The Ungoverned Brain: A Wild Card in Arbitral Decision-Making

article

By Charles D. Ehrlich

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If asked how she makes decisions, a reinsurance arbitrator might reply: "Through careful deliberation I apply my experience and concepts of fairness to the evidence presented, pertinent law, industry custom and practice, and the arguments of counsel."

Sounds great. Makes sense. But not totally accurate.

In reality, our brains take capricious detours. Arbitrators, counsel, and parties need to understand those detours and their possible effect on decision-making. This article identifies some of those detours, and suggests ways to keep them from leading us astray. We'll discuss the effects of inadmissible evidence, confirmation bias, hindsight, anchoring, framing, and, most captivating, self-serving bias.[1] We'll follow with a brief diversion into food's influence on decision-making. Then we'll look at some ways to avoid these thought detours.

Inadmissible Evidence

Inadmissible evidence is the classic challenge to a decision-maker; how to un-ring the bell? In fact, it's impossible – as demonstrated by several experiments with judges.[2]

Consider first a privileged document that is bad for the plaintiff. Seventy-one percent of the judges who saw the document ruled against the plaintiff. Of the judges who didn't see the document, only 45 percent ruled against the plaintiff. In other words, even though the document should have played no role in decision-making, it did.

Remedial measures taken after an accident are also generally inadmissible – the rationale being that eliminating dangerous conditions should be encouraged. So, what happened in an experiment where one group of judges learnt of remedial actions and the other group did not? All of the judges who didn't know about the subsequent fix ruled for the defendant. Only 75 percent of those who knew about it ruled for the defendant.

Lastly, let's look at a prior criminal conviction. Half of our judges were told that a personal injury plaintiff had been convicted of a swindle more than a decade before his accident; 80 percent of them ruled the conviction should be excluded. Yet, those judges awarded the plaintiff a median of $400,000; judges who didn't know about the conviction awarded 25 percent more.

We would likely all agree that offering clearly inadmissible material in order to ring the bell that cannot be un-rung is unethical. But admissibility is often fairly debatable. Thus, one might argue that counsel are well-advised to advance even evidence with a low probability of being admissible. One can certainly say that arbitrators need to be cautious how information admitted "for whatever it's worth" affects their decision-making.[3]

Confirmation Bias

Moving next to confirmation bias, this phenomenon was often a key plot point in the wonderful British detective series, *Inspector Morse*. Morse would rather quickly lock in on a likely suspect and then doggedly accumulate evidence confirming the unlucky person's guilt. The dramatic twist to the story was often that Morse's initial conclusion was wrong; he had been led astray by confirmation bias.

Confirmation bias occurs in legal decision-making. A variety of studies show that jurors often make an initial call on the case, and then listen carefully to evidence supporting that inclination while discounting contrary evidence.[4] In an experiment with judges, all were asked to evaluate evidence bearing on whether suspect #1 had committed a murder. Half of the participants were later told of a possible second suspect; the other half were not. Nevertheless, all evaluated the evidence, and the likely guilt of suspect #1, similarly. Suspect #2 was disregarded.[5]

Confirmation bias isn't a new concept. In 1620 the English philosopher Francis Bacon

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observed, "The first conclusion colors and brings into conformity with itself all that comes after."[6]

A variant of confirmation bias has the mysterious label "Implicit Egotism." In plain English, it means that we gravitate to people who resemble ourselves.[7] Thus, many reinsurance arbitrators may give additional credence to evidence coming from middle-aged, well-spoken, conservatively dressed, Caucasians of the professional class, i.e., their clones, while discounting witnesses who differ significantly from that prototype.

Hindsight Bias

Turning to hindsight bias, I think this phenomenon derives from our unconscious yearning to see the world as proceeding from cause to effect in a logical and predictable fashion.

Judges in an experiment were given information about an area that might experience a flood, including costs of flood protection.[8] They were told that if there was a greater than 10 percent likelihood of a flood, negligence liability would attach if a flood occurred. All were told that no protective measures were taken; half were told there had been a subsequent flood. Twenty-four percent of those who didn't know about the flood found negligence. More than twice as many, 57 percent, of those who knew about the flood found negligence. In other words, with the "benefit" of hindsight the judgment as to what was reasonable behavior *before the flood* changed 100 percent.

