



# Managing Hindsight Bias

by Merrie Jo Pitera

## **The Problem**

**H**UMAN BEINGS, especially jurors, like to believe they can prevent bad things from happening if they *do the right thing*. As a result, when something bad occurs, jurors find it comforting to assume, with the benefit of hindsight, that someone *did the wrong thing* and that they (the jurors) *would have known* better. This assumption is known in psychology as *hindsight bias*.

Because jurors are almost always introduced to a bad – often tragic – outcome *before* they hear the related evidence, their hindsight bias leads them, before they have heard the evidence, to ask subconsciously, *who did the wrong thing and why*, rather than *will the evidence support negligence?* Once jurors assimilate the tragic outcome into their knowledge base, it becomes difficult, but not impossible, for them to entertain non-negligence alternatives that may have caused the same outcome.

## **The Research**

Hindsight bias is far too pervasive and persistent to be completely avoided, and previous studies have shown that mock jury instructions or single warnings acknowledging the hindsight tendency are not an effective deterrent against this bias. As a result, a series of mock trials were utilized to determine what strategies and themes would prove effective in reducing hindsight bias among mock jurors.

## **Results**

The number of mock jurors who found negligence significantly decreased when defense attorneys inoculated against hindsight bias by systematically constructing a case story which included:

- a plausible alternative to the event's outcome;
- presentation of unforeseeable information that became available after the fact;
- multiple appeals to jurors to focus on the pre-outcome time period when making their decisions; and
- explicit cautions against Monday-morning quarterbacking.

## **Lessons Learned**

The bias-reducing effects of cautionary closings suggest that, because hindsight bias is so pervasive and damaging, systematic thematic hindsight inoculation should be developed by the defense for every stage of the trial, including voir dire, opening statements, closing arguments, and testimony that conspicuously references after-the-fact information, alternative outcomes and the fallacy of Monday-morning quarterbacking. <sup>1c</sup>

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