

BY ARLO WALSMAN

Hindsight Is 20/20

Admissibility of hindsight-bias evidence in Illinois.

WE HAVE ALL HEARD THE EXPRESSION THAT HINDSIGHT IS 20/20. Most of us are also familiar with Monday-morning quarterbacks who, after learning about an event and its outcome, think they could have made better decisions and achieved more favorable results.

The term “hindsight bias” is defined as “the tendency, after an event has occurred, to overestimate the extent to which the outcome could have been foreseen.”¹ A new trend in Illinois is for litigants to attempt to introduce evidence of hindsight bias through opinion testimony by experts in human factors or psychology. These opinions have been commonly offered by defendants in negligence cases to argue that jurors should not judge their conduct with the benefit of hindsight

1. American Psychological Association, Dictionary of Psychology, dictionary.apa.org/hindsight-bias (accessed Sept. 6, 2019).



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information learned after a plaintiff's injury; instead, they should consider only the information that a defendant possessed at the time of his alleged negligence.

The Illinois Appellate Court has not yet ruled on the admissibility of expert-opinion testimony regarding hindsight bias and trial courts have reached different conclusions on this issue.² Therefore, it is worth highlighting the legal issues surrounding the use of expert-opinion testimony on hindsight bias and practical tips for lawyers to consider when confronted with such evidence.

Recent Cases

To better understand the context in which opinion testimony regarding hindsight bias has been used, consider the following examples of recent Illinois cases.

McKenna v. Allied Barton Security Services (Cook County). In *McKenna*, the decedent was killed by a man named Jackson who entered a building in downtown Chicago after hours with a gun. A security guard took Jackson up the building's elevators to a law firm on the 38th floor after Jackson told the guard he possessed a gun. Once there, Jackson shot and killed the decedent. The plaintiff (the decedent's representative) brought suit against the security company alleging that it was negligent because the guard: 1) failed to use duress or alarm codes when Jackson said he had a gun; and 2) gave Jackson unauthorized access to the 38th floor. Prior to trial, the defendant retained an expert in psychology to offer opinions regarding hindsight bias. First, the psychologist opined that the plaintiff's security expert had used hindsight bias when suggesting measures—such as trying to avoid a

confrontation through negotiation or delay—that the guard could have taken in lieu of giving Jackson access to the 38th floor because it was unknown whether these measures would have led to a more favorable outcome. Second, the psychologist opined that while hindsight bias may have caused jurors to believe that the shooting was predictable, in reality, before the guard took Jackson to the 38th floor, the outcome was much less foreseeable. The trial judge ultimately granted the plaintiff's motion to bar the psychologist from referencing hindsight bias at trial³ and the jury rendered a verdict for the plaintiff.⁴

Haddad v. 3 Angels Cab Corp. (Cook County)

In *Haddad*, Haddad was injured while riding a bicycle when she was struck by a cab near an intersection. Haddad alleged that the defendant was negligent for failing to keep a proper lookout. The defendant admitted striking Haddad, but alleged that she was contributorily negligent for failing to ensure traffic was clear before entering the intersection. The defendant's expert in human factors opined that a dashcam video from the cab showing the collision should be viewed a limited number of times to guard against hindsight bias. According to the expert, when people watch a video once, they do not see very much. But they learn more each additional time they watch it. Therefore, the more times jurors

2. Compare *Haddad v. 3 Angels Cab Corp.*, 13 L. 9619 (Cook County Dec. 16, 2015) (denying the plaintiff's motion to bar the testimony of the defendant's expert in hindsight bias); with *McKenna v. Allied Barton Security Services*, 15 L. 12124 (Cook County Dec. 8, 2017) (granting the plaintiff's motion to bar the defendant's expert from referencing hindsight bias).

3. *McKenna*, 15 L. 12124, Order on Motions in Limine #1-70, page 7 (Dec. 8, 2017).

