CONTROLLING HINDSIGHT BIAS IN JURY TRIALS

TOM ALLEN
Weinberg Wheeler Hudgins Gunn & Dial

HINDSIGHT BIAS IN THE COURTROOM

Thomas D. Allen, Esq.
Laura L. Voght, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

950 East Paces Ferry Road
Suite 3000
Atlanta, Georgia 30326
tallen@wwhgd.com
lvoght@wwhgd.com
(404) 876-2700 (telephone)
(404) 875-9433 (facsimile)

INTRODUCTION

"Hindsight bias is the tendency for people with knowledge of an outcome to exaggerate the extent to which they believe that outcome could have been predicted" or "the tendency for people to use outcome knowledge to 'judge a priori decisions or actions in light of their post hoc knowledge.'" Schipani, C., *Med. Mal. v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (1994); Worthington, D., *Reducing the Hindsight Bias in Mock-Juror Decision Making: Assessing the Effectiveness of a Court-Appointed Witness*, COMMUNICATION L. REV. (2009). It has been confirmed in over one hundred experimental studies in both laboratory and applied settings, and involving both lay and expert judgment in a wide variety of fields. *See* Mandel, G., *Another Missed*

Opportunity: The Supreme Court Court's Failure to Define Non-obviousness or Combat Hindsight Bias in KSR v. Teleflex, 12 LEWIS & CLARK L. REV. 323 (2008). *See e.g.*, LaBine, G., *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996); Kamin, K., *Ex Post? Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995); Willham, C., *The Hindsight Bias: A Meta-Analysis*, 48 ORG. BEHAV. & HUM. DECISION PROCESSES 147 (1991).

Simply put, "people exaggerate the predictability of reported outcomes." *See* Peters, P., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277 (1999). In fact, it has been estimated that hindsight bias gives a 15% boost to the perceived probability of an occurrence. *Id.* In addition to making bad outcomes seem more predictable, hindsight bias can also lead fact finders to assume that reasonable persons would have taken more precautions than the Defendant did. *Id.* "As a consequence, a hindsight bias may lead jurors to mistakenly conclude not only that the plaintiff was a foreseeable victim of the defendant's conduct, thus establishing proximate cause, but also that the defendant should have taken greater precautions to avoid this foreseeable danger, thus establishing the defendant's negligence." *Id. See also*, Farber, D., *Review: Toward a New Realism*, 68 U. CHI. L. REV. 279 (2001).

"The hindsight bias clearly has implications for the legal system." Rachlinski, J., *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. (1998). Thus, it is important for trial attorneys to be aware of the risks posed by the effects of hindsight bias, and to take steps to guard against them (or to exploit them). Not surprisingly, it has been noted that "[a] factfinder should be aware, of course of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727, 1742 (2007). Thus, it is important for trial attorneys to be aware of the risks posed by the effects of hindsight bias, and to take steps to guard against them (or to exploit them).

PROBLEMS PRESENTED IN LITIGATION OR AT TRIAL BY HINDSIGHT BIAS

Hindsight Bias In the Wake of Wyeth v. Levine

The well-known ruling by the U.S. Supreme Court in *Wyeth v. Levine* has given rise to a new perspective on the role of hindsight bias as it relates to prescription drugs. *See Wyeth*, 555 U.S. ___, 129 S. Ct. 1187 (2009). In *Wyeth*, the Court rejected the doctrine of Federal pre-emption, holding that labeling approval by the FDA does not preempt state laws or shield companies from legal damages as part of liability claims. In response, it has been suggested that this ruling now permits the adequacy of prescription drug labels to be decided by jurors, in hindsight, as opposed to determinations being made by impartial FDA experts *ex ante*. The current state of tort law grants juries *de novo* review of FDA decisions on drug labeling. *See* P. Hutt, *A Unified System for Ensuring Drug Safety*, FOOD AND DRUG LAW, 9 (2002). This independent review by jurors, coupled with 20-20 hindsight, permits jurors to second-guess FDA regulation of prescription drug warnings. *Id.*

Unfortunately, given that trials occur only when a risk has gone wrong, inevitable hindsight bias can lead jurors to overestimate a drug's known risk at the time it was approved. *Id*. Thus, so long as the holding in *Wyeth v. Levine* stands, prescription drug regulation lies at the hands of biased jurors, rather than in the hands of neutral, unbiased FDA experts. "The adequacy of drug labels will henceforth be determined not by FDA experts but by random juries with massive hindsight bias." M. Greve, *Preemption Strike*, NATIONAL REVIEW ONLINE (April 2009).

Hindsight In Root Cause &/0r Safety Analyses

Hindsight bias is commonly seen in the medical arena when untoward patient outcomes are reviewed. *See* Fischoff, B., *Hindsight Is Not Equal to Foresight: the Effect of Outcome Knowledge on Judgment Under Certainty*, J. EXP. PSYCHOL. HUM. PERCEPT. PERFORM, 1: 288 – 299 (1975).

