



From the beginning, Litigation Insights (LI) has encouraged its partners and associates to not only deliver applied insights to our clients but to also create new ones by reviewing, conducting, and publishing research concerning the psychological foundations of jury behavior and courtroom communication.

With this first *Litigation Insight*, we initiate a policy of sharing these insights with our clients and client network months *before* they become part of conventional wisdom and fodder for CLE presentations. Each *Insight* will succinctly describe a litigation challenge, briefly summarize the research addressing this challenge, and recommend concrete applications of the lessons learned. While we can't promise how often you will receive your *Insights*, we do promise that every issue will contain at least a kernel of valuable information that gives you a competitive advantage.

The first *Insight* we offer is based on an article by Dr. Merrie Jo Stallard (a partner at LI). This article appeared in *Law and Human Behavior*, a prestigious peer-reviewed journal published by the American Psychological Association. Merrie Jo's research addresses one of the most fundamental questions facing those who make their living in front of juries: How can we minimize the effects of Monday-morning quarterbacking – a.k.a. *hindsight bias* – on jurors' liability judgments?

The research suggests that simply reminding jurors of the bias will not eliminate or significantly reduce it; however, explicitly introducing the issue as a theme as early as possible, then incorporating it into testimony and closings will reduce the translation of bias into blame, especially among high-cognition leaders on the jury.

We hope you find this first *Insight* beneficial, and be sure to watch your inbox for the second edition which will discuss the nuances of preparing the expert witness for cross-examination at trial. If you do not wish to receive future editions, please direct your request to unsubscribe to the editor: swielage@litigationinsights.com

Sincerely,

Pete

C. K. Rowland, Ph.D.

Insight #1 – Managing Hindsight Bias

Merrie Jo Stallard, Ph.D.

The Problem

Human 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, Dr. Stallard utilized a series of mock trials 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.