4. *McKenna*, 15 L. 12124, Verdict (Dec. 12, 2017).

TAKEAWAYS >>

- The admission of hindsight-bias evidence may depend on: 1) whether such evidence is beyond the understanding of the average juror; and 2) the complexity and scientific basis of the expert's opinion.

- A *Frye* hearing may be required to determine whether the principle of hindsight bias is sufficiently established to have gained general acceptance in the psychological community.

- An expert witness's opinions on hindsight bias must have an evidentiary basis and may not be based on speculation.

WITH RESPECT TO OPINIONS ON PSYCHOLOGICAL CONCEPTS LIKE HINDSIGHT BIAS, COURTS HAVE REACHED MIXED RESULTS ABOUT WHEN SUCH CONCEPTS ARE BEYOND THE COMMON KNOWLEDGE OF JURORS.

watch the dashcam video, the more likely it is that hindsight bias would change their view of whether the defendant should have seen Haddad and avoided hitting her. The trial judge denied the plaintiff's motion to bar the expert's testimony⁵ and the jury awarded a verdict for the defendant.⁶

Denton v. Universal Am-Can, LTD. (Cook County). In *Denton*, Denton was injured after his vehicle was rear-ended by a semitruck on Interstate 65 in Indiana. He then brought suit in Cook County alleging that the trucking company had negligently hired and retained the truck driver because the driver had: 1) been at fault in multiple prior accidents; 2) previously had his commercial driver's license suspended; and 3) been convicted of prior traffic offenses. However, the defendant's trucking-safety expert offered the opinion that employers generally have imperfect information when making hiring decisions and that hindsight bias may exist when looking backward at

a hiring decision after an accident has occurred. The expert also opined that when using foresight at the time the driver was employed, it was possible that he could have performed adequately even after being involved in accidents and convicted of traffic violations. According to one of Denton's attorneys, Denton did not challenge the admissibility of the hindsight-bias opinions at trial for strategic reasons. After trial, the jury rendered a verdict for Denton.⁷

Legal issues

Hindsight bias and the understanding of ordinary jurors. Generally, expert testimony is only admissible "when the expert testifies to matters that are beyond the common knowledge of ordinary citizens, and where [the] testimony will aid the fact finder in reaching its conclusion."⁸ Conversely, "expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain."⁹ When determining whether an opinion is beyond the understanding of an ordinary juror, courts have considered whether the opinion is counterintuitive¹⁰ or complex.¹¹

With respect to opinions on psychological concepts like hindsight bias, courts have reached mixed results about when such concepts are beyond the common knowledge of jurors. For example, the Illinois Supreme Court has held that the opinions that a criminal defendant's desire to protect his family may make him susceptible to falsely confess or that a young child's statements

to investigators may have been influenced by suggestive questioning are not beyond an ordinary juror's understanding.¹²

On the other hand, Illinois courts have held the following psychological opinions to be outside the ken of the average juror: a psychologist's testimony regarding whether a defendant had the ability to act intentionally at the time of a crime in relation to the defense of voluntary intoxication;¹³ a psychiatrist's testimony about the results of tests of the defendant's mental condition in relation to his insanity defense;¹⁴ and a psychologist's opinion in a proceeding under the Sexually Violent Persons Commitment Act that a respondent's progress in treatment was insufficient for him to continue to be safely managed and treated on conditional release.¹⁵

Given this existing caselaw, it is unclear whether a court would hold that opinions regarding hindsight bias are beyond the ken of the average juror. This inquiry is ultimately very fact-intensive and depends on the complexity of the expert's opinions.

