

SEEING CLEARLY:

TACKLING COGNITIVE BIAS IN DISPUTE RESOLUTION

Parties may unconsciously use conceptual shortcuts to help them navigate the complex territory of a legal dispute. If practitioners recognise these “cognitive biases”, they may help their clients to better outcomes. **By Ilya Furman and Jonathan Kaplan**

A multitude of cognitive biases have been identified and categorised over the years. These biases tend to distort our judgment and introduce errors, causing us to make wrong decisions. They are, however, unconscious “shortcuts” designed to assist us to make complex decisions quickly. This article will examine some of these biases in order to assist practitioners to recognise and deal with them, given that they could be a barrier to achieving a good outcome for parties.

ANCHORING

The tendency to rely on one aspect or piece of information when making a decision is often referred to as “anchoring”. We look for an anchor in a sea of information, even if that anchor is not relevant to the decision-making process. For example, when asked to guess the percentage of African nations which are members of the UN, people who were first asked “Was it more or less than 10 per cent?” guessed lower values (they guessed 25 per cent on average) than those who had been asked if it was more or less than 65 per cent (they guessed 45 per cent on average).¹

Anchoring can be a powerful tool in negotiation. A first offer, for example, can be the anchor for the remainder of the negotiation

and can have the effect of creating a benchmark for the range of figures comprising the possible settlement sum. Any figure mentioned by way of reference in an initial joint mediation session may have that anchoring effect, which may then dictate the process.

On recognising this bias, a mediator in private session might enquire about the extent to which the “anchor” figure can be substantiated were the matter to proceed to a litigation forum.

SUNK-COSTS BIAS

The Concorde is a well-known example of the sunk-costs bias. It became obvious early on that the Concorde was going to be very costly to manufacture and, with few seats, was unlikely to generate a profit. Few orders for the Concorde were received. Even though it was clear that the venture would not make money, France and England continued to invest in the project in the hope that it would succeed. It was a bad business decision, as it didn't.

The pure economic method most often used to generate a rational approach to settlement negotiations ignores past costs and only focuses on future costs (for example, the costs of running the litigation matter and/or continuing a hearing in already commenced

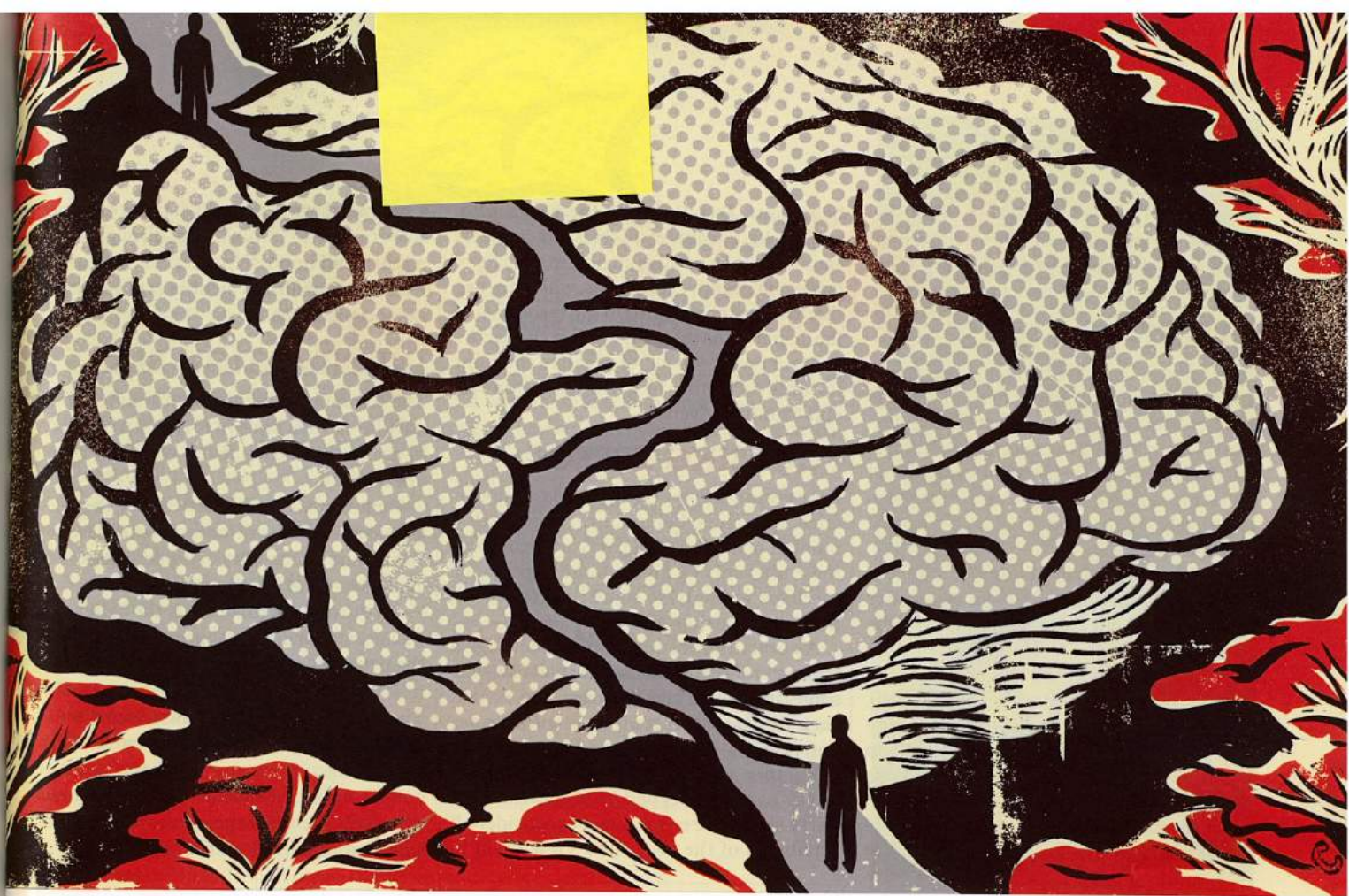
proceedings) and evaluates any future benefit from such costs. Parties often become trapped in the sunk-costs bias.

