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# Trial

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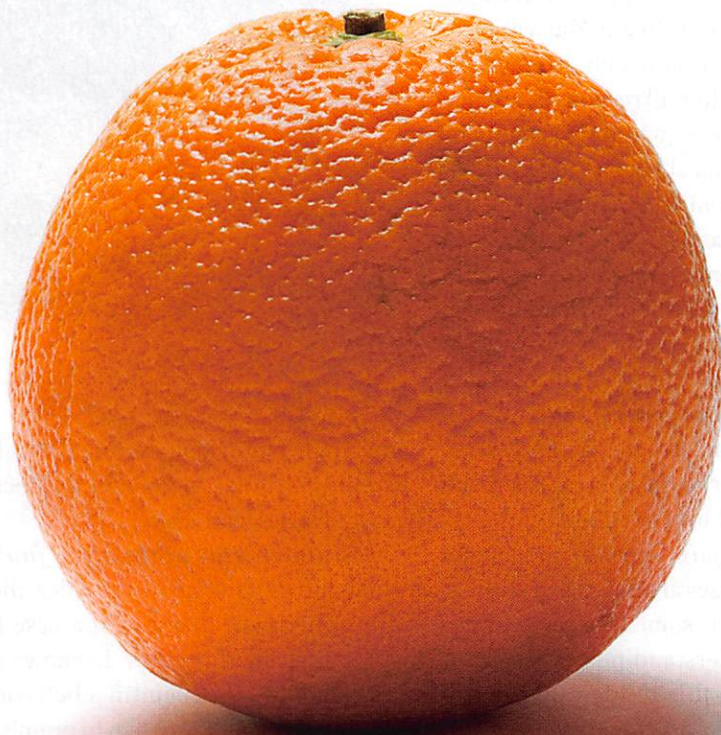
**PREMISES  
LIABILITY**



Premises liability cases often present juries with an ‘apples to oranges’ comparison that works against the plaintiff. Focus groups can help you bridge between a juror’s common experience and less familiar standards of care that apply to property owners.

By || JEFFREY D. BOYD

# FOCUS GROUPS AND **Juror**



**L**awyers who handle personal injury cases often represent people who were injured on someone else's property. If these premises cases go to trial, they can differ from other types of cases because they ask jurors to compare things they are familiar with to things they are unfamiliar with.

In automobile cases, for example, jurors will have personal experience with the subject matter (driving or riding in cars) and with the traffic laws that govern motor vehicle use. But in premises liability cases, they will have personal experience with the subject matter, such as walking across a parking lot in the rain, but not the legal and regulatory rules that define a property owner's duty to other people.<sup>1</sup> Focus groups can help you bridge this gap so jurors can see your injured client's conduct in the proper perspective.

Fault is relative; its degree depends on the perception of the fault to which it is compared. Nearly every premises case invites jurors to examine the plaintiff's conduct, which creates an "apples to oranges" comparison. If a

# Perspective

juror knows a lot about apples but little about oranges, he or she will spend more time judging whether the apples are good or bad—relying on his or her experience with apples—rather than judging the unfamiliar oranges. In short, when you ask jurors to compare a “known” to an “unknown,” the known will be more closely scrutinized and fare worse than the unknown.

Apply this concept to a hypothetical case in which your client slipped on an unnatural accumulation of ice in a sloped, poorly lit parking lot with vegetation that prevented proper drainage. Jurors would know the “apples” of the case (that rain and snow are a part of life and that puddles and ice form in parking lots) and that certain rules apply (that it is common sense to walk more slowly and be careful in poorly lit areas). But the unfamiliar “oranges” in the case include

- industry standards for the acceptable slope in a commercial parking lot
- safety standards for adequate illumination of commercial parking lots
- parking lot design and maintenance standards for drainage and injury prevention
- common practices of parking lot owners to prevent injury risks posed by poor design, maintenance, and lighting
- property owners’ legal duty to those who use the premises.