In another experiment, judges were given a hypothetical trial court sanctions ruling. They were asked to predict the most likely outcome on appeal: affirmance or vacation or a lesser sanction. Some of the judges were told of the "outcome;" the others were not. The judges who knew the outcome saw it as predictable at roughly double the rate of those who predicted without knowledge.

In a reinsurance arbitration, might "hindsight bias" incline a panel to find coverage for an event "post facto," even though the parties would have given a different answer when the contract was being agreed? Might a policy buy-out look far more reasonable if the policyholder later experienced an asbestos disaster than if measured at the time of the deal? Since reinsurance disputes almost always arise "post facto," arbitrators need to be especially wary of hindsight bias.

Anchoring

Moving to "anchoring," I'll observe that many of us grew up thinking that taking reasonable positions leads to the best outcomes, that rationality is rewarded. Anchoring experiments appear to rebut that concept. Instead, anchoring suggests that counsel (or party-appointed arbitrators) consider taking the most aggressive positions possible that don't careen into absurdity.[9]

In one anchoring experiment, judges were given the facts of a serious personal injury case in which liability was conceded.[10] Half of the judges were told that the plaintiff's lawyer had demanded $10,000,000 at a settlement conference; the other half were told only that "a lot of money" had been demanded.

The judges were then asked what damages they would award. Judges who hadn't been given the $10,000,000 number awarded an average of $808,000, with a median of $700,000. Those who knew the number averaged an award of $2,210,000, with a median of $1,000,000. Thus, a settlement demand several multiples of what either group of judges was willing to give nevertheless served as an anchor leading to much higher awards than if no specific demand had been made.

A second experiment presented another personal injury case in which only damages were at issue.[11] One group of judges was initially asked to rule on a motion to dismiss, made on the ground that damages couldn't exceed a hypothetical $75,000 jurisdictional threshold; the other group was not given that motion. Virtually every judge who had the motion denied it – in other words, it didn't have much merit. Nevertheless, the motion served as a very effective anchor. The "motion group" awarded damages that averaged $882,000, with a similar median. The "non-motion group" awarded an average of $1,249,000, with a median of $1,000,000. Thus, a motion of minimal merit, one that a conservative counsel might well not even present, was such an effective anchor that it reduced the damage awards by almost one-third.

How might anchoring affect a reinsurance arbitration? Consider allocation of continuing losses; there are often several approaches, each resulting in a significantly different outcome for the parties. A party strongly arguing for a return-maximizing approach that is isn't the most supportable one may nevertheless anchor the Panel to high-return alternative outcomes rather than low return alternative outcomes.[12] A similar approach might affect the result in a life insurance premium dispute, for example.

Framing

Our next concept, framing, teaches that that the verbal presentation of an event can have significant subconscious influence on the listener's assessment of what happened. In one experiment, the subjects were shown film of a car accident. Then, divided in subgroups, they were asked to estimate how fast the cars had been going when the accident occurred. The question was asked using a different descriptor for each subgroup, starting with "contacted," and then moving up through "hit," "bumped," "collided" and "smashed." The result? The more that the descriptor connoted a violent event, the higher the speed estimated by the test group.[13] Then, a week later, the groups were asked if they saw broken glass after the accident –although there was no broken glass in the film. The "smashed" group was more likely than any other to "remember" the non-existent broken glass.[14]

Interestingly, my experience in arbitration suggests that framing is used ineffectively because it's overly exaggerated. Thus, when counsel portrays a failure to

produce documents as the most egregious wrong since the Spanish Inquisition, the Panel is more dubious than terribly upset. That said, is it possible that more effective framing has influenced me without my knowing?

Self-Serving Bias

This brings us to self-serving bias, which might prompt the reader to ask "what on earth is that?" Self-serving bias is simply the conviction that we're right (because we're smarter) and those who disagree with us aren't either right or as smart. Thus, in a classic 1977 study, 94 percent of professors rated themselves above average relative to their peers.[15] In another study, 32 percent of the employees of a software company said they performed better than 19 out of 20 of their colleagues.[16]

In another study, judges were asked to estimate how their rate of reversal on appeal compared to their fellow jurists. The top quartile represented those who were reversed the most, the bottom quartile those who suffered the least reversals.[17] Surprise! Fifty-six percent put themselves in the bottom quartile – more than twice the number that could mathematically fit there. With another 31 percent putting themselves in the second lowest quartile, 87 percent of the judges thought that they had better records than 50 percent of their peers.[18] While arbitrators rarely face reversal, is there any reason to believe that our confidence in our judgment may not be similarly a bit overconfident?

