CONTROLLING HINDSIGHT BIAS IN JURY TRIALS

TOM ALLEN
Weinberg Wheeler Hudgins Gunn & Dial
Atlanta, GA

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" and/or is "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). "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). Indeed, the "hindsight bias 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).

Problems Presented In Litigation or At Trial By Hindsight Bias

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.

It has been suggested that the statutory presumption as to the validity of an issued patent could be a potential remedy to the issue of hindsight bias in patent litigation. See 35 U.S.C. 282.

HINDSIGHT BIAS AND CURATIVE INSTRUCTIONS

Frequently, judges give curative instructions to jurors at trial, directing that they disregard testimony or arguments made by counsel. A study from the American Bar Foundation, however, indicates that there are limits to the effectiveness of these judicial admonishments. Research has found that, far from disregarding the testimony, jurors tend to use the information to make sense of preceding events, a phenomenon psychologists refer to as "hindsight bias." *See* Allen, *When Jurors Are Ordered to Ignore Testimony, They Ignore the Order*, WALL ST. J. at 31, col. 3 (Jan. 1988). For this reason, curative instructions have become increasingly disfavored by courts. *See* *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542, 561 (1988)(dissenting opinion). This is particularly true where the error is so prejudicial that curative instructions are essentially rendered nugatory. *Id*. *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).

INDEPENDENT MEDICAL EVALUATIONS

Hindsight bias also becomes a concern in cases in which an independent medical evaluation 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, and Defendant Paul Revere 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.

BUSINESS AND/OR STOCK VALUATIONS

Hindsight bias also arises in expert testimony as to valuation of the worth of businesses and/or corporate stock at a given point in time. 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?

"In the world of psychology, this phenomenon is known as 'hindsight bias' whereby the subject, upon learning that something occurred, overestimates the ability to predict that 'something' would occur."

Id.

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 right or a wrong decision 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" at the time. *In re McCook Metals, LLC*, 2007 WL 4287507 (N.D. Ill. 2007)(not reported). *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 CONTRACTOR

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*.

BATSON CHALLENGES

Any delay in addressing a *Batson* challenge by the Court and/or any delay in releasing jurors' self-reported racial information in relation thereto can be fundamentally unfair in relation to the party being challenged's race neutral motives. *See U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005)(*dissenting opinion*, citing *Miller-El v. Dretke*, 125 S.Ct. 2317, 2325(2005)). Under such circumstances, "the passage of time and impermissible hindsight bias might cloud any proffered race-neutral reasons for the strikes." *Id*.

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 a solution to the problem remains 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.

EXPERT TESTIMONY

In the case of *Gehlen v. Snohomish County Public Hosp.*, 2001 WL 815005 (Wash. App. July 2, 2001)(not reported), 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*. Nonetheless, the jury verdict in favor of Plaintiff and against Dr. Harms was likewise affirmed in that the jury properly relied on testimony from Plaintiff's experts that at reasonable radiologist would have seen and recognized a tumor the size of the one on the decedent's 1993 x-ray films. *Id*. at *6.

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*.

CLOSING ARGUMENTS

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.

MOTIONS IN LIMINE

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 punitive damages. *Id*.

JURY INSTRUCTIONS

Several states have allowed the use of "hindsight" jury instructions 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.

Georgia

Georgia courts allow the use of a "hindsight" jury instruction in medical malpractice cases "'where the evidence raises an issue as to whether the negligence claim is based on later acquired knowledge or information not known or reasonably available to the defendant physician at the time the medical care was rendered.'" *Betha v. Ebanks*, 264 Ga. App. 4, 589 S.E.2d 831 (2003) (quoting *Mercker v. Abend*, 260 Ga. App. 836, 839, 581 S.E. 2d 351, 355 (2003)). *See also Smith v. Finch*, 292 Ga. App. 333, 665 S.E.2d 25 (2008).

Examples of "hindsight" instructions that have been given in Georgia medical malpractice cases include the following:

- "In medical malpractice actions, a Defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later in hindsight proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care. In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding against that which is possible and likely to happen, not against that which is only remotely and slightly possible." *Smith*, 292 Ga. App. at 334.

- "A physician cannot be found to have committed medical malpractice on the basis of an assessment of a patient's condition which later or in hindsight proves to be incorrect, as long as the initial assessment was made in accordance with the then reasonable standard of medical care. In other words, the concept of medical malpractice does not encompass hindsight, but in failing to foresee and guard against that which is probable and likely to happen, not against that which is only remotely or slightly possible." Betha, supra.

- "A defendant cannot be found negligent on the basis of an assessment of a patient's condition which only later or in hindsight proved to be correct [sic], so long as the initial assessment was made in accordance with the reasonable standard of medical care. The concept of negligence does not encompass hindsight." Mercker, 260 Ga. App. at 838-39, 581 S.E. 2d at 354.

- "[I]n a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition which only later, or in hindsight, proved to be incorrect, as long as the initial assessment was made in accordance with the then reasonable standards of medical care. In other words . . . the concept of negligence does not encompass hindsight. In other words, negligence consists in not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible." Haynes v. Hoffman, 164 Ga. App. 236, 238, 296 S.E. 2d 216, 218 (1982).

"Reasonable foresight does not require anticipation of exactly what will happen and perfect judgment of what is necessary to prevent injury. Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness. Negligence is predicated on faulty or defective foresight rather than on hindsight which reveals a mistake." Shockley, 118 Ga. App. at 675, 165 S.E. 2d at 182 (internal quotations and

Use of a hindsight instruction has also been affirmed in simple negligence cases in Georgia. In Concrete Construction Co., the Court of Appeals of Georgia held that it was not error to refuse to give the suggested instruction because

> [t]he trial court charged the jury that the defendants could be held liable only for the natural and probable consequences of acts which reasonably could have been foreseen "as the natural, reasonable, and probably consequences of the original negligent

> act." Although the trial court did not specifically charge the jury on "hindsight," the charge as a whole properly emphasized to the jury that they should look to the circumstances existing at the time of the defendants' actions.

See *Concrete Construction Co. v. City of Atlanta*, 176 Ga. App. 873, 339 S.E. 2d 266, 269 (1985).

Generally speaking, Georgia courts have held that negligence should be judged on foresight rather than hindsight. *See* *Smith v. Poteet*, 127 Ga. App. 735, 736, 195 S.E. 2d 213, 215 (1972); *Church's Fried Chicken, Inc. v. Lewis*, 150 Ga. App. 154, 156, 256 S.E. 2d 916, 920 (1979); *Shockley v. Zayre of Atlanta, Inc.*, 118 Ga. App. 672, 675, 165 S.E. 2d 179, 182 (1968); *Daneker v. Megrue*, 114 Ga. App. 312, 313, 151 S.E. 2d 158 (1966).

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.*

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 hot 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.

"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 or understand. 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., <u>all</u> of the facts, in essence puts the mind of the trier of fact into a box the that can prevent if 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.

WEINBERG WHEELER HUDGINS GUNN & DIAL
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