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# THE FLAVOUR OF VARIETY



THE VARIETY OF WORK that takes place in tribunals continues to surprise many. In this edition of *Tribunals* we publish some articles that give a flavour of that interesting work.

The concluding section of a two-part article by Mark Hinchliffe looking at the use of the specialist expertise held by tribunal members and judges can be found on page 2 (part one was published in the winter 2013/14 issue).

The joint Law Commissions have now published their final report on the future of health care professional regulation. It is an enormous report with many profound implications and David Bleiman has taken a look at some of the proposals as they relate to the composition, appointment, role and guiding objectives of panels (see page 6).

Lydia Seymour asks the question ‘Do people really behave rationally when they make decisions?’ and provides a thought-provoking article on irrational behaviour and decision-making (see page 11).

On page 15, an article both describes and celebrates the many interesting and varied examples of good practice in training that incorporate social context. The Judicial College is a keen exponent of this approach as it lies at the heart of our concept of judicial training.

Paula Gray takes a light-hearted look at judgment writing while providing some valuable tips for judges (see page 19).

Bowing to the inevitable move to ‘digital by default’, the decision has been taken that the publication of *Tribunals* will be by electronic means only from March 2015. In the winter 2013/14 issue, guidance was provided on how

to register on the judicial intranet and through that the Judicial College’s Learning Management System (LMS), where *Tribunals* is published, usually by means of a link in the News section on the home page. Some time in the next few months, the College’s secretariat will be contacting subscribers to establish the best means of electronic communication.

We are very pleased to be preparing a special international issue of *Tribunals* for late summer, which will be published on the LMS. The articles will cover the broad range of work of the Judicial College internationally, including providing assistance to countries in training their judges (Albania, Kosovo, FYROM and Malta), involvement in exchange programmes, and membership of international bodies such as the European Judicial Training Network and the International Organisation for Judicial Training.

I hope that you find articles of interest to you in this issue, and wish you a pleasant summer.

**Professor Jeremy Cooper, Chairman of the Editorial Board.**

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# ‘EXPERTS IN OUR OWN LITTLE NICHES’ (PART TWO)



**Mark Hinchliffe** assesses the implications of specialist knowledge on tribunals and considers how panel members can use their expertise effectively.

IN THE FIRST PART of this article, I concluded that a degree of expertise or, at least, specialism, is a unique selling point of the tribunal system. It is why many appellate judges have been prepared to treat the factual findings, predictions and assessments of specialist tribunals with a considerable degree of deference and respect.

But this poses a few pertinent questions. How much expertise is desirable? If the appellate jurisdictions are justified in backing off in deference to a lower tribunal’s expertise, how can the public be assured that the tribunal really does have the expertise it claims? And how does a tribunal ensure that it uses its expertise both profitably and fairly – without, in effect, giving evidence to itself?

## Sub-specialty

Alexander Pope thought that ‘a little learning is a dangerous thing’. But in my own jurisdiction, a consultant psychiatrist on a mental health tribunal dealing with an anorexic schoolgirl may, in fact, be a geriatrics specialist, or the doctor on a tribunal looking at the case of a dangerous criminal with a personality disorder may have little forensic experience. And yet, despite not being experienced in the relevant sub-specialty, our trained medical members should still have sufficient expertise to ask pertinent questions and test the treating clinician’s professional opinion.

In *Shea (a child)*,<sup>1</sup> Mrs Commissioner Brown in Northern Ireland considered an appeal where the child claimant to disability living allowance (DLA) suffered from bilateral hearing loss and

asthma. The claim to DLA was disallowed. On appeal to the Social Security Commissioner, the appellant was represented by the National Deaf Children’s Society. One of the submitted grounds was that there had been a breach of the rules of natural justice as the appeal tribunal did not include as a member a person who was specifically ‘deaf aware’. Mrs Commissioner Brown stated:

‘... there is no specific requirement to include panel members with a qualification in the disability suffered by the particular claimant. While it might be desirable in a particular case to have a panel member who has such a qualification, it is not a legal requirement. The members of tribunals will obviously have experience in assessing care and mobility needs across a range of disabilities and panel members, I am confident, take these responsibilities seriously... In addition a claimant’s representative

is always in a position to call the relevant expert’s evidence in the appropriate case.’

