



Sacking the Monday Morning Quarterback

By Loren H. Brown, Daniel J. Cooper and Christopher G. Campbell

Examining this psychological tendency and offering practical tips to mitigate its effects.

# Tackling Hindsight Bias in Failure-to-Warn Cases

In his 2003 *New Yorker* article “Connecting the Dots,” Malcolm Gladwell resurrected the term “creeping determinism” to describe hindsight bias. Creeping determinism, he wrote, is “the sense that grows on us, in retrospect,

that what has happened was actually inevitable.” Malcolm Gladwell, *New Yorker*, Mar. 10, 2003. Psychologist Baruch Fischhoff originally coined the term. Gladwell tells of Fischhoff’s 1960s experiment in which, on the eve of President Nixon’s visit to China, Fischhoff asked a group of people about the probability of the trip’s success. After Nixon’s trip received accolades as a diplomatic victory, Fischhoff went back to those same people and asked them to recall their own predictions. Fischhoff reported that, overwhelmingly, the subjects “remembered” being more optimistic than they had actually been. Those who had predicted a low likelihood that Nixon would meet with Mao, for instance, recalled after knowing that the meeting had occurred that

they had predicted its likelihood as high. After gathering the results of this experiment, Fischhoff wrote, “The occurrence of an event increases its reconstructed probability and makes it less surprising than it would have been had the original probability been remembered.” *Id.*

Others have recognized this phenomenon in jurors. In his book *Legal Blame: How Jurors Think and Talk About Accidents*, Neal Feigenson observed that in jurors, as well as in the population generally, “hindsight bias is one of the most consistently replicated effects in the cognitive psychology literature and has proven fairly resistant to attempts to reduce its impact.” Neal Feigenson, *Legal Blame* 62 (APA 2001).

We face the challenge of eliminating or at least mitigating hindsight bias in jurors as defense lawyers in failure-to-warn cases. Whether you call it creeping determinism, Monday morning quarterbacking, or simply hindsight bias, as we will here, this psychological tendency presents a significant obstacle in failure-to-warn cases. This is particularly true in pharmaceutical product liability cases. Jurors have been known to hold manufacturers to standards of near omniscience when drugs or devices have been accused of causing or contributing to horrific injuries or deaths.

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This article has two purposes. The first is to examine hindsight bias in pharmaceutical failure-to-warn cases and other legal contexts. The second is to offer practical tips to mitigate the effects of hindsight bias.

### Hindsight Bias in Failure-to-Warn Cases

Failure-to-warn cases invite hindsight bias.

It is critical at the outset of a case, or as early as possible, to develop a defense story that will take jurors back in time.

To establish a failure-to-warn claim in a pharmaceutical product liability case, a plaintiff must prove that the defendant “knew or should have known” that the drug in question was dangerous but failed to adequately warn either the medical community or the public. *See, e.g., Anderson v. Owens-Corning*, 810 P.2d 549 1002–1003 (Cal. 1991); *Wolfgruber v. Upjohn Co.*, 423 N.Y.S.2d 95, 97 (N.Y. App. Div. 1979). This “knew or should have known” standard opens the door to hindsight bias, both when jurors consider liability and when plaintiffs bring up after-the-fact-of-injury remedial measures to establish liability.

Of the two aspects of the standard, the “knew” aspect or the “should have known” aspect, it is “should have known” that mostly leads to hindsight bias. Under the “knew” aspect of the standard, the question is what the company *actually* knew at the time of a plaintiff’s injury. This raises an objective question. The issue turns on actual facts—such as laboratory data or clinical trial results—that show what the company’s state of knowledge was during the time in question.