Be it as a facet of peer review or root cause analysis, there remains a tendency to say things like "why couldn't they see that" or "why didn't they do this." *See* Wears, R., *Replacing Hindsight with Insight: Toward Better Understanding of Diagnostic Failures*, ANN. EM. MED., Vol. 49, No. 2 (2007). Those reviewing events after the fact have a notable tendency to see the outcome as more foreseeable and therefore more preventable than they would have appreciated in real time. *Id*.

> "A mistake follows an act [and] names it. An act, however, is not a mistake; it becomes a mistake."
>
> -- Paget, The Unity of Mistakes

Thus, the value of peer review, quality assurance and root cause analysis processes, depends upon an understanding of the type of subconscious factors involved in decision making in the subject situation, thereby helping put reviewers or investigators in the position of the actual participants of the situation. *Id*. *See also* Cheney, FW, *Effect of Outcome on Physician Judgments of Appropriateness of Care*, JAMA, 265: 1957 – 1960 (1991). Comprehension of what led the providers involved to follow the direction that they went in is fundamental to fair and effective quality assurance measures. *Id*. *See also* Cook, R., *The Illusion of Explanation*, ACAD. EMERG. MED., 11: 1064 – 1065 (2004). In turn, such an understanding serves to further better preventive measures to avoid an untoward outcome in similar situations in the future.

Hindsight Bias and Its Effects on Media

Prescription drug and medical device advertisements have been under strict scrutiny for the effect that they have on the general public, as well as physicians' prescribing practices. By the same token, the news media plays a prominent role in the impact on the public's views of particular products. For instance, in the silicone breast implant controversy, one news report by Connie Chung sensationalized the implant controversy, giving rise to widespread panic among asymptomatic implant

recipients. *See* Angell, M, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case 34*, W.W. NORTON & CO. (1997). Thereafter, media reporting on silicone breast implants propagated a negative bias against the implants. This one-sided, negative media reporting engendered heightened, yet unfounded, concerns and warped perceptions about the safety of silicone breast implants. Due to the media portrayal of the implants, viewing the situation in hindsight, many people overestimated the possibility that the alleged link between breast implants and systemic disease was real.

Fraud By Hindsight

"Hindsight bias is the tendency for people with knowledge of an outcome to exaggerate the extent to which they believe that outcome could have been predicted." *In re Citicorp, Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Feb. 24, 2009)(citing H. Arkes & C. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias,* 73 OR. L. REV. 587 (1994)). Hindsight bias arises in relation to medical device manufacturers under the "fraud by hindsight" doctrine. *See Mississippi Public Employees Retirement System v. Boston Scientific Corporation*, 523 F.3d 75 (2008). More specifically,

> Fraud by hindsight refers to allegations that assert no more than that because something eventually went wrong, defendants must have known about the problem earlier. "[A] plaintiff may not simply contrast a defendant's past optimism with less favorable actual results, and then 'contend that the difference must be attributable to fraud.' " *Shaw*, 82 F.3d at 1223 (quoting *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.1990)).

Id. at 91. The classic case of fraud by hindsight is seen where a plaintiff alleges that the fact that something turned out badly must mean defendant knew earlier that it would turn out badly. *Id*.

Such claims are not necessarily disposed of through early motion

practice. This is because medical device manufacturers "are in a highly regulated industry." Therefore, it can be inferred, that medical device manufacturers "constantly monitor reports of patient injury and death and look for prompt solutions to such problems." *Id*. Thus, ample opportunity for full and complete discovery should be afforded in such cases. In the end, such claims will fail "where there is no contemporaneous evidence at all that defendants knew earlier what they chose not to disclose until later." *Id*.

Hindsight In Patent Disputes

In patent disputes and litigation, a court must determine whether the subject invention was obvious to a person of skill in the art at a prior date and time. This determination is then used to decide whether a currently marketed product is embodied by a prior patent. "Recreating the mindset of a person of ordinary skill in the art, and not forming a bias based on the course of innovation in the field in the past two decades, is exceptionally difficult." *See Rambus, Inc. v. Hynix Semiconductor, Inc.*, 254 F.R.D. 597 (N.D. Ca. Dec. 29, 2008). At the same time, however, in a patent case, the court must seek to strike a delicate balance between avoiding the prejudice of hindsight and permitting reason and common sense to be over-shadowed by the desire to hindsight bias. "Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it." *KSR Int'l Co.*, 127 S.Ct. at 1743. In evaluating patents, courts must be aware "of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." *Arrow Int'l, Inc. v. Spire Biomedical, Inc.*, No. 06-cv-11564-DPW, 2009 WL 2058807 (D. Mass. July 10, 2009). *See also Blount, Inc. v. Trilink Saw Chain, LLC*, No. 06-CV-767-

It has been suggested that the statutory presumption as to the validity of an issued patent could be a potential remedy for the issue of hindsight bias in patient litigation.

***See* 35 U.S.C.A. § 282.**

BR, 2009 WL 1916227 (D. Or. June 30, 2009)(the court must guard against any hindsight bias when analyzing obviousness).

