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“What?” vs. “Why?”

If I’ve learned anything from doing hundreds and hundreds of focus groups, it’s that the strength of a case often rises or falls on what my partner, Deborah Nelson, has come to label “legally insignificant facts.”

For example, a juror may ask what color the defendant’s car was. “Who cares? It doesn’t matter” we say, but we ignore such issues at our peril. **If it is important to the jurors, it is important!** I was helping with a motorcycle case. The jurors wanted to know if the rider was wearing boots. I didn’t get it - he wasn’t claiming a foot injury. But to the jurors, wearing boots was a part of being careful; from this they were weighing whether the rider was a safe rider (and therefore deserving their verdict) or not.

Lawyers are great at talking about **what** happened: the defendant went left of center into the oncoming car, the company didn’t follow its own maintenance rules, the drug manufacturer sold a drug that killed people.

What is easy. As lawyers, we are taught (with limited exceptions) that **what** is the thing that matters. The defendant went left of center into an oncoming car. There are three witnesses and a video that prove it. Summary judgment/directed verdict, right! Who cares why? We are done here.

“Yeah, I hear you, but **why** did this happen?” ask the jurors. “**Why** did that nice

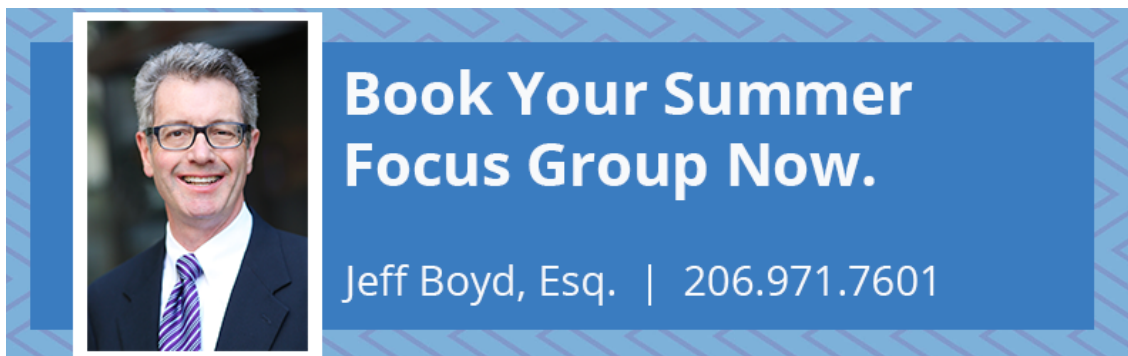
road? What may look like summary judgment facts to lawyers may look like a forgivable *act of God* to jurors. It matters because jurors value the case accordingly; damages awards are built on the strength of the **liability** evidence.

Jurors judge cases, and make compensatory damages awards, based on their perception of the **relative moral fault** of the parties. To do that, they need to know **why** something happened. And regardless of whether there is a line on the verdict form for the fault of the plaintiff, the plaintiff's conduct goes on the scales, too.

Because trials are confusing and jurors have very little experience or understanding of the law, they fall back on what they do understand – their own personal view of what is *right* and *wrong*. That evaluation is almost always based on them weighing a multitude of factors, many of which are legally irrelevant. Focus groups help you figure out what you need to introduce into evidence to satisfy the needs of the jurors for all the facts that matter **to them**.

A summary judgment ruling or admitted liability doesn't stop the weighing of moral fault. Jurors are reluctant to accept a determination of liability when their questions aren't answered. They can't decide a case if they don't know what happened and **why** it happened. Unanswered questions lead to confusion, and confusion **always** helps the defense.

To win, plaintiffs have to show that the reason something happened was because of a morally bad choice by the defendant. What happened isn't as important as **why** it happened. Adjust your discovery and your case framing accordingly. Ignore **why** at your peril!



Book Your Summer Focus Group Now.

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