In contrast, the “should have known” part of the standard is subjective. As a result, there is great opportunity for hindsight bias to creep in and affect the interpretation of the facts. Under the “should have known” standard, the question is not what a com-

pany knew, but what it might have known if it had simply done more. In some cases, this provokes a moral judgment. With the introduction of morality, the question shifts from whether a company should have known of the risk to whether the company is “good” or “bad.” Jurors perceive that a “good company” would have done more studies before putting a drug on the market, and a “bad company” would not. Because many jurors already have a negative view of the pharmaceutical industry, they may surrender to hindsight bias and, on the basis of current knowledge, find that a defendant is a bad company that should have done more to protect patients.

Of course, regardless of the standard, the facts of almost any failure-to-warn case can invite hindsight bias. Take this classic scenario: (1) a plaintiff is injured while taking a medication; (2) after the injury, data emerges showing that the medication may cause the injury at issue; and (3) the FDA approves a revised label—which was not in effect when the plaintiff took the medication—warning new patients that the injury in question is a possible side effect.

Under these circumstances, it is not difficult to understand how hindsight bias can play a role in a juror’s decision-making process. Jurors exist in the present in their own here and now. At the time when they are asked to apply the “knew or should have known standard,” they are not asked to weigh the issues in the abstract but in the face of a living, breathing plaintiff who claims to have been injured by a defendant’s drug. When confronted with an actual plaintiff and an actual injury, it is difficult for jurors to put a plaintiff’s story aside, travel back in time mentally, and explore what a manufacturer actually knew or should have known at that time. On top of this, most jurors view their role as unraveling the mystery of what happened to a plaintiff, why it happened, and deciding whom to blame. For those jurors looking for someone to blame, hindsight bias makes it easier for them to hold a defendant responsible and to find favorably for the plaintiff.

Moreover, and apart from the desire to find someone or something to attribute a serious injury to, most of us have a difficult time discarding some of the information that we have when we want to make a “correct” judgment. As Fiegeonson noted,

“jurors are inclined to take into account whatever evidence they think will help them reach a substantively correct result.” Fiegeonson, at 105. As a result, jurors tend to resist “debiasing” efforts. Even when legal instructions direct jurors to assess the reasonableness of conduct from the time before or at the time of harm, jurors are more likely to take the ex post perspective because this allows them to use all the information that they have at hand. According to Fiegeonson, the psychological research teaches that jurors are more likely to think, “If I know the outcome of the parties’ conduct, why make believe that I don’t? The outcome is what really happened, and taking it into account will help me to reach a just decision about responsibility for what happened.” *Id.*

The issue of hindsight bias is further complicated by the doctrine of subsequent remedial measures, which can compound hindsight bias. A common example of a subsequent remedial measure in failure-to-warn pharmaceutical cases is the existence of a revised label after the fact that warns of the very injury alleged by a plaintiff. While the law does not expressly permit a plaintiff to present this evidence during a trial, the plaintiff likely will have many opportunities to present evidence of a defendant’s changes that were made to the warning after a plaintiff suffered an injury.

The law provides an example of the broad opportunity that plaintiffs can have to present evidence of subsequent remedial measures. *See, e.g., Kimberly Eberwine, Note, Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633, 652–55 (2005). Although prohibited generally, plaintiffs may introduce evidence of subsequent remedial measures if the plaintiff seeks to prove the feasibility of a measure that the defendant could have taken prior to the plaintiff’s injury or when the defendant claims that “all reasonable care was being exercised at the time.” *Id.* at 653 (citing *Kenny v. Southeastern Penn. Transp. Auth.*, 581 F.2d 351, 356 (3d Cir. 1978)).

Evidence introduced under this exception can present challenges in a failure-to-warn case, as the plaintiff might use this exception to illustrate the relative ease by which the company could have better, or more adequately, warned the plaintiff

about the potential harm that the plaintiff suffered. After the fact the addition to the label seems so simple to accomplish and is typically reinforced by the prescriber and the patient testifying that the change would have mattered to them in their risk-benefit analysis. Even if not taken quite so far, the plaintiff, at a minimum, readily suggests that the absence of the remedial language led the patient to believe that the prior warning did not apply to him or her.