In *Southall v General Medical Council*,<sup>2</sup> Leveson LJ addressed a submission by the practitioner’s counsel that the lack of a panel member from the same specialty as the practitioner required the court to pay less deference to the panel’s conclusions. The judge considered the possible danger of too much expertise, stating:

‘Any issues requiring particular specialist knowledge should be dealt with through the calling of expert evidence; neither the GMC nor the doctor would be in a position

*While it might be desirable in a particular case to have a panel member who has such a qualification, it is not a legal requirement.*

to challenge the opinion of a member of the panel and, if a professional in the same field, the risk would be that a decision would be made on the basis of an expert view that had not been subject of evidence or argument.’

To assure the public that the tribunal does have the expertise it claims, some jurisdictions have developed specialist panels because, even within the niche of the jurisdiction, there are several sub-niches where specialised knowledge and experience is deemed essential. In mental health, for example, in accordance with a promise made to Parliament, every effort is made to ensure that in any case involving a patient under the age of 18 years, at least one member of the tribunal – although not necessarily the medical member – is on the tribunal’s Child and Adolescent Mental Health Services panel. And in every case involving a restricted patient who has come into hospital via the criminal justice system, the judge must be on the tribunal’s Restricted Patients Panel, and this currently means that they have to be a circuit judge or a recorder with relevant experience, or an authorised salaried mental health judge.

### Induction training

Training is also pivotal. A new immigration judge, or traffic commissioner, or Upper Tribunal judge sitting alone in the Administrative Appeals Chamber, may or may not already have, upon appointment, the sort of experience necessary to fully deserve recognition as an expert or specialist judge. Over time, of course, experience will encourage the development of expertise, but this cannot be instantly acquired by osmosis, so proper induction training is essential. When the former commissioners in the Upper Tribunal started hearing mental health and special educational needs appeals, many learnt quickly, developing expertise by training and observation, and building their experience on a case-by-case basis.

Assuming that tribunals really do have expertise acquired through professional or personal background or experience, or through education or training, how does a tribunal achieve what the overriding objective requires, and use its special expertise effectively? Or, to put it another way, how does a tribunal ensure that it uses its expertise both profitably and fairly?

To answer this question, a distinction may be drawn between a tribunal that uses its expertise to assess and weigh the evidence and submissions placed before it, and a tribunal that uses its expertise to go off on what used to be called ‘a frolic of its own’ and to conjure up issues, points and solutions not raised by the parties.

*... how does a tribunal ensure that it uses its expertise both profitably and fairly?*

In *Richardson v Solihull Metropolitan Borough Council*,<sup>3</sup> the Court of Appeal addressed the issue of an expert panel member becoming a sort of ‘backstage expert’. The court heard an appeal against a decision of the High Court on appeal from the Special Educational Needs Tribunal that had included a member with particular experience of special schools. The tribunal decided that neither the school put forward by the local authority, nor the one put forward by the parents, were suitable for the child, but suggested (on the basis of its own expert knowledge) that a suitable school did exist. But the determination that there was an appropriate school other than those proposed by the parties was not made on the basis of any evidence presented by the parties. Indeed, the parties had not been offered any opportunity to comment on the factual basis underlying the tribunal’s judgment. Beldam LJ said:

‘I am conscious that it is sometimes difficult to distinguish between an expert tribunal using the expertise for which its members have been chosen in deciding issues before it, and using that expertise in a way which raises other issues that the parties may not

have had an opportunity to consider. I have no doubt that the specialist member of a tribunal who had in mind a specific school which neither party had considered would regard it as fair, and in the child's interests, to raise with the parties the possibility of the provision of such a school to meet the child's educational needs. But in the present case I think it would have been preferable, once the tribunal had decided that neither school proposed by the parties was appropriate, for the chairman to have indicated this to the parties and told them that the expert members considered suitable arrangements could be made, and to have invited submissions from the parties.'

In the same case, Peter Gibson LJ stated that:

'Although the tribunal is a specialist tribunal with members appointed for their expertise, it is important that the tribunal obeys the rules of natural justice and that the members should not give evidence to themselves which the parties have had no opportunity to challenge.'

