



Anatomy of a trial victory

The author shows how to handle a case with “a bone to pick”

BY CHUCK GEERHART

On April 26, a Contra Costa jury returned a \$2.5 million verdict for my client, Calla Felicity, a 59-year-old woman who went to hell and back thanks to a chicken bone in her Round Table pizza¹. I have reported this case in Verdictsearch and other places, so the purpose of this article is to discuss how handling this case for two years felt, lessons learned, and thoughts about what worked well at trial. I also want to stress at the outset that although this article does critique the way the defense tried the case, I do not intend to suggest that defense counsel were anything other than professional and highly competent. My partner Tom Paoli and I tried this case together.

Summary of the case

In 2010, Calla Felicity, then age 56, ordered a BBQ chicken pizza at a Round Table Pizza restaurant in South San Francisco, California. Although she did not know it at the time, she swallowed a 1.2” chicken bone contained in one of the processed chicken strips buried in cheese and sauce on the pizza (she thought a piece of crust had gone down her throat). Over the long holiday weekend, she developed what she thought was the flu, but was really a horrible esophageal perforation and infection. She ultimately had 15 surgeries. To this day she has a paralyzed left vocal cord, difficulty breathing, increased risk of aspiration pneumonia, massive scarring all throughout her upper body where various cuts were made, and weakness in her left chest and shoulder because surgeons had to use a piece of her pectoral muscle to cover the hole in her esophagus.

Chicken Strips

Foster Poultry Farms produces the grilled chicken strips to Round Table’s specifications from whole chicken breasts at its plants in Fresno and Porterville, CA. Foster Farms has many hands and eyes examine the breasts as they go down the conveyor belts at its plant, looking for defects such as bone, blood clots, fat and bruising. Foster Farms also does random inspections of 50 breasts it pulls from large bins on the production line. If even one bone is found, the batch must fail and be reinspected by taking a larger sample of 200 pieces. In discovery, Foster Farms produced six random 50 breast audits from October and November 2009 (just a few months before the incident of 2/13/2010) showing that Foster Farms inspectors were passing batches that had bones in them and therefore should have been failed. (These six audit failures were culled by us from among hundreds of other random inspections.) On the witness stand, Foster Farms’ Regional Quality Control Manager admitted that these were *quality control failures*.

The chicken is cooked, seared and cut into chicken strips, which are then frozen and placed in 2.5 pound plastic bags, four bags to a 10 pound case. When the cooked chicken is diced, the target strip measurement is 3/8” x 1/2” x 1 1/2”. The bone plaintiff swallowed was 1.2”. Foster Farms admitted that the chicken strips are intended to be boneless.

Preparation by Pizza Bytes

All three Pizza Bytes employees deposed, including the person designated as its Code of Civil Procedure section 2025 “person most knowledgeable”, testified that they do not look for or inspect

for bones when making a BBQ Chicken pizza. Pizza Bytes later produced a video in which it claims that when the employees mix the chicken strips with the dark brown BBQ sauce using gloved hands, that constitutes an inspection for bones. Pizza Bytes contended that when the employees’ gloved hands sprinkle the chicken in sauce onto the pizza, that is another inspection for bones.

Challenges and realizations

Among the challenges we faced were jousting against large companies, the fact that the incident itself was unwitnessed (except by Calla’s 82 year-old mother), and the defense argument that she should have chewed more carefully, realized she had swallowed a bone and gone to the ER immediately.

Here’s what we learned handling this case.

• *It’s all about the client*

In March 2010, I got a breathy voice-mail on my office phone. The woman’s voice on the other end of the line was a whisper, but I could make out that she had been injured by a 2 inch chicken bone in a pizza and was in the hospital. I called her back and found that she had already had many surgeries for an esophageal infection.

When I eventually met Calla, at her home, I realized I had a great client. She never felt sorry for herself. She and her wife are a married lesbian couple with two adopted children. They stressed to me how important being a family was to them, especially as they faced this health crisis. They asked if they would need to change their appearance (they are both fairly obviously “out” lesbians) for litigation, and I said absolutely not. Be yourself. They liked this.



So knowing that I had a great client was the beginning. Now we had to prove liability and damages.

• **Venue selection**

In my opinion, and based on trials our office has had there, Contra Costa county is the third best venue in the Bay Area, after Oakland and San Francisco. In this case, we had a choice between San Mateo (where incident happened), Santa Clara (where Pizza Bytes is incorporated) or Contra Costa (where Round Table is incorporated). We feel many San Mateo judges have a hostile attitude toward personal injury litigation, so that was out. We feel Santa Clara has a high percentage of scientific/technical jurors who have difficulty wrapping their heads around general damages. So for us it was a relative no-brainer to choose Contra Costa. As it turned out, we drew an excellent trial judge, Hon. Laurel Brady, who gave us a totally fair trial (see below). We also, obviously, got a great jury.