Hindsight bias and the province of the jury. Under Illinois law, "it is generally improper to ask one witness to comment directly on the credibility of another witness."¹⁶ This is because questions of credibility are to be resolved by the trier of fact.¹⁷

For example, in *People v. Becker*, the Illinois Supreme Court held that the trial court did not err in excluding the testimony of the defendant's expert (a child and adolescent psychologist) that the statements of a child victim of a sexual assault were not reliable because they

ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *Decisions and Diversity—How Our Minds and Experiences Sustain Bias and What to Do About It?* (Recorded Sept. 29, 2020), law.isba.org/3jCCKpx.
- Patrick M. Kinnally, *A Primer: Expert Opinions—IRE 702-705*, Trial Briefs (May 2020), law.isba.org/3kFqCE4.
- Michael R. Lied, *Expert Testimony on Implicit Bias Barred*, Labor & Employment (Mar. 2020), law.isba.org/3j1cLYw.

5. *Haddad*, 13 L 9619, Order (Dec. 16, 2015).
6. *Haddad*, 13 L 9619, Verdict (Dec. 18, 2015).
7. *Denton v. Universal Am-Can, LTD.*, 15 L 1727, Verdict (Oct. 16, 2017).
8. *People v. Gilliam*, 172 Ill. 2d 484, 513 (1996).
9. *Id.*
10. *People v. Lerma*, 2016 IL 118496, ¶ 24.
11. *Wade v. City of Chicago Heights*, 295 Ill. App. 3d 873, 883 (1st Dist. 1998).
12. *Gilliam*, 172 Ill. 2d at 513; *People v. Becker*, 239 Ill. 2d 215, 236–37 (2010).
13. *People v. Free*, 94 Ill. 2d 378, 411 (1983).
14. *People v. Noble*, 42 Ill. 2d 425, 434–36 (1969).
15. *In re Commitment of Tunget*, 2018 IL App (1st) 162555, ¶¶ 44–45.
16. *Becker*, 239 Ill. 2d at 235–36.
17. *Id.*

may have been influenced by improper interviewing techniques.¹⁸ According to the Court, allowing such testimony would have improperly allowed the psychologist to comment on the child victim's credibility. Similarly, in *People v. Corral*, the First District of the Illinois Appellate Court held that the trial court did not abuse its discretion in barring the defendant's expert in eyewitness identification from commenting on the reliability of a witness's identification of the defendant.¹⁹

Expert testimony regarding hindsight bias may be problematic if the expert opines that other witnesses are not credible or reliable because they are subject to hindsight bias.

Hindsight bias and *Frye*. Illinois Rule of Evidence 702 provides, in part, that:

Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.²⁰

Illinois law is "unequivocal" that the exclusive test for the admission of expert testimony regarding scientific evidence is "governed by the standard first expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)."²¹ Under the *Frye* standard, scientific evidence is only admissible if the methodology or scientific principle upon which an opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs."²²

A party seeking to challenge the admission of expert testimony may request a *Frye* hearing. However, the trial court is only required to hold a hearing if: 1) the expert's opinions are based on a scientific principle or methodology; and 2) the methodology is new or novel.²³ With respect to the first prong of this test, scientific evidence is defined as "the product of scientific tests or studies."²⁴ With respect to the second prong, evidence will generally be considered new

or novel if it is "original or striking" or "does not resemble something formerly known or used."²⁵

Opinions on psychiatric and psychological topics have warranted *Frye* hearings in past cases. For example, in *In re Detention of New*, the Illinois Supreme Court held that a psychiatrist's hebephilia diagnosis of a respondent in a Sexually Violent Persons Commitment Act proceeding was sufficiently scientific to warrant a *Frye* hearing.²⁶ Similarly, in *People v. Shanklin*, the First District of the Illinois Appellate Court held that the trial court did not err in conducting a *Frye* hearing regarding the Gudjonsson Suggestibility Scale (GSS) after the defendant sought to introduce the testimony of a psychologist regarding GSS and the defendant's susceptibility to suggestive police questioning.²⁷ According to the court, the 30-year history of the GSS showed that its acceptance in the field of psychology was unsettled and thus it remained a "novel scientific methodology."²⁸