*If the medical member believes that there is such an objection, plainly he must say so.*

notice. If the medical member believes that there is such an objection, plainly he must say so. He is a member of the tribunal because of his medical expertise, and if he thinks that his medical expertise is relevant in some specific way that has not otherwise been pointed out, he must draw on it in the course of the hearing and the tribunal's deliberations. I do not for a moment suggest that the medical member of the tribunal should in some way suppress his personal expertise and reactions to medical issues which arise. However, if the point which concerns him is a new one and might in itself be decisive, it does seem to me that

fairness requires that it be explained to the appellant or to the appellant's representative, and that the appellant should be given a realistic opportunity to consider it.'

This straightforward principle has subsequently been reasserted in a number of cases, from various jurisdictions, in both the High Court and the Upper Tribunal.<sup>5</sup>

Four years later, in *Butterfield and Creasy v Secretary of State for Defence*,<sup>4</sup> Park J had to consider a decision of a Pensions Appeal Tribunal which, in 2000, had dismissed an appeal against a decision of the Secretary of State that Mr Butterfield did not qualify to receive a disability award or pension under the Naval Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983. The court found that:

'There is a potential problem if a medical member of a tribunal is the only person present with specialist medical knowledge, and he perceives a possible medical objection to the appellant's case, particularly an objection which has not been taken in advance by the Secretary of State and of which the appellant has not had prior

On the other hand, where there is evidence on the table, an expert panel can, and should, use its expertise when analysing and assessing it. In *F Primary School v Mr & Mrs T and SENDIST*,<sup>6</sup> a substantive ground of appeal was that the tribunal used its own expertise without giving due notice to the parties. James Goudie QC, sitting as a Deputy High Court Judge, rejected this, saying:

'Of course, tribunals must not give evidence to themselves which the parties have had no opportunity to challenge. But this tribunal was not giving evidence to itself. It was, in my judgment, performing its function as a specialist tribunal, of evaluating all the evidence before it at the hearing and legitimately using its specialist expertise for that purpose.'

This distinction has also been well highlighted in two decisions from Stadlen J. In *Lawrence v GMC*,<sup>7</sup> the judge agreed that the use to which expert members of the tribunal can put their expertise or experience is limited to the evidence that is adduced and the submissions that are made. To go beyond that and reach a conclusion on an issue which was not live before the panel or on which no evidence or argument had been made would be unfair. But the same judge in *McKeown v British Horse Racing Authority*<sup>8</sup> said:

‘There is in principle no reason why a tribunal including members with relevant experience and a knowledge of the sport in question should not draw on their knowledge and experience of viewing and interpreting video evidence and drawing inferences from it and from the evidence relating to such things as the nature and record of the contestants. Indeed there is every reason why they should be free to do so.’

*... it is possible to argue that too closely aligned expertise may be seen as a dangerous thing.*

### Conclusion

To summarise, therefore, a degree of expertise or, at least, specialism, is a unique selling point of the tribunal system. It is part of its original *raison d'être*, and it is why the appellate judges are prepared to treat the factual findings, predictions and assessments of specialist tribunals with a considerable degree of deference and respect. But the expertise or specialism of a tribunal decision-maker cannot simply be taken for granted and may depend, at least in part, on judicial training and experience acquired over time.

On the other hand, such expertise does not have to be so closely aligned with the subject matter of the case as to give the decision-maker indisputable inside knowledge. Indeed, it is possible to argue that too closely aligned expertise may be seen as a dangerous thing.

When using their specialist insight, tribunals must carefully focus their expert analysis upon the evidence and submissions presented. However, if on the basis of his or her expert view a tribunal member feels constrained to look beyond the evidence for an answer, natural justice demands that the parties (and especially the party adversely affected) should be warned, and given a chance to respond. Indeed, a counsel of perfection would suggest that if, on the basis of his or her expert view rather than on the basis of material received, a tribunal member thinks it right to reject (or even accept) evidence put forward by one or other of the parties, such a warning and opportunity should also be given. After all, the tribunal member may have misunderstood, or be misinformed or out of date.