Independent Medical Evaluations

Hindsight bias can also become a concern in cases in which an independent medical evaluation ("IME") of the plaintiff is sought. More specifically, the concern in relation to IME's performed as part of litigation is that there is an automatic bias that exists in relation to the known claims asserted in the lawsuit, subsequent to the date of injury. *See Pearce v. The Paul Revere Life Ins. Co.*, 2002 WL 1976014 (D. Minn. Aug, 23, 2002)(unreported decision). In the *Pearce* case, Plaintiff sought disability benefits. The Defendant argued that "any time an independent medical evaluation cannot be performed at or near the time of disability or surveillance cannot be conducted, insurers are prejudiced because of the risk of 'hindsight bias.'" *Id* at *6. In the end, the court sided with Plaintiff because Defendant's own claims adjuster testified that nothing in the claims file warranted an IME in this particular case. *Id*.

Business &/or Stock Valuations

Expert testimony as to valuation of the worth of businesses and corporate stock at a given point in time is fraught with hindsight bias. Indeed, the possibility of hindsight bias "and other cognitive distortions seems untenably high" when an expert approaches valuing something with the knowledge of what a business or stock's actual results were for the subject year. *See Agranoff v. Miller*, 791 A.2d 880, 892 - 893 (Del. 2001). In *Agranoff*, the court noted:

> Consider this analogy. Suppose there was an interview with Sir Georgia Martin from 1962 in which he opined as to how many number one songs he thought would be release by his new protégés, the Beatles. Could one fast-forward to 1971, interview Martin, and revise Martin's earlier projection in some reliable way, recognizing that

> Martin would have known the correct answer as of that date? How could Martin provide information that would not be possibly influenced in some way by his knowledge of the actual success enjoyed by the Beatles and his recollection of his earlier projection?

Id.

Psychologists and human factors analysts refer to this phenomenon as "hindsight bias," whereby, upon learning that something occurred and resulted in a certain outcome, a person overestimates the ability of those involved in the occurrence to have predicted or foreseen the ultimate outcome.

Similarly, valuating a piece of property cannot be fairly done for a specific time frame, if any subsequent rezoning of the property is taken into consideration, thereby supposing that the probability of rezoning at a specific point in time was made stronger by after-the-fact events. *See Michigan Dept. of Transp. V. Haggerty Corridor Partners Ltd.*, 473 Mich. 124, 700 N.W.2d 380 (2005). "This fallacy presumes that a zoning event occurring after the date of condemnation has logical and legal relevance to the hypothetical willing buyer's calculation of the price of the property on the condemnation date." *Id*. at 142. Hindsight bias is similar to the causation theory of "post hoc ergo propter hoc" (after this, therefore because of this), whereby inflated significance is likewise assigned to an after-the-fact event. *Id*.

In this regard, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *In re Citigroup, Inc. Shareholder Derivative Lit.*, 964 A.2d 106, 124 (2009). Proper analysis by a court of whether corporate decision makers made a correct decisions fundamentally calls for avoidance of any hindsight bias in making such an assessment. *Id*.

Along the same lines, bankruptcy courts must use caution in assessing the solvency of a corporation at a given time. "Caution should be

taken not to consider property as 'dead' merely because hindsight teaches that the debtor was traveling on the road to financial ruin." *In re McCook Metals, LLC*, 2007 WL 4287507 (N.D. Ill. 2007)(unreported). *See also In re Taxman Clothing Co.*, 905 F.2d 166, 170 (7th Cir. 1990). Moreover, the existence of a present claim for outstanding debt by a creditor should not be indicative of insolvency at any time prior to the claim, as the current existence of the claim and/or outstanding debt does not mean that the claim was knowable previously. *Id*.

Hindsight Bias In Relation to Actions of Police Officers

Excessive use of force in effectuating an arrest violates the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394-395, 109 S.Ct. 1865 (1989). Thus, when an accused criminal is injured in an altercation with police officers, it often gives rise to a claim of excessive force. The question in relation to such a claim is one of whether the use of force was clearly excessive and/or was objectively unreasonable under the circumstances. *Id*. "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . ." *Id*. at 396. Moreover, the severity of the injury suffered by the accused should not color the court's analysis as to the reasonableness of the use of force. *See Peterson v. City of Ft. Worth, Texas*, 2008 WL 440301 (N.D. Tx. Feb. 19, 2008)(not reported). "To allow such an influence would bias the objective review of the officer's use of force with 20/20 hindsight." *Id*. at *10.

Likewise, care must be used in assessing the existence of probable cause at the time of an arrest. *See Williams v. Cambridge Bd. of Edu.*, 370 F.3d 630 (6th Cir. 2004). Probable cause means the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627 (1979). "In analyzing an officer's actions, we must look at the totality of the circumstances from a reasonable officer's perspective at the

time of the arrest so as to avoid the effect of hindsight bias." *Williams*, 370 F.3d at 647 (dissenting opinion).

Termination of Government Contractors & Hindsight Bias

In *McDonnell Douglas Corp. v. U.S.*, 323 F.3d 2006 (Ct. Fed. Claims 2003), a government contractor working to develop stealth aircraft for the Navy sought equitable adjustment and conversion of contract termination. In addressing default of a government contractor and termination of the related contract by the contracting officer, the court must decide whether the officer was "justifiably insecure about the contract's timely completion." *Id*. at 1017. "Because the inquiry is concerned with the contracting officer's reasonable belief, rather than whether he was correct, it would be impermissible to show that after the termination action events occurred which would have permitted the contract to be completed by the delivery date." *Id*. Considering such factors would, therefore, transform the standard from one of "reasonable belief" into a strict demand that the contracting officer "have perfect foresight." *Id*. Accordingly, the inquiry must be limited to the time of the termination action in order to reduce the potential for hindsight bias. *Id*.