Under this framework, it is likely that an expert's opinions regarding hindsight bias would be subject to a *Frye* hearing. At a *Frye* hearing the proponent of the evidence would have the burden of showing that the scientific principles and methods underlying the expert's opinions on hindsight bias are generally accepted in the scientific community. In lieu of a *Frye* hearing, a court can also take judicial notice of "unequivocal and undisputed prior judicial decisions or technical writings on the subject."²⁹ For the purposes of determining general acceptance, courts do not look to an expert's ultimate conclusion but instead to "the underlying methodology used to generate the conclusion."³⁰

Practical tips

For hindsight-bias evidence. Those seeking to admit expert-opinion testimony on hindsight bias must be prepared to demonstrate to a trial court why the opinions are beyond the understanding of ordinary jurors. In this endeavor, it may

ACCORDING TO DR. NEAL ROESE, A HINDSIGHT-BIAS EXPERT AND PROFESSOR AT THE KELLOGG SCHOOL OF MANAGEMENT AT NORTHWESTERN UNIVERSITY, HINDSIGHT BIAS IS MOST LIKELY TO OCCUR WHEN: 1) A LARGE AMOUNT OF TIME PASSES BETWEEN THE INITIAL EVENT AND TRIAL; AND 2) WHEN AN EVENT, SUCH AS INJURY TO A PLAINTIFF, IS TRAUMATIC AND EMOTIONALLY TAXING.

be useful to explain to the court when a witness or a jury is most likely to be influenced by hindsight bias. According to Dr. Neal Roese, a hindsight-bias expert and professor at the Kellogg School of Management at Northwestern University, hindsight bias is most likely to occur when: 1) a large amount of time passes between the initial event and trial; and 2) when an event, such as injury to a plaintiff, is traumatic and emotionally taxing.³¹

Practitioners should also be wary about having a hindsight-bias expert comment that one of their opponent's witnesses succumbed to hindsight bias, as this may be interpreted as the expert improperly offering comment on another witness's credibility.

18. *Id.*

19. *People v. Corral*, 2019 IL App (1st) 171501, ¶ 114.

20. Ill. R. Evid. 702.

21. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 76–77 (2002).

22. *Id.* at 77.

23. *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 112.

24. *People v. McKown*, 226 Ill. 2d 245, 254 (2007).

25. *In re Detention of New*, 2014 IL 116306, ¶ 34.

26. *Id.* ¶ 33.

27. *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 80.

28. *Id.*

29. *People v. Beck*, 2017 IL App (4th) 160654, ¶ 107.

30. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 77 (2002).

31. Comments based on author's interview with Dr. Neal Roese.

Finally, if video evidence exists, such as dash-camera footage of an automobile accident, a party may wish to file a motion *in limine* asking that the jury only be allowed to view the video a limited number of times.

Against hindsight-bias evidence. A party challenging the admission of hindsight-bias-opinion testimony must first carefully consider whether the expert's opinions have some evidentiary basis in the case or whether they are based only on speculation as to what might have occurred.³² For example, it is important to determine whether a hindsight-bias expert intends to testify about the concept of hindsight bias

generally or whether the expert can identify some actual evidence of hindsight bias being displayed by a witness.

Practitioners also may request a *Frye* hearing to challenge the admission of expert testimony on hindsight bias. For example, if an expert testifies that another witness is guilty of hindsight bias, a party may challenge whether the methods used to reach that conclusion are generally accepted in the psychological community.

Conclusion

The use of expert-opinion testimony on hindsight bias remains a fascinating new trend in Illinois trial practice. In the

future, whether Illinois courts will admit or exclude such evidence depends on many different fact-specific inquiries and legal issues. Skilled advocates are needed on both sides to educate courts about the relevant facts and law when deciding whether to admit opinion testimony on hindsight bias. **EB**

32. See *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 886 (1st Dist. 1999) (holding that one opinion of an expert was improperly admitted when it was based on speculation as to how an accident might have happened and there was no evidence to support the theory).