Practitioners should be alert to the sunk-costs bias in the decisions and recommendations made by others. Comments such as “we've invested so much already” and “we don't want to waste those resources” are important signals. One should remind the party that even smart choices (taking into account what was known at the time the decision was made) can have bad outcomes.

Cutting one's losses does not necessarily mean that one was foolish to make the original choice. It is useful to bear in mind the sage advice of Warren Buffett: “When you find yourself in a hole, the best thing you can do is stop digging”.

CONFIRMATION BIAS

This bias involves the tendency to want to confirm what we already suspect and then seek facts to support it. The bias affects not only where we go to collect information but also how we interpret the evidence we receive. As practitioners we sometimes avoid asking tough questions and discount new information that might have a tendency to challenge our preconceptions.



This bias also influences the way we listen to others. It causes us to pay too much attention to supporting evidence and too little to conflicting evidence. Psychologists believe the bias derives from two fundamental tendencies. The first is our inclination to subconsciously decide what we want to do before figuring out why we want to do it. The second is our inclination to be more engaged by things we like than by things we dislike.

Changing what we believe takes effort. When first encountered, information that conflicts with our preconceptions is often interpreted as being the result of error or some other externally attributed factor. It is only after we are repeatedly exposed to the conflicting information that we are willing to make the effort to change our beliefs.

On recognising the bias in a client, practitioners must establish a good understanding of the facts on which the party relies. Following this, practitioners could introduce counter arguments, play the devil's advocate and use probing, "open" questions in discussions. Practitioners should resist the inclination to avoid discussing information which might make a party feel uncomfortable, unless it is abundantly clear that the party does not want to go down that path.

FRAMING EFFECT

The way a problem is framed strongly influences the subsequent choices we make. People tend to accept what is presented to them and seldom stop to reframe that in their own words. A frame that biases our reasoning causes us to make poor decisions.

When you see a block of cheese in the supermarket claiming that it is 90 per cent fat free, do you stop to reframe this proposition and say to yourself that the cheese is 10 per cent fat?

Similarly, in dispute-resolution discussions, it sounds more positive to say that a claim has a "one-in-ten chance of succeeding" than to make the mathematically equivalent statement that it has a "90 per cent chance of failing". If people are rational they should make the same choice in every situation in which the outcomes are identical. It shouldn't matter whether those outcomes are described as "gains" or "losses" or "successes" or "failures". However, word choice can establish different frames, and decisions may differ because of this.

We should pose problems in a neutral way that combine gains and losses, adopt alternative reference points, or promote objectivity and choose a frame that captures all of what is important.

ENDOWMENT BIAS

Michael Pompian² describes the endowment bias as the mental process in which a differential weight is placed on the value of an object. He notes that the value depends on whether one possesses the object and is faced with its loss or does not possess the object and has the potential to gain it. His approach is that the magnitude of the loss is perceived to be greater than the magnitude of the gain were the same object added to one's endowment.

In other words, people value a good or service more once their right to it has been established. They will often have difficulty letting go at the risk of achieving an outcome, even if the other party is willing to give up something in return.

Victor Antonio, an American motivational speaker, noted that the emotional impact of a loss is greater than the desire for gain. To highlight this, he observed that if you lost a \$50 bill your angst would be greater than the joy you would feel on finding a \$50 bill.