Biased Witness Testimony Based On Hindsight

The quality of witness testimony presented at trial can be greatly affected by hindsight bias. *See Maybrier v. La. Med. Mut. Ins. Co.*, No 081508, 2009 WL 1608447 (La. Ct. App. June 10, 2009)(unreported)(likelihood of bias on the part of a patient in a medical malpractice case testifying in hindsight as to what he would or would have not done if he had certain material information prior to consenting to the subject procedure). "How one retells an event depends on the audience and the purpose of retelling. For example, when testifying in court or supplying evidence to a police officer, people usually try to be as accurate as possible." Dudukovic, N., *Telling a Story or Telling It Straight: The Effects of Entertaining Versus Accurate Retellings On Memory*, APPL. COGNIT., PSYCHOL., 18: 125 – 143 (2004). Indeed, the "act of retelling is a creative,

constructive process, and the final product depends on the perspective the reteller develops." *Id.* As part of the same, a communication goal introduced upon retelling can lead to a change in the witness's personal impressions. *Id.* Without question, the "perspective people use when later retelling events can alter memory for those events." Tversky, B., *et al.*, *Spinning the Stories of Our Lives*, APPLIED COG. PSYCHOL., 18, pp. 491 – 503.

Memory is guided by beliefs about what should have occurred, as well as the presence, feedback and goals of other people. *Id.* *See also*, Tversky, B., *et al.*, *Biased Retelling of Events Yield Biased Memories*, COG. PSYCHOL. 40, 1 – 38 (2000)(biased memory is a consequence of the reorganizing schema guiding the retelling perspective, in addition to the rehearsing specific information in retelling). The inaccuracies in memory caused by erroneous information provided after the event become known as the "misinformation effect." Loftus, E., *Memories of Things Unseen*, AM. PSYCHOL. SOC., Vol. 13, No. 4, pp. 145 – 147 (2004). "Memories create our stories, but our stories also create our memories." C. Tavris & E. Aronson, *Mistakes Were Made (but not by me)*, p. 77 (2007). As such, an appreciation of the distortions of memory can lead people "to drop the certainty that their memories are always accurate, and to let go of the appealing impulse to use the past to justify problems of the present." *Id.* at 93.

MITIGATING HINDSIGHT BIAS

Although the issue of hindsight bias has been recognized in the legal field, its negative influence is still difficult to avoid and solutions to the problem remain somewhat illusive. *See* Rachlinski, J., *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. (1998).

Nonetheless, there are several options for a litigator to choose from in an attempt to mitigate the impact of hindsight bias.

CURATIVE INSTRUCTIONS

As noted by the United States Supreme Court, "to perform its high function in the best way, justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). Stated otherwise, while it is tempting to rely upon the idea of curative instructions as a remedy for potential prejudices arising at trial, including that of hindsight bias, what appears to be a simple resolution in theory does not in fact work as effectively in actual practice. Judge Learned Hand has accordingly referred to curative instructions to disregard as a legal "placebo." *U.S. v. Delli Paoli*, 229 F. 2d 319, 321 (2d Cir. 1956).

Indeed, the efficacy of instructing jurors to disregard certain things at trial has been a subject of great debate, and it is a concept that has been met with reluctant acceptance, persistent skepticism and uncertainty as to its potential limitations. Although the United States Supreme Court has recognized that it is not entirely unreasonable to conclude that juries can and will follow a trial court's instructions to disregard, the Court has only done so with the qualification that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital" that the practical and human limitations in relation to such instructions "cannot be ignored." *Bruton v. U.S.*, 391 U.S. 123, 135 (1968). Similarly, one member of the Court noted sixty years ago that "the naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949)(Jackson, J., concurring); *accord U.S. v. Semensohn*, 421 F.2d 1206, 1208 (2nd Cir. 1970). *See also Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 148 (3d Cir. 2002) (jury instructions can be intrinsically ineffective as the nonadmissible declaration cannot be wiped from the brains of the jurors); *Georgeson v. Nielsen*, 260 N.W. 461, 463 (Wis. 1935) (telling the jury to

disregard what they have already regarded can avail little towards destroying the effect thus probably produced).

The Advisory Committee Notes to Federal Rule of Evidence 105 make clear that the rule is decidedly not intended to imply that limiting or curative instructions are sufficient in all situations. *See* FED. R. EVID. 105 advisory committee's note, P.L. 93-595, § 1, 88 Stat. 1930 (1975). "A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Id.* In turn, the effectiveness of the practice of limiting or curative instructions must be taken into consideration in addressing the prejudicial impact of hindsight bias at trial.

This pervasive apprehension as to the use of curative instructions or instructions to disregard is reflected in a variety of metaphors from written opinions:

- "The wisdom of experience is embodied in the aphorism that the scent of a skunk thrown into the jury box cannot be wiped out by a trial court's admonition to ignore the smell." *Reed v. GM Corp.*, 773 F.2d 660, 664 (5th Cir. 1985).