“Why not say more sooner? Why not do more if it might protect even one patient from the harm suffered by this plaintiff? That’s what a company that places health over profits would do, isn’t it? Why not here?” are often questions posed by a plaintiff’s counsel for jurors hoping to lead jurors to conclude that it was the absence of will and good intentions, not the absence of knowledge, that motivated the labeling choices of a company.

With evidence of fairly simple remedial steps, juries may be more inclined to ignore other evidence on the extensive research and testing results that led a company to conclude a product exhibited no evidence of a risk, because they know that the injury occurred, and the company later warned of the potential for this injury. *See, e.g.*, Eberwine, at 655–58 (discussing the magnifying effect of subsequent remedial measures evidence on hindsight bias in juries). There is often no good reply to the question, why wasn’t more done sooner, why didn’t the company discover the risk before it was too late for this plaintiff? Thus, evidence of subsequent remedial measures directly increases the impact of hindsight bias in juries because it supports the assumption that the defendant should have known of and warned about the injury from the outset.

### Hindsight Bias in Other Areas

The effects of hindsight bias are not limited to failure-to-warn cases, and it is worth taking a moment to discuss some of those other areas. *See, e.g.*, Donald S. Davidson and Marie K.N. DeBonis, *Overcoming the Effects of Hindsight Bias*, N.Y. L.J. S4, Col. 1, Oct. 14, 2003; *see* Kimberly Eberwine, Note, *Hindsight Bias and the Subsequent Remedial Measures Rule: Fixing the Feasibility Exception*, 55 CASE W. RES. L. REV. 633, 636–37 (2005). Two areas that present valuable examples of the effects of hind-

sight bias can be found in patent and negligence law.

In patent cases, hindsight can affect the issue of obviousness. A lack of obviousness is one of the key requirements of patentability—that the technology in question was new and not obvious at the time of the invention. It is not difficult to imagine, however, that once a new invention exists, stepping back in time and assessing whether it was obvious invites hindsight bias. For instance, in *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 399 (2007), the U.S. Supreme Court ruled that an inventor’s modification of an existing gas pedal design was an obvious change and, therefore, not deserving of patent protection. It is easy to imagine how, when similar issues come before a jury, hindsight bias might affect the outcome. Once the matter comes before a jury, the technology actually does exist, and the jury is made of aware of the process by which the technology was invented, thereby potentially leading many jurors to view the invention as more obvious than it was at the time of its development. Gregory N. Mandel, *Does Hindsight Bias Affect Obviousness Rulings?*, NAT’L L.J. S2, Col. 1, Aug. 18, 2008.

Courts and counsel dealing with these issues in patent cases have suggested ways to mitigate hindsight bias in that context. For example, in *KSR v. Teleflex*, the U.S. Supreme Court discussed a “teaching, suggestion or motivation” approach in which the patent is only proved obvious if prior information reveals some motivation or suggestion that would have generated the technology in question. Patent law experts have also suggested presenting a case that focuses on the problem that the invention solved. Mandel, NAT’L L.J. S2, Col. 1, Aug. 18, 2008.

At the core, jurors are often most interested in the inventor and the invention story. While obviousness is the subject of expert analysis on the issue of what a person of ordinary skill in the art would have known at the time, the human interest element is what often grabs the attention of the jurors—going back in time with the inventor into the lab or to the research bench, confronting a real problem, working hard, failing, and then finally arriving at a valuable solution. By framing a case in this way, the experts suggest that ju-

rors are put in a position that is more analogous to that of the inventor at the time of the invention, when there was only a problem to solve and no known solution. *Id.* As discussed below, a narrative that places the jurors in the shoes of the decision makers at the time of decision making is an approach that can be useful in failure-to-warn cases.