• **Depose older or infirm witnesses ASAP**

Calla's mom had Parkinson's disease. We knew we needed to take a video deposition ASAP so she could back up Calla's account of feeling what seemed like crust go down her throat. Not long after her deposition, her disease worsened and she slid into dementia. She was utterly incapable of testifying by the time of trial. But her video deposition went great!

• **Sometimes experts are unnecessary**

We knew from the outset that this was a negligence case, not strict products liability. We argued that defendants had a duty to carefully inspect their food products for bones under *Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617, 631-633.

We had two liability experts, one in food safety and the other in restaurant practices. The former, although knowledgeable about food safety (and very helpful during discovery), was an inexperienced witness and was pushed around quite a bit in his deposition by the defense lawyer. The latter had opinions about the restaurant that were soft and really did not add anything to the admission we already had that restaurant

employees did not inspect for bones. *So we went to trial with no liability experts.*²

• **Defense experts can help the plaintiff**

The defense hired a well-known professor of "meat science" from a Midwestern university. He had been an industry guy his whole career. The expert had testified that Foster Farms' practices were well above the industry standard and that its quality control was excellent. On cross, Tom Paoli confronted him with the Foster Farms' audit documents (well-known to everyone else involved in the trial, but apparently not this expert) that showed Foster Farms had ignored its own bone audits. He told the expert, in two successive questions: "That's not well above the industry standard, is it? That's not excellent quality control is it?" The expert sat silently like a deer in the headlights for at least five full seconds after the first query, then tried to tap dance his way around the same documents that Foster Farms' own regional quality control manager had already admitted (on the stand) represented quality control failures. Although he seemed impressive on direct, he was such a cheerleader for the defense that the jury appears to have ignored him.

We used only plaintiff's three treating surgeons as medical experts. Two testified via video. We had the lead surgeon who performed 15 operations testify live. The defense had two hired medical experts, offered solely for the argument that if plaintiff had presented to the ER within 6 to 12 hours, she would not have had esophageal perforation. These were eminent UC doctors, but one actually helped us, because he agreed that it was common for people to swallow inch-long objects, and that 50 percent of perforation cases did not present to the hospital for at least 24 hours, just like our plaintiff. When I spoke to a juror after trial, she said the jurors felt that the average person would not rush off to the ER just for flu-like symptoms.

• **It's a good idea to divide trial tasks**

Tom and I split this trial pretty evenly. He handled voir dire. We were lucky to have a judge who approved a

10-page questionnaire, and gave us essentially unlimited questioning time in voir dire. I handled opening and closing. We split witnesses about 50-50. We also split motions in limine. I have to say that when you are gearing up to do an opening, it's really nice not to have to be doing voir dire. I was able to relax somewhat and be our "jury consultant" (we did not use a professional jury consultant; the defense did). Then, during the trial, each one of us got some time where we were not on the stage of trial. I think it kept us both fresh.

• **Run at the defendants' strength**

We ran at Foster Farms' perceived strength, which was its "state of the art" processing plant in the Central Valley. In opening, the defense lawyer showed the jury a real chicken skeleton and said, "As you can see, there's lots of bones in chicken. We get most of them, but *we can't get them all.*" In my opening, I called this the "bones happen" defense.

Plaintiffs showed the following to contradict the defense position: Foster Farms 1) failed to detect a 1.2" bone which then caused a horrible injury to Calla; 2) ignored its own 50 breast raw chicken samples that showed bones in its chicken and passing the batch anyway 3) refused to use x-ray technology on chicken strips, even though that technology is available and used at its meat processing plant; and 4) was on notice of bones getting through its process based on 206 customer complaints during the period 2005-2010.

In addition, the contract between Foster Farms and Round Table Pizza specified that there could be up to two bones per 10-pound case of finished chicken strips at time of shipment. In other words, in a final randomized package inspection, finding up to two bones would not cause the finished product to fail. We argued that everyone else in the production and supply chain knew there could be bones in the chicken strips except the ultimate consumers, such as plaintiff. The juror I spoke to said this was a significant fact for them in finding liability.



• **Mediation can be a waste of time**

Before plaintiff's deposition, defense counsel took me aside and said the defense wanted to try to resolve the case in mediation. After her deposition, he told her the same thing, with the Foster Farms claims rep present (she attended the first few depositions in the case). The stars seemed to be in alignment to get this case settled quickly.