- "After the thrust of the saber it is difficult to say forget the wound." *Dunn v. U.S.*, 307 F.2d 883, 886 (5th Cir. 1962).

- "A drop of ink cannot be removed from a glass of milk." *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976).

- "The virus thus implanted in the minds of the jury is not so easily extracted." *People v. Levan*, 64 N.E.2d 341, 346 (N.Y. 1945).

- Such instructions are "recommendation to the jury of a mental gymnastic which is beyond, not only their powers,

but anybody's else." *Nash v. U.S.*, 54 F.2d 1006, 1007 (2d Cir. 1932).

See also Lieberman, J., *Understanding the Limits of Limiting Instructions*, PSYCH., PUBLIC POLICY AND LAW, Vol. 6, No. 3, 677 – 711 (2000)(judicial admonitions are frequently disregarded by jurors, and outcome information affects how evidence is encoded, recalled and retrieved).

Based upon scientific studies and an understanding of thought suppression and humans' ability to disregard information upon being instructed to do so, skepticism about the efficaciousness instructions to disregard is warranted. *See* D. Wegner, *et al.*, *Thought Suppression*, 51 ANN. REV. PSYCHOL. 59, 83 (2000). Such studies have shown that instructions to the jury to disregard certain evidence or information may actually do more harm than good in that the instruction itself draws focus and attention to the matter, making it all the more difficult for the jurors to forget. *See e.g.*, *State v. Mason*, 271 Neb. 16, 909 N.W.2d 638 (Neb. 2006)(admonition or instruction can serve to draw the jury's attention to the information and raise questions in their minds regarding the meaning and importance of the information); E. Loftus, *Human Memory: The Processing of Information*, pp. 7-10, 107 - 118 (1976). In fact, some studies have shown that once a juror hears a fact, it is almost impossible for him to then ignore its effects on his way of thinking as the fact then colors the way the juror looks at the case as a whole. *See* J. Casper, *Juror Decision Making, Attitudes, and the Hindsight Bias*, LAW & SOCIETY ANNUAL MEETING (1987).

EXPERT TESTIMONY

Consideration should be given to trying to educate the jury about the effects of hindsight bias. One way to attempt this is through a retained expert. *See e.g.*, *Gehlen v. Snohomish County Public Hosp.*, 2001 WL 815005 (Wash. App. July 2, 2001)(unreported); *Gregorie v. Alpine Meadows Ski Corp.*, No. S-08-259, 2009 WL 1942893 (E.D. Cal. July 2, 2009). In *Gehlen*, a decedent's estate brought a medical malpractice and wrongful death action against the hospital and Dr. Lester Harms. Dr.

Harms read an x-ray of the decedent's chest in 1993 and determined that the images were normal. Three years later, a subsequent x-ray reflected that the decedent had a tumor in his chest, was surgically removed and found to be malignant. The decedent underwent radiation and chemotherapy, and 2 years later, he died of respiratory failure due to radiation pneumonitis. At trial, Defendant was permitted to present the testimony of Dr. Loftus, a psychologist and professor from the University of Washington, as to hindsight. *Id*. at *5.

Dr. Loftus noted that the radiologist who looked at the 1993 x-ray of the decedent's chest had the benefit of knowing that a tumor was visible on the x-ray, so it was more apparent to him than to Dr. Harms who looked at the films in 1993 without the benefit of that knowledge. *Id*. It was determined that this testimony from Dr. Loftus would assist the trier of fact to understand the evidence or fact in question. *Id*. This was affirmed on appeal, despite the fact that Dr. Loftus had no experience in radiology and was not familiar with the standard of care for a radiologist looking at an x-ray. *Id*.

Another option advanced by legal scholars, aside from presenting the testimony of an expert qualified to explain the concept of hindsight bias to the jury, is the development of a system where expert witnesses are court-appointed, as opposed to hired by litigants directly. *See Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation*, 8 PSYCHOL. PUB. POL'Y & L. 154 (2002). Not only does court appointment make the expert less likely to approach the case with hindsight bias, but it also increases the likelihood that jurors will view the expert more objectively. *Id*.

OPENING AND CLOSING ARGUMENTS

Argument to the jury can and should be used to try and enlighten the jury about hindsight bias and, hopefully, mitigate its effects. In *Arocha v. State Farm Mut. Auto. Ins. Co.*, 203 S.W.3d 443 (Tex. App. 2006), Plaintiff was injured in a collision with a car in a cross-walk and, at trial, the jury found for Defendant and concluded that Plaintiff's injuries were solely due

to Plaintiff's own negligence. In closing, counsel for the Defendant UM carrier made the following argument:

> **Defense Counsel**: I think your greatest challenge as jurors in this case is to do this, to take yourself back to Thursday of last week before you became involved in this case, before you became fact finders in this case, before you heard this story; your challenge is not to let what we call hindsight bias affect your decision making. It's easy now that we know he ran into her [the driver] and caused this to happen, that something happened. But take yourself back to your driving last Thursday when you're at an intersection and what you're doing to make sure it's safe to go, and you're about to turn –
>
> **Plaintiff's counsel**: Objection, your Honor, improper jury argument. He's asking the jury to put themselves in the place of the driver.
>
> **The Court**: Overruled.
>
> **Defense Counsel (cont.)**: So it's your challenge as jurors to take yourself back and . . . judge what an ordinary person would do . . . If the driver used ordinary care she's not negligent . . . So what did she do? She stopped in the proper place, she looked for traffic, she waited until it was safe to go, and she slowly pulled into the intersection. Everything else they say about her is all that hindsight bias.