In negligence and medical malpractice cases, hindsight bias can actually favor either a defendant or the plaintiff, depending on the facts of the case. Take a typical slip-and-fall case. If the question is one of notice—whether the defendant knew or should have known about a particular hazard that caused the plaintiff to fall—then hindsight bias may favor the plaintiff. Jurors may view the fact that the plaintiff fell as an event that the defendant should have foreseen. In contrast, if the question is whether the hazard was so open and obvious that the plaintiff him- or herself should have seen it, then hindsight bias may actually favor the defendant. *See* Terrence W. Campbell, *Commentary: Open & Obvious: Considerations of ‘Hindsight Bias,’* MICH. LAW. WKLY., 2005 WLNR 24503096, Feb. 14, 2005. In other words, the fact that the plaintiff fell may lead jurors to overestimate how open and obvious the hazard truly was at the time of the injury, when in fact with only foresight, the same conclusion would not have been drawn. *Id.*

### Tips for Tackling Hindsight Bias

You can attack hindsight bias in five particular ways: (1) develop a story through your defense that transports jurors back in time; (2) use discovery to develop facts to fight hindsight bias; (3) use jury selection to identify jurors susceptible to hindsight bias; (4) during a trial, attack hindsight bias head-on; and (5) carefully craft jury instructions.

### Develop a Story That Transports Jurors Back in Time

Jurors respond to stories. The best trial lawyers live by this creed. For example, author Jim Perdue in *Winning with Stories* explains, “So, why a story? Because stories persuade at the subliminal level by using the concept of vividness. They involve the audience. The story uses the schema format for storing and organizing information. The story empowers the speaker by mak-



ing the presentation easier and enlivens by making facts fun.” Jim M. Perdue, *Winning with Stories* 20 (Tex. Bar 2006). Importantly, stories are easier to remember and repeat and, as such, become an extremely useable tool for jurors in deliberations. One invaluable lesson for defense counsel is, replace stacking facts and arguments with a compelling, integrated narrative.

**Experts can emphasize that scientific knowledge is constantly advancing and that it is unfair to judge yesterday’s decisions based on today’s knowledge.**

It is critical at the outset of a case, or as early as possible, to develop a defense story that will take jurors back in time to the relevant events or decisions and put those events and decisions in context. For example, if a plaintiff claims that a company should have known about a harmful side effect, then the defendant needs a narrative that will transport jurors back to the drug development phase and allow jurors to see that process through the eyes of the scientists involved at the time. In viewing the process from a company’s perspective and in the appropriate historical context, jurors will be less likely to fall prey to hindsight bias. In addition, it is important to tell a story about a plaintiff’s conduct before, during, and after the plaintiff and a company “collided.” A plaintiff will tell one story on the stand, but actions speak louder than testimony, so you must focus jurors on the plaintiff’s actual conduct at the relevant times. Without attacking or explicitly criticizing a plaintiff, and adopting more of an historian’s demeanor than an advocate’s, you need to develop and control the character and decision-making discernment of a plaintiff. To do that, you need to examine in great detail a plaintiff’s history.

This storytelling process should start before discovery. When reviewing com-

pany documents before discovery, for instance, find those documents that can provide the necessary historical context that show a company’s state of knowledge at a given time period. The regulatory record documentation, particularly the record documenting a medication’s label, is a good example. It is important to show jurors how the FDA’s rulings, negotiations, and directions significantly influenced a company’s decisions and played a key role in a label’s final content. Ultimately, the FDA is the final arbitrator of a label’s content and a product’s status in the market.

The same principle applies to company witnesses. When talking to witnesses, make a point of distinguishing between what the witnesses know now as opposed to what they knew at the relevant time. Hindsight bias does not only affect jurors. There is a very real possibility that company scientists and safety officers may “remember” in hindsight things that may be detrimental to your case. For example, if a new side effect is revealed after a drug is put on the market, a company scientist, especially if he or she wants to make a name for him- or herself, may claim in e-mails to peers that he or she predicted the side effect years before the drug was approved, but that his or her predictions were ignored. You need to take those statements seriously, and determining whether they are simply the product of hindsight bias is critical. Focus on developing the facts needed to open a window into the decision-making process that took place in the laboratory or the boardroom at the time in question. This means spending time with witnesses to develop the pieces of the puzzle required to humanize the story and make it appealing to jurors.