Once a party understands this concept their recognition of the bias will facilitate a more open approach to resolution, and practitioners should encourage parties to understand compromise as an option and to "let go a little", however painful the emotional

impact of giving up a position might be. Helpful questions could be "How important is ownership of *everything* to you?" or "What does it mean to you to retain everything?"

NEGATIVITY BIAS

Many psychologists³ have noted that a negative experience, or fear of bad events, has a far greater impact than a neutral experience or even a positive experience. Humans are thus inclined to behave in a manner that will avoid negative experiences and are much more likely to recall and be influenced by past negative experiences.

ST Fiske⁴ noted that, when given a piece of positive information and a piece of negative information about a stranger, people's judgment of the stranger will be negative rather than neutral (assuming the two pieces of information are not severely imbalanced). Perhaps it's a case of bad news sells best – or seeing the glass as half empty rather than half full – where there is a range of information to assimilate.

Ng⁵ observes that negative perceptions are used to judge the other person's *subsequent*

behaviour. To put that in the vernacular, mud sticks. To counter this bias, practitioners should focus on positive attributes and ignore irrelevant negative comments, which are neither healthy nor helpful to the resolution of the dispute. The theory is to allow the parties to drain the "cesspool" of negative emotions towards each other by giving each other an opportunity to "vent".

FOCUSING EFFECT

It is easy to stereotype on the basis of appearance, speech or behaviour. Faced with a number of attributes, a party may consider these unevenly by giving more importance (perhaps wrongly) to some than to others, hence the focusing effect.

As practitioners we should encourage a party to reflect on the issues in dispute for some time before making a decision, so that they can view the attributes with proper perspective.

Further, where it is recognised that one party has stereotyped another, the first party should be encouraged to consider all attributes of the other and view them in

a balanced way, even if that involves an adjournment to "think things through". This might avoid impulsive decisions by a party who may not initially be able to filter out the stereotypical bias.

INFORMATION BIAS

The commonly accepted and simple explanation of this bias involves a tendency to seek information, even when it cannot affect action.

Some terms that might describe the relevant state of mind are inquisitiveness, lack of clarity and an inability to properly assess or evaluate a set of facts or circumstances.

An example of this bias is the belief that the more information that can be acquired, the better, even if that extra information is irrelevant to the decision a party must make. The request for additional information could even be used as a tactic to frustrate or delay an outcome.

Before a request for more information is pursued, the relevance and value of that information must be established.

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BIASED JUDGEMENTS OF FAIRNESS

Numerous experiments have been conducted in the area of settlement negotiations, in the hope of explaining and therefore assisting practitioners to understand the major barriers to successful settlement.⁶ Many such experiments focus on how parties attempt to anticipate the court's decision should the matter proceed to a hearing. The closer the estimates of each of the parties are to each other, the more likely it is that a negotiated outcome can be reached.

Analysts differ in their rationale for settlement failures when the parties are given fairly accurate advice about the likely outcome by their experienced advisers. One difference relates to the amount of information made available to the parties. Some practitioners suggest that, with more information, parties are more likely to settle because they can make a better prediction of the court's decision. The rules of discovery are based in part on this premise. Others suggest that the opposite holds true: the more information the parties have, the more likely they are to analyse it in a self-serving manner and thus maintain their biased view of the dispute.

Instead of providing more information to their client, practitioners may have a better chance of achieving a settlement if they can uncover the client's bias when analysing the existing information and then assist their client by providing a more objective view of what is a fair outcome.

WISHFUL THINKING

Wishful thinking is the formation of beliefs and the making of decisions according to what is pleasing to imagine instead of on the basis of evidence or rationality. Parties tend to predict positive outcomes to be more likely than negative outcomes.⁷

Christopher Booker⁸ described wishful thinking in the following terms:

- "the fantasy cycle" – a pattern that recurs in personal lives, in politics, in history and in storytelling;
- "the dream stage" – when we embark on a course of action that is unconsciously driven by wishful thinking, all may seem to go well for a time;
- the "frustration stage" – occurs where make believe can never be reconciled with reality;

- the "nightmare stage" – as things start to go wrong, there is a more determined effort to keep the fantasy going;
- the "explosion into reality" – as reality presses in, everything goes wrong; the fantasy finally falls apart.

It is arguable that the further a party moves through these stages the more confused and weak they will become, thereby jeopardising the opportunity for an early and good outcome.

As practitioners, we would all have witnessed a party going through these stages, so the challenge is to recognise this bias early and work through the risks with the party.

CONCLUSION

Practitioners should be aware that biases are not easily recognisable by the parties themselves. Understanding biases and the errors they cause helps us as practitioners to find ways to counteract them in a dispute-resolution context and thus achieve better outcomes for our clients. ●

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