Id. at 447.

On appeal, Plaintiff argued that the argument improperly asked the jurors to put themselves in the shoes of a party in order to decide the case. The appellate court disagreed, finding that the argument, taken in context, merely asked the jury to decide the case, based on what conduct would have

been objectively reasonable for a person in the driver's position at an intersection.

There is an elusive distinction between the fact of an incident and whether it was reasonably possible to foresee the occurrence of that event on a given date and time.

MOTIONS IN LIMINE

The most effective way to control for the bias of hindsight is to withhold publication of the outcome information. A fundamental principle behind most Motions in Limine is the concept that the trial court may exclude relevant evidence when its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. *See* FED. R. EV. 403. This rule is intended to negate the danger that exists when there is a chance that marginally probative evidence will be given undue or preemptive weight by the jury. *See People v. Crawford*, 458 Mich. 376, 398, 582 S.W.2d 785 (1998). A distinction must be drawn by the court between fact and reasonable probability of the occurrence of an event. Notably, it "does not follow from the fact that something occurs that people could have reasonably believed beforehand that it would occur." *See Mich. Dept. of Transp.*, 473 Mich. at 157 (concurring opinion). The following illustrations have been offered in relation to this potential prejudice:

> In January 1968 one could have predicted that it was reasonably possible that Neil Armstrong would set foot on the moon in July 1969. Similarly, one could say today that it is reasonably possible that man will visit Mars in Future years.
>
> Merely because an event occurred does not mean that it was reasonably possible on a given date beforehand. Reasonable predictions of space exploration require one to know much about the status of our space program at the time the prediction is made. An accurate assessment of the reasonable possibility of these two space

> explorations depends on the information known beforehand.
>
> The distinction between the fact of an occurrence and whether it was reasonably possible on a given date before it occurred has eluded many.

Id. at 157 – 158. The appropriate question is: was it reasonably possible at the time in question? *Id*. at 158. To this end, a Motion in Limine, seeking to exclude evidence that will likely give rise to hindsight bias on the part of the jury, should be granted by a court. *Id*. Admission of after-the-fact evidence is unfair where the jury will likely not properly limit its consideration of the evidence and/or accord the evidence wildly disproportionate weight or treat the evidence as a foregone conclusion. *Id*.

This is particularly true in relation to the admissibility of subsequent remedial measures. *See* Eberwine, K., *Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633 (2005). Hindsight bias can taint determinations as to feasibility, thereby resulting in unwarranted conclusions as to reasonable actions and unsupported damages awards. *Id*. Accordingly, particular caution should be used in relation to evidence of subsequent remedial measures, and Motions in Limine seeking to exclude such evidence should be given serious consideration.

Another area to be addressed by Motions in Limine in which hindsight bias should be considered is evidence of recklessness and/or financial worth in relation to claims for punitive damages. *See* Viscusi, W., Juries, *Hindsight, and Punitive Damages Awards*, 51 DEPAUL L. REV. 987 (2002).

In addition to pursuing motions on limine, a Defendant should also consider seeking bifurcation and/or a bench trial on the issues of damages, especially punitive damages. *Id*.

As a matter of principle, the purpose of requiring proof of proximate cause is "to avoid hindsight bias by limiting causation to those results which were foreseeable at the time of the action." *Corales v. Bennett*, No. 07-55892, 2009 WL 1508581 (9th Cir. June 1, 2009). Several states have allowed the use of "hindsight" jury charge in both simple negligence and medical malpractice cases. As discussed below, those states that have allowed the "hindsight" jury instruction in simple negligence cases have done so because it is a correct statement of the law of negligence.

Alabama

Alabama has approved the use of "hindsight" jury instructions in medical malpractice cases. *See Sewell v. Internal Medicine*, 600 So. 2d 242, 244 (Ala. 1992); *Watson v. Univ. of Alabama Health Services Found.*, 681 So. 2d 216, 218 (Ala. Civ. App. 1996). The instructions in these two cases provided:

- "I charge you that you must determine the defendants' conduct at the time they were treating [Plaintiff]. You must not judge their care and treatment of [Plaintiff] in retrospect, with hindsight, or based upon what was learned or on what happened after they made their decisions." *Sewell*, 600 So. 2d at 243.

- "Now, in looking and making the determination about the factual events that have come to you from the witness stand, the jury must view the evidence and events as of May 6, 1989, and not today. The jury must make a decision on the conditions and circumstances that faced Dr. [] then and not viewed in hindsight." *Watson*, 681 So. 2d at 218.