Then we went to mediation, with \$700K in pre-Howell damages. We demanded \$2.9 million. The offer was \$50,000. The mediator said, "They like their product and their process, and they are prepared to defend it."

We all felt like we had just been hit with a roundhouse punch. Our clients were understandably unhappy. We told the defense they needed to offer \$800,000 before we would begin to negotiate. They declined. We went home before lunchtime.

So what could have been done to avoid this? I can't think of anything. We were led to believe mediation would be fruitful. One thing we got from mediation: we knew we would have to try the case to get any real money for our client.

• **Look for reptile theme opportunities**

This case, involving the public food supply, was tailor-made for the "reptile" theory of trying cases, in which plaintiff stresses that the trial is really about protecting the community, the jurors themselves, and their children. In closing, we showed the jury that of the 206 prior bone complaints, at least 30 involved children choking on bones in these chicken strips. We "called out" and enlarged in PowerPoint³ the portion of their own spreadsheet that identified the victim as a child. I quickly touched on each of the 30 child incidents to hammer home the point that these chicken strips are dangerous to children, and that this was because the defendants' inspection procedures were sub-par. This, I believe, empowered the jurors to feel they could make a difference in food safety in their community.

• **Don't let the defense get away with bogus evidence, or restricting your evidence**

We know the defense always files a raft of in limine motions. Plaintiffs too, need to stop the defense from bringing in bogus evidence. We won several in limine motions that greatly restricted the defense, or helped us get our evidence in. Had we lost these motions, the trial could have gone differently.

First, the defense argued that the FDA "Compliance Guideline" (§ 555.425) for hard and sharp objects applied. This standard stated that anything above 25 mm is not a hazard because it will likely be detected by the consumer. The subject chicken bone on plaintiff's pizza was 30 mm. However, the plain language of the standard exempts it from naturally occurring objects such as bones and pits. The court ruled that the defense could not reference the FDA standard. This seems like no-brainer ruling, but if the jury heard the FDA did not consider a 1.2 inch bone a hazard, that could have swayed some jurors.

Second, the defense wanted to argue that the chicken was USDA-inspected and approved, even though there was testimony from the defense Regional Quality control manager that the USDA had absolutely no oversight for bones. The court granted plaintiffs' motion in limine to exclude reference to USDA approval. Again, it was potentially devastating for plaintiff's case if the jury heard the USDA blessed this chicken.

Third, plaintiffs won a motion to permit evidence of the 206 prior customer bone complaints, many of which involved children choking on bones. Several involved bones on Round Table pizzas as well. In any negligence case involving a big company, plaintiff's lawyers need to push hard in discovery to get all other incidents. I had to threaten a motion before they produced this evidence.

Finally, in what was probably the hardest fought motion in the trial, plaintiffs won a motion permitting evidence of

Foster Farms' use of x-ray technology to scan chicken breast for bones, and the statistics showing that they regularly found hundreds of bones in the up-to-40,000 pounds of chicken breasts they could scan each day.

Conclusion

This trial reinforced my belief that to win big for the plaintiff, the jury has to believe that the plaintiff needs their help and deserves their help. I have lost trials where my client did not fit this description, even though the facts seemed to indicate liability. It really is all about the plaintiff.



Geerhart

Chuck Geerhart is a founding partner of Paoli & Geerhart and was admitted to the California bar in 1989. He is a graduate of Cornell University and the UCLA Law School.

Chuck has tried 20 cases to jury verdict. He has also sat as a juror in three cases in San Francisco County. In addition to his active practice representing injured people, Chuck is a court-appointed arbitrator and settlement mediator in the San Francisco Superior Court, and also mediates cases for the Bar Association of San Francisco's Early Settlement Program. Chuck Geerhart is a member of the Board of Directors of the San Francisco Trial Lawyers Association, and since 2010 has been Editor in Chief of SFTLA's Trial Lawyer magazine.

Endnotes

¹ The case is *Calla and LauRose Felicity v. Round Table Pizza et al.*, Contra Costa County Superior Court No. C-10-01576. Judge: Hon. Laurel Brady, Dept. 31. The defendants were: Foster Poultry Farms and Pizza Bytes Inc. (which is Round Table's franchisee). Round Table Pizza was dismissed by stipulation based on the defense representation that it was merely a franchisor. Foster Poultry Farms defended and indemnified Pizza Bytes pursuant to written contract, although the jury never heard this. The liability allocation was 60% to Foster Farms and 40% to Pizza Bytes.

² The defense moved for nonsuit based on our lack of liability experts. The court quickly denied this motion.

³ Used PowerPoint for about 5 minutes total in this trial. We did have four 3' X 4' color medical illustrations of the injuries, and numerous gruesome photographs of the injuries.