#### **Use Discovery to Develop Facts to Fight Hindsight Bias**

The story-building process continues during discovery. Depositions will offer one of your first opportunities to develop witness testimony that could mitigate hindsight bias when presented to a jury. In preparing defense witnesses, it is important to continue to stress the importance of historical context. For instance, prepare witnesses to testify in a way that will put their decisions and actions in the appropriate historical context. Prepare witnesses to ask for clarification if a plaintiff’s attorney

asks questions that do not refer to a specific time period by asking that attorney before responding, “What time period are you asking about?”, or “As of what time?”, which will prevent the plaintiff’s attorney from muddling history and will help keep the record clear.

You should consider engaging in redirect examinations of company witnesses. This is a proactive step through which you can begin to lay the groundwork for a defendant’s story. Even a short redirect examination can develop testimony that humanizes a witness—something a plaintiff’s counsel will have no interest in doing—and hopefully will show that the witness is a real human being whose decisions or actions were based on the best available information at the time.

Affirmative discovery can also advance the defendant’s story. If you can demonstrate that a plaintiff would not have heeded an additional warning, even if furnished, that is another way to tackle hindsight bias. After experiencing a side effect, generally a plaintiff will claim in hindsight that he or she would not have taken a drug if he or she had been warned. The way to defeat that testimony is to bring up other situations in which a plaintiff ignored warnings on other products, such as smoking, taking other medications with similar warnings, or using other potentially dangerous products. If jurors hear that a plaintiff has a history of ignoring warnings, then they may approach a plaintiff’s assertions with skepticism.

#### **Use Jury Selection to Identify Jurors Susceptible to Hindsight Bias**

Jury selection is always critical to a good defense. When it comes to overcoming hindsight bias, the jury selection process presents an important opportunity on at least two fronts. The first is that you can use the selection process to begin teaching jurors the value and importance of overcoming hindsight bias. Lay the issue on the table. The saying “hindsight is 20/20” is common, and most jurors will recognize how hindsight bias enters their daily lives. Use an example of hindsight bias to bring the issue home. From the very beginning, tell jurors that their responsibility as fact finders requires viewing the facts in the appropriate historical context.

If the standard is whether the manufacturer “knew or should have known” about a particular harm, then jurors must understand at the outset that the question that they will decide is tied to a particular point in time and that the benefit of hindsight should not sway their verdict. It is difficult for jurors to talk about abstract concepts, values, or hypotheticals. It is easier to conduct voir dire by referring to jurors’ personal experiences. Consider questions that allow jurors to talk with you about their personal experiences of assessing past conduct. You will note eliminate hindsight bias by instruction, lecture, or argument. Making jurors aware of hindsight bias and how it can handicap them in their efforts to reach a correct result is a big enough challenge during voir dire. Use jurors’ personal experiences to elicit awareness of hindsight bias, and recognize that some jurors cannot realistically practice impartiality, regardless of your efforts to educate them.

That means that the other important aspect of jury selection is to identify those jurors who are unwilling or unable to set aside their biases, including hindsight bias, to render a fair and impartial verdict. There are a variety of techniques to gauge a juror’s susceptibility to hindsight bias. Deciding which techniques you will use will depend on the facts of a case. Approaching the problem directly it is not particularly useful. Asking jurors directly whether they will be able to overcome hindsight bias and decide the case based on the information available at the relevant time typically will elicit politically correct answers about following the judge’s instructions. The more reliable window into bias, including hindsight bias, is to explore relevant personal experiences. So developing voir dire questions that explore jurors’ experiences involving hindsight bias can help you to introduce questions about hindsight bias. But to be meaningful, you will need to prepare to follow up and probe. Ask a juror how he or she felt about that event. Did it result in a fair decision or an unfair decision? What did the juror learn from the experience, would he or she approach the situation differently today, and why, or, if he or she would not change a thing, why not? For example, you might ask, “Have you ever made a decision that, based on information you learned later, you wish

you could take back?” Jurors who have been hurt by hindsight bias are more likely to reject it than jurors who have not been affected by it. If you chose to use some of your voir dire time on hindsight bias, probe deeply enough to know whether and how it has affected jurors in their own lives in real and concrete terms—not as a mere theory or hypothetical.