Indiana

In *Dahlberg v. Ogle*, 373 N.E. 2d 159 (Ind. 1978) the Supreme Court of Indiana approved the use of a "hindsight" jury instruction, but did so

with some hesitancy. In *Dahlberg* the trial judge instructed the jury, "You are to determine whether or not the defendant was negligent in one of the ways charged by the plaintiff upon the conditions as they existed in January, 1971, as alleged by plaintiff. You are not to utilize *retrospection or hindsight*." *Id.* at 164 (emphasis in original). On appeal, the Supreme Court of Indiana held that the instruction was proper, but not one that it would recommend. *Id.* The court further explained, "When considered as a whole, [the instruction] requires the jury to consider the alleged wrongful acts of the defendant in light of the conditions shown by the evidence to have actually existed at the time those acts took place. This instruction is not in a form which we would recommend. Nevertheless its import is sufficiently clear and we do not believe it would have confused or misled the jury." *Id.*

"Negligence is predicated on what should have been anticipated rather than what happened."

Kentucky

Both the Supreme Court and the Court of Appeals of Kentucky have stated that "proper application of negligence law requires courts to view the facts as they reasonably appeared to the party charged with negligence. We are not at liberty to impose liability based on hindsight." *Mitchell v. Hadl*, 816 S.W. 2d 183, 186 (Ky. 1991) (a medical malpractice case). *See also North Hardin Developers, Inc. v. Corkran*, 839 S.W. 2d 258, 261 (Ky. 1992) (a negligence case involving the issue of whether horses kept on a farm in close proximity to a neighborhood should be considered an attractive nuisance); *Carneyhan v. Thomas*, No. 2001-CA-000365-MR, 2003 Ky. App. LEXIS 23, at *5-*6 (Ky. Ct. App. January 31, 2003) (a case in which it was alleged a fraternity chapter was negligent in providing alcohol to a nineteen-year-old woman).

Missouri

"Negligence is predicated on what should have been anticipated rather than what happened," on faulty or defective foresight rather than on hindsight which reveals a mistake. *See McCollum v. Winwood Amusement Co.*, 59 S.W. 2d 693 (Mo. 1933). Further,

> The fact of plaintiff being injured does not of itself warrant a finding of actionable negligence. It is not enough to show that if the starting point of the slide had been built longer, or if the open space between the eight-inch end board and the railing had been built solid or closed by nailing boards over the open space, the accident would not have happened. The question is whether the danger to sliders of getting their legs caught in the open space was so apparent and obvious that a person of reasonable prudence and forethought would not have constructed the slide in the manner it was constructed or thereafter operated it in that condition. It is a trite saying that a person's "hindsight" is often better than his foresight, which merely means that a person, after a thing has happened, can see error or mistake or at least something which, if it had been done, would have prevented a bad result. However, negligence which imposes liability must result from a faulty or defective foresight. Negligence is predicated on what should have been anticipated, rather than what happened.

Id.

Montana

The Supreme Court of Montana has approved the use of a "hindsight" jury instruction in a simple negligence case. *See Jacobsen v. State of Montana*, 769 P. 2d 694, 698 (Mont. 1989). In *Jacobsen*, homeowners brought suit against the State of Montana for negligence in combating a forest fire. *Id*. at 695. At trial, the court instructed the jury, "Negligence is not proved merely because someone later demonstrates that there would have been a better way. Reasonable care does not require prescience nor is it measured with the benefit of hindsight." *Id*. at 698. After a jury verdict was rendered in favor of the State, the homeowners appealed, arguing that the "hindsight" instruction was improper. *Id*. The Supreme Court of

Montana disagreed with the homeowners, holding that the instruction was a correct statement of the law of negligence. *Id.*

Oregon

"Hindsight" jury instructions are also used in simple negligence cases in Oregon. *See Schwerdt v. Myers*, 683 P.2d 547, 548 (Or. 1984); *Minato v. Ferrare*, 663 P.2d 1240, 1242 (Or. 1983). For example, in *Schwerdt* the Supreme Court of Oregon approved the use of the following instruction:

> Common law negligence, therefore, is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do under the same or similar circumstances. Care should be in keeping with dangers apparent or reasonably to be expected at the time and place in question and not in light of aftereffects or hindsight.

683 P.2d at 548. Similarly, in *Minato* the same instruction was approved as an adequate statement of the standard of care in negligence. 663 P.2d at 1242 n. 1.

South Carolina

"Hindsight" jury instructions are also accepted in medical malpractice cases in South Carolina. *See Keaton v. Greenville Hospital System*, 514 S.E. 2d 570, 575 (S.C. 1999). In *Keaton*, the trial judge instructed the jury:

> Now I have told you that in considering a medical malpractice case, you and I don't know what the standards are, and you have to determine the facts and circumstances that existed on the date and time in question when this child was brought into the emergency room. . . . In giving their opinions, the experts must review the records at the time of the incident. In considering whether a physician, resident, or nurse has exercised reasonable

> judgment in a given case, you must consider such judgment in relation to the facts as they existed at the time the judgment was made, and not in light of what hindsight may reveal.

Id. at 572. On appeal, the Supreme Court of South Carolina held that the use of these instructions was proper as a correct statement of medical malpractice law even though it was "not a word for word quotation of previous case law." *Id.* at 574.

