the two-year gap between the last back treatment and the accident may be necessary.

- **Client problems.** Work with the client. Consider a practice cross exam. Use another lawyer, video it, and give a play-by-play. Ask friends and family, cameo witnesses, to testify about the harm to the client rather than the client himself. This allows them to talk about the changes rather than have the client come across as a whiner.

Bring up what you are most worried about in jury selection. Some lawyers worry about poisoning the jury pool. But in order for you to pick a good jury, you must raise the issue that is most likely to defend your case. Remove the potential jurors who lean toward the defense on the issue.

### Know when to fold 'em

Many lawyers have been dashed on the rocks by the Sirens' song of good exposure. Special damages that look good on a blackboard sometimes take on a different appearance when flesh and blood witnesses start to speak. Do the best you can with what you've got. Some cases have to try. Others may not have the upside risk. In those situations, do your best to resolve the matter without trial.

### A gross verdict

Once we conducted a focus group, we knew the hurdle. The jurors were reluctant to find the State responsible for what they



viewed as damage caused by a drunk driver. A slim majority in the focus group agreed that the ambulance would have saved his life. But a slim majority is not nine out of twelve. We did everything we could in the case to address the causation problem. With a zero offer, we felt we could not fold it. The result? The State was grossly negligent but it was not a substantial factor in causing the death.

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