

As a torts professor, I get regular emails from a listserv that compiles and summarizes new torts cases from around the country. In a recent blast, I discovered a case from Idaho that combined two of my favorite subjects: torts and cognitive biases. In this case, a plaintiff reported to an emergency room and was sent home for his mild symptoms, and with some vanilla diagnosis, only to then return to the ER suffering from a massive stroke.¹ The court reflected on trial testimony in which one of the defendant hospital’s medical experts explained the perils of judging an incident such as this with a “hindsight bias.”² While finding that it was both unnecessary and irrelevant for the expert to testify to the jury about the risk of judging with hindsight bias, the court said something that got me thinking. And I thought about this enough to want to run it past our community of blog readers. The court said, “It is within the experience of the average juror that ‘hindsight is 20/20.’ The jury did not need Dr. Adeoye to explain that concept to them.”³ The court followed that quote up by saying expert testimony about hindsight bias wasn’t—quoting Idaho Rule of Evidence 702—based on “...scientific, technical, or specialized knowledge...” that would help the trier of fact in deciding the defendant hospital’s negligence.⁴ To summarize all this another way, the court basically said that if you know the famous phrase you understand the cognitive bias.

The hindsight bias is a very real cognitive phenomenon backed by scientific and experimental literature. One of my personal-favorite pieces for this very blog was about a fascinating experiment demonstrating hindsight bias in mock juries.⁵ Even our United States Supreme Court has acknowledged its sneaky power.⁶ Yet courts don’t seem particularly keen on allowing expert witnesses to testify about the phenomenon of hindsight bias, so long as the purpose of the testimony is *just* to warn the jurors about its sneaky power.⁷ I found it a little odd, however, to suggest that if one understands that “hindsight is 20/20” one must also understand the hindsight bias *and* would similarly understand the need to guard against it. It seems to me that there can be a gap between knowing an aphorism and understanding its scientific outcomes. This isn’t to say that there are no good reasons to stop experts from testifying about hindsight bias. The trial judge in *Hagan*, a case I mention in footnote 7, felt that the scientific literature in front of him hadn’t precisely clarified what kind of factual circumstances produce the biggest risks of hindsight bias.⁸ It seemed that judge *might* be open to the testimony so long as researchers had first discovered a precise set of risks in a lab that were then being duplicated in his courtroom. Finally, it goes without saying that a savvy attorney can argue in closing that it is easier to legally conclude there must have been a problem after the problematic thing has already happened. That is a species of commonsense argument which courts readily allow.

But I’ve played a dirty little trick here, haven’t I? I have purposefully withheld from you a scientific definition of hindsight bias so that you couldn’t test that definition against the statement, “hindsight is 20/20.” So, let’s get into that now, shall we? Do we feel at this point that we understand the hindsight bias,

¹ *Hill v. Emergency Med. of Idaho, P.A.*, No. 50686-2023, 2025 Ida. LEXIS 34, at *2-3, (Ida. Mar. 27, 2025).

² *Id.* at *14.

³ *Id.* at *20.

⁴ *Id.*

⁵ Grant Rost, *When a Jury Easily Predicts the Past*, BRAIN LESSONS BLOG (Dec. 1, 2023), <https://law.temple.edu/aer/2023/12/01/when-a-jury-easily-predicts-the-past/>

⁶ *KSR Int’l Co. v. Teleflex Inc.* 550 U.S. 398, 421 (2007) (“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.”)

⁷ See, e.g., *United State v. Maxwell*, 20-CR-330, 2021 U.S. Dist. LEXIS 228127 at *9, (S.D.N.Y. Nov. 21, 2021) (“Indeed, neither the Government nor the Court could identify a federal court that has admitted expert testimony on the jury’s hindsight bias.” Noting also that hindsight bias was admissible as a critique of another expert’s opinion in the case. *Id.* at *8.); *Holley v. Gilead Sciences, Inc.*, 18-CV-06972, 2023 U.S. Dist. LEXIS 92255 at *58-59, (N.D.Cal. Mar. 27, 2023) (Holding that Gilead could argue the biasing of viewing facts in hindsight but didn’t need expert testimony to illuminate the bias to the jury because “The jury is fully capable of considering that argument without expert testimony.” *Id.* at *60.); and *Hagan v. Wright*, 2011CV4404, 2012 Colo. Dist. LEXIS 2988 (D. Colo. Jun. 4, 2012) (Expressing concerns about hindsight bias testimony and specific scientific literature on hindsight bias offered by a party, though no expert witness was listed to testify about the phenomenon.)

⁸ *Hagan v. Wright*, 2011CV4404, 2012 Colo. Dist. LEXIS 2988 at *3, (D. Colo. Jun. 4, 2012)

as science understands it, simply by recalling the wise saying that hindsight is 20/20? Maybe or maybe not. Let's make a true comparison between aphorism and phenomenon, and I'll let you decide whether a jury easily crosses the bridge from the popular quote to the popular science. Here's how at least one group of researchers has defined hindsight bias in a courtroom setting:

Research on human judgment suggests that people cannot ignore a known outcome when assessing an event's likelihood ... When trying to reconstruct what a foresightful state of mind would have perceived, people remain anchored in the hindsightful perspective. This leaves the reported outcome looking much more likely than it would look to the reasonable person without the benefit of hindsight.⁹

Maybe it's just me, but I don't think this same idea is fully captured by or apparent in the common meaning of the phrase "hindsight is 20/20." Then again, I recently turned 50. My vision hasn't been 20/20 for a while now and I'm open to a hindsight rebuke on my conclusions here. You can now understand why the hospital wanted its expert to testify about and caution against hindsight bias. In its view, supported by scientific literature, it becomes that much easier to conclude the hospital should have predicted or easily diagnosed the plaintiff as having a stroke for the simple reason that we're now fully aware the plaintiff was having a stroke.

⁹ Kim. A. Kamin and Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 10 *LAW AND HUMAN BEHAVIOR*, no. 1, 1995, 89-104 at 90, <https://psycnet.apa.org/doi/10.1007/BF01499075>