In *Hurd v. Williamsburg County*, 579 S.E. 2d 136 (S.C. Ct. App. 2003), plaintiff brought suit for injuries he sustained when he was struck by an automobile after the County Transit bus driver allowed him to exit the bus on the shoulder of a highway. After the jury returned a verdict for the plaintiff, the County appealed. *Id.* at 139. In considering whether the County was the proximate cause of plaintiff's injuries, the Court of Appeals of South Carolina stated: "One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach." *Id.* at 144-45.

Tennessee

The Court of Appeals of Tennessee has held that a "hindsight" jury instruction is a correct statement of negligence law in general and in the form of negligence called malpractice. *See Dillard v. Meharry Medical College*, No. M2001-02038-COA-R3-CV, 2002 Tenn. App. LEXIS 471, at * 14-*15. In *Dillard*, a medical malpractice case, the trial court instructed the jury that "'foresight, not hindsight is the standard by which one's duty of care is to be judged.'" *Id.* at *14. On appeal, the Court of Appeals of Tennessee held that this instruction was proper because the standard of care in malpractice is measured by the standard of care "at the time the alleged injury or wrongful action occurred." *Id.* at *15.

Washington

The Supreme Court of Washington has approved the use of "hindsight" jury instructions in both medical malpractice and simple negligence cases. *See Christensen v. Munsen*, 867 P.2d 626, 633 (Wash. 1994) (a medical malpractice case); *Qualls v. Golden Arrow Farms, Inc.*, 288 P.2d 1090, 1092-93 (Wash. 1955) (a simple negligence case). For example, in *Qualls*, a case involving allegations of simple negligence, the court approved the following instruction:

> You are instructed that in determining whether or not the defendants should have foreseen that Randolph Qualls or his cousin, Ronnie Toschi, was likely to release the brake on the truck, you are not to use hindsight in determining such foreseeability, and the mere fact it was released and that the truck did roll backward does not in and of itself prove it was reasonably foreseeable. If you find that defendants set the brake on the truck, then whether or not a reasonably prudent person should have foreseen the likelihood of the brake being released must be determined in the light of all of the facts and circumstances as they existed at the time the brake was set.

Id. at 1092.

Similarly, in *Christensen*, a medical malpractice case, the court approved the following instruction:

> A defendant is not to be judged in the light of any after-acquired knowledge in relation to the case, and the questions of whether or not a defendant-physician failed to comply with the standard of care and/or failed to inform the patient, as defined elsewhere in these instructions, are to be determined by what was known or should have been known, in relation to the case at the time of the treatment in question and must be determined by

> reference to the pertinent facts then in existence of which he knew, or in the exercise of reasonably prudent care should have known.

867 P.2d at 633.

CONCLUSION

Memory distortion phenomena such as hindsight bias are a well recognized part of the human condition. They influence our day-to-day lives in ways we rarely are able to objectively perceive, understand or control. With regards to hindsight bias, because of the vagaries of the human mind, knowledge can be prejudicial. That irony is no more real and meaningful than in the context of our legal system where nearly all ways results (i.e., "justice") depend upon an *ex post facto* evaluation of the facts and the parties' conduct. Knowing the outcome, i.e., all of the facts, in essence puts the mind of the trier of fact into a box that can prevent it from seeing the truth of the conduct it is charged to judge and the liability and damages it will adjudicate. The opportunities for significant prejudice exist in almost all phases of litigation; yet, courts have had a hard time coming to terms with this reality on the relatively few occasions when they have been forced to deal with the issue.

A trial attorney must be aware of and understand these types of phenomena and their potential ramifications on his or her client and case. This requires thinking outside of the box and pushing the trial court to do the same in order to liberate the trier of fact from the constrictions of the box of hindsight bias.

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ATTORNEYS AT LAW LLC
ATLANTA LAS VEGAS MIAMI

A NATIONAL TRIAL LAW FIRM

Thomas D. “Tom” Allen

Over 20 years experience litigating and trying complex civil cases throughout the United States with an emphasis on construction defect, product liability, toxic exposure, environmental contamination and trucking claims.

Representative Cases/Experience

- Served as national coordinating defense counsel for leading building products manufacturer regarding formaldehyde personal injury and property damage litigation.
- Regional trial counsel for manufacturer of products containing asbestos.
- Defense verdict in child lead poisoning case in Wayne County, Michigan.

Awards & Professional Recognition

- Named “Top 500 Product Liability Lawyers” by Lawdragon

Education

- B.A., cum laude, Oakland University, 1980
- J.D., with honors, Wayne State University Law School, 1983

Publications/Speeches

- “How Low Can You Go? Measuring Exposure to Benzene,” Mealey’s Benzene Litigation Conference, Phoenix, Arizona, with accompanying paper, “Measuring Benzene Exposure: Applying Law to the Science,” 2005
- “Toxic Mold Litigation,” The Network of Trial Law Firms seminar, West Palm Beach, Florida, 2001

Tom Allen

Partner

Atlanta

404.832.9533

tallen@wwhgd.com

Practice Areas

Catastrophic Injury

Construction

Environmental and Toxic Tort

Premises Liability

Product Liability

Professional Liability