These unknowns could be substantial in the jurors’ minds. If the jurors are unaware of the concept of a cross slope and its effect on water accumulation, that such slopes should be managed in parking lot design and maintenance, and of the property owner’s duty to meet industry standards, no informed comparison of the relative fault of the property owner and the pedestrian client can occur.<sup>2</sup>

### Get Focused

The solution is a well-run, interactive focus group for case selection, evaluation, and discovery long before trial. Your goal in a focus group is to listen without judgment, because you need to make jurors feel comfortable saying everything that is on their minds. You have to appear to be happy to hear things that are churning your gut. You will get to the bottom of what people are thinking only by rewarding all responses, not just the ones that are good for you. Only by listening to typical people discuss what they understand and don’t understand about a case—and how they fit their personal experiences and prejudices into the facts and law they are hearing—can you know what needs to be addressed at trial and how to address it. By listening to jurors in focus groups, you can meet their needs and create the apples-to-apples comparison that creates a much better outlook for your client.

The things jurors need to understand in premises cases are not rocket science. Every juror has some basic experience with and understanding of these concepts. The goal is to identify the gap between the knowledge they carry into the courthouse and what they need to give you their verdict.

Lawyers often think that premises cases are driven by the law as stated in jury instructions. For example, in a slip and fall in a grocery store caused by water on the floor, you may think the most important issues are how the water got there and how long it was there. Proving these elements may be important to avoid a directed verdict, but focus groups will tell you that the answers may not persuade jurors who have other issues on their minds. Things that may seem completely irrelevant to lawyers, such as how store employees treated the plaintiff when she reported the problem, may be important to jurors. You can learn what is important to jurors



and build your evidence around that by listening to “real” people in the focus group discuss your case.

### **Minimize the plaintiff’s fault.**

When jurors don’t know the rules, they often start their analysis of a case by looking at something they do know and can relate to—the plaintiff’s behavior. This is a particular problem in premises cases that involve an open and obvious danger, or where the defendant’s liability is based on the existence of a dangerous condition, such as a steep ramp. The plaintiff’s lawyer wants to maximize the degree of fault, which requires maximizing the degree of danger by arguing that the slope was twice as steep as called for in the building code and that it was an accident waiting to happen. The problem is that the jurors don’t know how to judge the defendant’s conduct: How much slope is too much? So their natural inclination is to form a judgment by looking at the plaintiff’s conduct: If the ramp was so steep, why didn’t the plaintiff stay off of it?

Jurors base their evaluations on their own knowledge and experience.

It doesn't take long before deliberations turn to discussions in which someone says, "One time, when I was doing *this*, I saw *that*, and I knew I shouldn't do what the plaintiff did." When danger is there to be seen, jurors believe they would have seen it and avoided it, reasoning that the defendant shouldn't have had a hole in his sidewalk, but the plaintiff should have seen it. When jurors look at the problem from the perspective of the person who had the last chance to avoid danger, the plaintiff loses out. Focus groups can help you determine how to make the case about the defendant's fault, rather than that of your injured client.

**Beat the bias.** Piled on top of a juror's personal beliefs and experiences are the two most powerful filters of juror cognitive function: confirmation bias

no fault of their own, be badly injured or killed. The self-protective response is to look for things the plaintiff did wrong that the juror wouldn't have done: "I would not have walked across that parking lot in the dark." This makes the juror feel safe, but it also hurts the plaintiff's cause. Focus groups can identify pre-existing beliefs and fears and show you how to frame your case to address both.

Experienced trial lawyers know there is prejudice in the air against plaintiffs in every jury panel. Doing focus groups well, like doing voir dire well, can open some uncomfortable doors. Great questions, such as "Do you believe that some people sue about things that are their own fault?" invite responses that may frighten you. But such questions are necessary to find out how to present the

## The goal is to identify the gap between the **knowledge the jurors carry into the courthouse** and what they need to give you their verdict.

and defensive attribution. Confirmation bias is people's tendency to embrace evidence that confirms what they already believe to be true. With expert testimony, for example, if the expert's opinions support what the juror already believes, the juror will adopt that testimony. If it is contrary to their beliefs, they will reject it.

Defensive attribution is jurors' tendency to find a way to think that what happened to the plaintiff wouldn't happen to them. Few people are comfortable living in a world where they can be doing everything right and yet, through

case in a way that can convince jurors that the fault lies with the defendant, not with the plaintiff. Further, not every case can be won; it is better to find that out early with a focus group than years and tens of thousands of dollars later trying to win an unwinnable case at trial.

The best questions are those that give jurors on both sides of an issue an opportunity to tell you how they feel. Here are some examples:

- Some people feel that lawsuits keep businesses safe by holding them accountable if they are negligent. Some people feel that lawsuits are

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damaging businesses and causing unemployment. How do you feel about this?