And, what if it all actually comes down to our tummies?

An Israeli study looked at the decisions of judges ruling on prisoners' parole applications.[19] Judges who had recently eaten were more likely to rule favorably on an application. The longer a court session went on without a meal, the more negative the judges' decisions became. The authors attribute this phenomenon to "decision fatigue." In other words, the more decisions the judges made the more depleted their energy, and when their energy was depleted they were more likely to rule in favor of the status quo, i.e., continued incarceration.

Applying this learning to arbitrations, perhaps the party seeking relief should ensure that the panel is well supplied with energy bars, while the party opposing should try to extend proceedings well into the lunch hour.

So, what are we in the reinsurance arbitration community to make of all this? Of course, we can shrug it off as sociological mumbo-jumbo, having little relevance given our specialist qualifications and particular niche in the decision-making world. But, why would our analytical processes be significantly "better" those of other professional decision makers? Are we simply indulging in self-serving bias if we think we're immune from the subconscious?

So, let's experiment. Let's consider some processes that may sharpen our decision-making, including the following:

- Before coming to a final conclusion on an issue, run your tentative view though a mental checklist of the potentially skewing factors: inadmissible evidence, confirmation bias, hindsight, anchoring, framing, and self-serving bias. Consider whether any of them have affected your conclusion.
- Think about whether any other factor external to the merits is playing a part in your conclusion, e.g., reputation of counsel, (un)likeability of a witness, coherence of presentation, past experience with a party, etc. If it might be, try to re-examine your conclusion with that factor eliminated.
- When you've arrived at a tentative conclusion, take pen to paper (fingers to keyboard) and write up your reasoning. That helps clarify thinking and sometimes reveals that the tentative conclusion doesn't hold up.
- List the key points supporting each party's position and informally score them, say from 1 to 10. Then add up the scores; if there are significantly more points on the position you aren't inclined to support, you may want to deliberate further.
- Experiment by agreeing with your co-panelists to discuss the evidence at the end of each hearing day rather than withholding comment until deliberations. This approach can foster consideration of differing views before they've all solidified into cement.

Justice Scalia, in his treatise on advocacy, cautioned, "[w]hile computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are)."[20]

While advocates face the hurdles Scalia noted, those of us who are arbitrators can conscientiously work to recognize them and eliminate them. ▼

ENDNOTES

1. This article owes a considerable debt of gratitude to the work of Edna Sussman (www.SussmanADR.com), who has analyzed decision-making in depth and gathered much source material.
2. Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. Rev. 1251 (2005).
3. It appears arbitrators are reluctant to exclude evidence, preferring rather to "give it whatever weight, if any, it deserves." That's likely a distinction without a meaningful difference in outcome.
4. W. Kanasky, Juror *Confirmation Bias: Powerful. Perilous. Preventable.*, www.courtroomsciences.com.
5. Eyal Peer and Eyal Gamliel, *Heuristics and Bias in Judicial Decisions*, aja.ncsc.dni.us/publications/courtrv/cr49-2/CR49-2Peer.pdf
6. Edna Sussman, *Arbitrator Decision Making*, The American Review of International Arbitration, 2013 v. 24 no.3 502.
7. Brett W. Pelham, Mauricio Carvallo and John T. Jones, *Implicit Egotism*, Current Directions in Psychological Science, April 2005 vol. 14 no. 2 106.
8. Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 433 (2007).
9. While I haven't encountered anything in the literature dealing with absurd or unreasonable positions advanced as anchors, experience suggests that such positions do not anchor, reduce credibility, and are generally unwise.
10. *Id*. at 431.
11. *Ibid*.
12. I reiterate my belief that an effective anchor needs to be within some ambit of reason; that an absurd position backfires.
13. Elizabeth F. Loftus and John C. Palmer, *Reconstruction of Automobile Destruction: an Example of the Interaction Between Language and Memory,* Journal of Verbal Learning and Verbal Behavior 13, 585-589 (1974).
14. *Ibid*.
15. *Everyone Thinks They Are Above Average*, Lifescience.com, February 7, 2013, 12:25 PM.
16. *Ibid*.
17. Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 436-37 (2007).
18. *Ibid*.
19. Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, PNAS, April 26, 2011 v. 108 no. 17 6889–6892.
20. Sussman, supra note 6, at 490.