



Be Aware of ‘Legally Irrelevant Facts’

BY DEBORAH M. NELSON

What do cash register tape and frozen food temperatures have to do with a slip and fall case? Nothing—or everything. After conducting hundreds of interactive focus groups on all manner of cases across the country, I have noticed a powerful phenomenon that I refer to as “legally irrelevant facts.”

Take, for example, a case over a slip and fall injury that occurred in a grocery store. During a focus group, we asked the jurors what they expected when they shopped at this particular grocery store, and they responded, “I want them to care about me” and “I want them to respect me.” Then, the focus group jurors were told that the plaintiff slipped and fell in the frozen food aisle. This led to big yawns and lots of pushback: “She should have looked where she was going” and similar comments. After she fell, the plaintiff went to a cashier to report what happened. Instead of giving her a claim form to complete or referring her to the store manager, the cashier pulled off some cash register tape and said, “Just write down your name and phone number.”

Before the focus group jurors began deliberating, we shared a photo of the floor tile where the plaintiff fell, which showed that the tile was discolored. Of course, all the attorneys were thinking, “Notice, this shows notice!” But what did the jurors say? “This tells me that the store is unsafe.” Bingo! But wait, not so fast: They went on to say that the “discoloration tells me that the store doesn’t properly chill the food and that is a danger to me because I might buy frozen food that wasn’t kept properly, and my family might get sick.” Then one juror, when pressed about the reason for his verdict amount, blurted out, “I picked my verdict number because the store didn’t respect her. I didn’t like the whole deal with the cash register tape. That made me mad because they didn’t respect her, and I think they should have to pay for that.”


So, what are the jurors telling us here? First, remember that jurors see the case differently than we do. Second, jurors are willing to perform all sorts of mental gymnastics to avoid the conclusion that the injury to our client could easily happen to them. Often, this results in blaming the victim, but the

interpretation of the discolored tile is an example of how jurors instinctively distance themselves from plaintiffs. Here, I suspect most of the jurors thought, “I watch where I’m going, and I’m smart enough not to slip and fall in a grocery store.” But their interpretation of the safety hazards posed by the discolored tile allowed them to cling to the false belief that “this couldn’t happen to me,” while still endorsing the idea that the grocery store is a dangerous place. According to the jurors, these two theories are not mutually inconsistent.

Third, their view of the cash register episode completely aligns with their comments about wanting to feel like the grocery store respected and cared about them. Finally, the jurors’ focus on respect and food safety shows that, instead of dealing with the evidence head on, jurors often will duck and weave to find a different approach to embrace the parts of your client’s case that they do understand—not necessarily the parts that you and your expert witnesses are trying to explain. Here, the jurors weren’t interested in the law or grocery store safety standards. That was long division to them, so why not focus on simple addition?

To prepare your case, given the possibility of the importance of legally irrelevant facts, you must know what matters. The best way to do this is through focus groups with people who are not your staff, friends, or family. It is crucial to give a balanced showing of the evidence—to present the information in an objective and unbiased manner, while encouraging a free-flowing discussion by the jurors. In my experience, the more complex the case, the more likely you will see jurors seek out legally irrelevant facts because those facts give jurors something they understand.

Once you know the facts jurors care about, embrace them, and build your case around them. In the grocery store case, the themes became “safety for all” and “respect.” The plaintiff’s lawyer showed each and every choice the defendants made that did not favor safety, and this paved the way for themes about corporate America not valuing its customers or respecting their safety and money.

Listening to people from all walks of life is a crucial step in framing your case for trial and for focusing your discovery on the things that matter to the jury. “What color was the car?” “Why did the defendant run the stop sign?” The answer to questions like these may be legally irrelevant, but if it matters to jurors, it matters! 

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