- Should the people who run retail stores such as clothing or grocery stores expect people to look down at their feet when walking in the store? Why or why not?
- Do you feel that a customer has a duty to look and see what is there to be seen? What about objects left on the floor by the store that the customer could trip over?
- Is it a fair rule that a corporation that owns and controls land—such as sidewalks and parking lots that are open for use by the general public—has a duty to know about any dangerous conditions on its property?
- Should a corporation that owns and controls land—such as sidewalks and parking lots that are open for use by the general public—have as its number-one concern the safety of people who are on the property? How does the issue of the cost to the company come into this?
- True or False: When doing a construction project, if there is more than one way to do something, the company in charge should always choose the safest way of doing it, regardless of the cost. Why do you feel that way?
- If you could make the rules, would you say a corporation that operates a store should have a duty to have its employees check the stores to look for unsafe conditions on a regular basis?

- Do you agree or disagree: Customers in a retail store usually aren't paying attention to the condition of the floor in the store while they are shopping because of conditions controlled by the store, such as the placement of displays, the placement of merchandise, and lighting conditions in the stores.
- Do you think swimming pools are dangerous? Who is ultimately responsible for safety at a swimming pool: the pool's owner or the people using the pool?

**Feedback is fuel.** Once the focus group has helped you see what jurors like and don't like about your case, you must put that knowledge to use. You should use focus group feedback to improve your case, not to measure how it will turn out. The way to do so is to take what you learn in the focus group and shape your trial presentation so that it fits the jurors' mental model of a good case. It is easier to restructure your case into a round peg than it is to pound a square peg into a round hole.

I often ask focus group participants if they believe there are too many frivolous lawsuits. Most say they do—a frightening response for the plaintiff's lawyer. But rather than attempt to talk them out of that belief, the next question should be: "What are the characteristics of a frivolous case?" Most jurors will go out of their way to tell you all the things that make them unhappy with the system, such as "filing big lawsuits over little injuries" or "suing corporations for no reason because they have deep pockets." Having heard this, you know what you have to prove to get these jurors on your side. As long as you can prove your client's injuries are significant and that you have a good reason to sue the defendant corporation, you need not fear the bias. But you must be willing to uncover the bias to know how to beat it.

Piled on top of a juror's **personal beliefs and experiences** are the two most powerful filters of juror cognitive function: confirmation bias and defensive attribution.

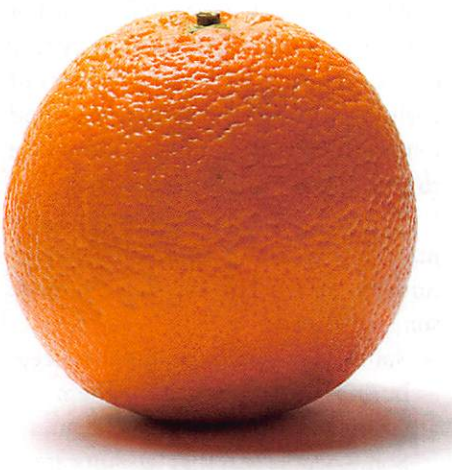
Juror biases are not unconditional. For example, many jurors think that in a slip-and-fall case caused by water on the floor, what matters is "personal responsibility," meaning that the plaintiff had the duty to look where he or she was going. If that were really the case, it shouldn't matter how the water got there, or the number of prior similar incidents; if you should have seen it, you should have seen it. In reality, "personal responsibility" adherents will assign significant fault to the defendant if there is proof that the water got there because of a recurring leak in a freezer

that the store owner knew about but did not remedy despite three other falls that resulted in injury. When you know what will overcome the bias, you know what to emphasize at trial and which experts you will need.

Never forget that jurors are the decision-makers in your case, and they have minds of their own. If you ignore their needs and questions, you do so at your peril. Listening to typical people talk about your case in focus groups will give you the tools to make better decisions about every aspect of your case. **□**



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#### NOTES

1. Adding to jurors' difficulty in understanding the law is the different legal status that may be assigned to those who enter a property in those states that make such distinctions. For example, lawyers know there is a significant legal distinction between a "licensee" and an "invitee," but those terms and the difference between them is often lost on the average juror.
2. I have seen in focus groups, and learned in postverdict interviews with jurors, that jurors always talk about a plaintiff's potential fault, regardless of whether contributory negligence is pleaded or even mentioned in the case.