### **Tackle Hindsight Bias Head-On During Your Trial**

Trial is the time to tell the story of the case and tackle hindsight bias head-on. An opening statement should build on the discussion of hindsight bias from jury selection but now introduce the facts of a case. As noted, the key here is to tell the story so that jurors are transported back in time and can view the facts through the eyes of company scientists, safety officers, and executives who will testify at the trial, as well as view the plaintiff’s conduct and the plaintiff’s case through the same lens. During the part of the trial when the plaintiff’s attorney makes the plaintiff’s case, use cross-examination when possible to challenge hindsight bias. For instance, if a plaintiff’s experts rely on some recent data to support their opinions, in your cross-examination point out that the data was not available to company scientists at the time in question.

In presenting a defendant’s case, it is important to call live witnesses when possible to put a living human face on a company’s actions. These witnesses should be capable of discussing in detail the decisions that a company made and the basis for those decisions at the time. Effective live witnesses who are able to tell a story can assist in breaking down prematurely constructed causal links between a plaintiff’s injury and the product and can help jurors judge the case from the perspective of foresight, as opposed to hindsight. Philip G. Peters, *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. Sr. L.J. 1277, 1287 (1999). These witnesses can contribute to your attempts to recreate the atmosphere and conditions of a company’s decision-making process before a plaintiff was injured. Research has shown that placing jurors in the situation of a company can mitigate hindsight bias, as discussed above.

Expert witness testimony can also help mitigate hindsight bias. Choosing the right expert—both in terms of credentials and the ability to connect with jurors and transport them back in time—is important. A good teacher is far more compelling than the smartest guy in the room. Because they do not work for a company, expert witnesses can furnish the perspective of out-

**It is important to insist that the instructions include language to mitigate potential hindsight bias.**

side observers, commenting on the state of knowledge at the time of a particular company decision. If the issue is whether a company “should have known” of a possible side effect of a drug, an expert can contrast what is known today with what was known at the time that the drug was developed, even highlighting the events that led to improved knowledge. In this role, experts can emphasize that scientific knowledge is constantly advancing and that it is unfair to judge yesterday’s decisions based on today’s knowledge.

A closing argument then presents yet another opportunity to communicate the defendant’s story and to emphasize the facts and themes developed to mitigate potential hindsight bias.

### **Carefully Craft Jury Instructions**

Don’t forget the jury instructions. The words in your closing argument are not the final words. Jury instructions are the final words. While most trial lawyers have mixed feelings at best about jury instructions, these instructions have the potential to play a key role in the deliberation process. For that reason, it is important to insist that the instructions include language to mitigate potential hindsight bias. An obvious example is an explicit instruction that acknowledges the potential for hindsight bias and advises jurors that they may not rely on information developed

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after the fact to judge a company's conduct at a particular point in the past. A less direct approach is to ask that the instructions refer to the point in time that is relevant to a case. To maximize the effect of carefully crafting instructions, you might also consider requesting that jurors receive

preliminary instructions before a trial begins, which provides yet another opportunity to mitigate potential hindsight bias.

### **Conclusion**

Sacking the Monday morning quarterback is no easy task. Whether predicting the success of Nixon's trip to China or sitting on a

jury in a pharmaceutical failure-to-warn case, the potential for hindsight bias exists in all of us. As defense attorneys, it is crucial to recognize hindsight bias from the start and to formulate a strategy that places a company's decisions and actions in the appropriate historical context to mitigate the bias as much as possible. 