

## Hindsight bias in health and safety

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**Corporate Crime analysis: David Travers QC of 6 Pump Court discusses hindsight bias, its relevance to health and safety cases and how to avoid its impact.**

### What is hindsight bias?

Hindsight bias describes the way in which knowledge of the outcome colours the perceived likelihood of reported events.

When we know that an injury has occurred, we are much more likely to believe that, had we been asked to predict the future, we would have said we expected it to happen.

### How might it be relevant in cases involving accidents in the workplace?

Most of us who practice in health and safety and cognate areas are familiar with witnesses, Health and safety inspectors and even judges say ‘this was an accident waiting to happen’ even when the activity which caused the untoward event had been carried out without incident every day for the last quarter century. ‘They were just lucky before’ is a common cry of some prosecutors. The problem arises because we do not appreciate that our judgement is unconsciously tainted by the knowledge of the outcome.

Moreover, it has been argued that this lack of awareness has the potential to restrict our ability to judge or learn from the past. Indeed, it would be counterintuitive if it did not.

There are two problems for our purposes—one, which is outside the scope of this article, is that it compromises policymakers’ ability to make big strategic decisions properly. This is a problem which one might anticipate would be amplified the bigger the adverse event which prompted that decision.

The other problem is this that if we are psychologically predisposed to think all accidents were waiting to happen that includes, not just policymakers, lawyers and judges but jurors and other decision makers too.

The problem is exacerbated by the fact common sense, everyday experience and authority tell us, correctly, that the fact an accident happened is capable of being evidence that a defendant had created a material risk.

Moreover, when assessing whether a defendant did what was reasonably practicable to avoid a breach of duty under [sections 2](#) or [3](#) of the Health and Safety at Work etc Act 1974 the foreseeability of danger informs that assessment.

#### References:

*Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v The Queen* [\[2011\] EWCA Crim 2015](#) at para [25]

As Hughes LJ (as he then was) said in *Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v The Queen*: ‘after all if a danger is not foreseeable it is difficult to see how it can be practicable, let alone reasonably practicable, for the defendant to take steps to avoid it. There is no doubt that foreseeability of the danger is relevant to reasonable practicability:...’. Note that, properly understood, it is not whether the actual event which occurred was foreseeable, it is whether a risk was foreseeable.

In very many cases the question of foreseeability is intimately linked with the jury’s deliberation, ‘In most cases,..., it is likely that consideration of foreseeability will add little to the question whether there was a risk. In most cases, we think, the principal relevance of foreseeability will be to go to the defence of all reasonable practicable precautions having been taken. We note that this defence does not impose on an employer the duty to take every feasible precaution, or even every practicable one; it imposes a duty to take every reasonably practicable one. What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it.’

The dangers to an accused person of hindsight bias are self-evident, and they are not the only inherent disadvantage for defendants. Things which are burned onto our memories, or of recent experience, or easily imagined, are judged to be more likely than things which are not. This concept, so called availability bias is a bedfellow of hindsight bias. In very many health and safety cases, and in all inquests, there has been some dreadful event which makes up part of the factual nexus which the decision maker has to consider. It is undoubtedly correct that summings-up generally contain a warning that the jury must not fall into the trap of concluding that simply because something happened it was likely to happen and should have been guarded against. Unsurprisingly perhaps there is no general warning to guard against our very humanity, which comes packaged with various unconscious preconceptions which may have served our species well in evolutionary terms but do not equip us for good decision making in a complex industrial society.

The problem is not just limited to the binary question of guilt or innocence. The issue goes to sentence too. The Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline requires an assessment of the harm risked and the likelihood of that harm eventuating in Step One, upon which hangs the rest of the sentencing exercise. Similarly for corporate manslaughter the guideline lists as the first criterion in assessing harm and culpability in Step One 'How foreseeable was serious injury?'

We would anticipate there is little reason to doubt that judges are more cautious than juries in seeking to look for, and step back from, hindsight bias. We know however from other contexts how difficult it is to address learned unconscious bias let alone that which is innate.

### **What steps can practitioners take to ensure that hindsight bias does not interfere with the findings of risk or foreseeability in their health and safety cases?**

The challenge for the lawyer is to try and help the decision maker (whether judge or jury) form a view of the facts which is untainted by our hindsight bias. In the right case direct factual evidence as in the common sense example above is one way.

Evidence from experts is another.

#### *References:*

*Regina v Squibb Group Ltd* [2019] EWCA Crim 227 *HSE v Faltec Europe Ltd* [2019] 4 W.L.R. 77

In *Regina v Squibb Group Ltd* the sentencing judge had to consider, not the likelihood of the adverse event occurring, but the perhaps easier question of the likelihood of adverse consequences of that event. He found useful the statistical evidence of the likelihood of an adverse outcome from exposure to asbestos when compared to other causes of death. As everyone who has litigated this issue knows, this is often a contentious issue, even among those who appear to be in agreement. The approach of the judge was, unsurprisingly endorsed by the Court of Appeal, which was followed in *HSE v Faltec Europe Ltd*. In the later case Gross LJ cited the summary of the statistical evidence in *Squibb*, and observed 'While we do not read [the statistics summarised by Leggett LJ which put the risk of death from exposure to asbestos in the context of risks from other causes of mortality] as laying down a rule for the characterisation of the likelihood of harm arising, let alone a rule of general application, it does serve as a reminder that the court's characterisation ought not to be divorced from the reality of the scientific evidence before it.'

Expert evidence will not always be appropriate, nor will a statistical analysis of the probability of the occurrence of the untoward event, morbidity, or mortality, following a breach of duty. It is important for the practitioner to remember, however, that assessing risk in hindsight is something humans are not naturally good at and it is sometimes essential to help the court with a proper evidential basis for its conclusions.

*Interviewed by Pietra Asprou.*