In 1698, an anonymous author signing himself ‘AB’, and referring to the philosopher and jurist Francis Bacon, wrote:

‘Twas well observed by my Lord Bacon, that a little knowledge is apt to puff up, and make men giddy, but a greater share of it will set them right, and bring them to low and humble thoughts of themselves.’

In our own little niches, some humility is no bad thing.

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<sup>1</sup> C11/01-02 (DLA).

<sup>2</sup> [2010] EWCA Civ 407.

<sup>3</sup> [1998] EWCA Civ 335.

<sup>4</sup> [2002] EWHC 2247 (Admin).

<sup>5</sup> See, for example, *Busmer v SoS Defence* [2004] EWHC 29 (Admin), and *DB v SoS Work and Pensions* [2010] UKUT 144 (AAC).

<sup>6</sup> [2006] EWHC 1250 (Admin).

<sup>7</sup> [2012] EWHC 464 (Admin).

<sup>8</sup> [2010] EWHC 508.

# HEALTH CARE REGULATORS GIVEN CLEAR ROUTE



The joint Law Commissions' final report on the future regulation of health care professionals has profound implications. *David Bleiman* examines some of the report's proposals.

ON 2 APRIL 2014, the joint Law Commissions of England and Wales, Scotland and Northern Ireland published their proposals for the review of UK law relating to the regulation of health care professionals and (in England only) social workers. The Final Report<sup>1</sup> ('the report') and draft Bill cover nine regulatory bodies responsible for 32 professions and 1.44 million professionals.

The aim is to create a clear, modern and effective legal framework. It will have a significant influence on thinking about best practice across a much wider range of professions. Because only health care regularly involves matters of life and death, other professions may nonetheless retain or develop their own distinctive frameworks.

## Relevance for panellists

Health care regulators use hundreds of panellists in fitness-to-practise adjudication. Panellists have a role akin to HMCTS tribunal members and many serve in both capacities. Each regulator has its own statutory basis, with a bewildering variety of detailed regulations. All concerned will benefit from a simplified and consolidated legal framework.

This massive report concludes that regulators should be given powers to make their own rules concerning issues such as professional registration, education, standards and continuing professional development. In most areas, the report says the regulators should have operational autonomy.

This article focuses on the fitness-to-practise function. Many patient groups and lawyers argued that the rules for hearings should be the same no matter which regulator is deciding the case and that inconsistent outcomes are unacceptable. The report agrees that:

'The arguments for consistency are particularly compelling in respect of fitness to practise adjudication, where it is difficult

to justify different professionals being disciplined in different ways for the same misdemeanours or discrepancies existing between the relevant disciplinary procedures.'<sup>2</sup>

## Greater consistency

In law, the regulators are responsible for both the investigation and adjudication of allegations. This has led to criticism that, as standard setters and prosecutors, their independence as adjudicators is open to question. Some argue for an independent adjudicator to conduct all hearings. The General Medical

Council has hived off its adjudication function to the Medical Practitioners Tribunal Service (MPTS) under judicial leadership. Others believe that internal measures can achieve the requisite separation between investigation and adjudication. The report takes this latter path, while signposting a more independent future for adjudication.

I will look at three key areas of the report. What does it mean to say that a professional's fitness to practise is impaired? How should such an allegation be investigated in order to establish

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whether or not it should be referred on for adjudication? What are the essential elements of the adjudication system?

### Overarching objectives

To set the context, let us consider the general objectives of the regulators.

The report proposes that the main objective of each regulator will be to protect, promote and maintain the health, safety and well-being of the public. This is uncontentious. Health care professionals should look after our health and obviously their regulators should share this main objective.

Two further objectives attracted more debate during the consultation. Regulators should promote and maintain public confidence in the profession as well as proper professional standards and conduct. These wider objectives are supportive of the main objective. So why spell them out?

Consultees provided examples of behaviours which undermine confidence in the profession although unconnected to professional conduct, such as the publication of homophobic and racist materials or sexual offences such as rape and downloading child pornography. Many felt that such conduct would always be incompatible with registration as a health care professional even if a criminal sentence had been served or remedial steps taken. So an express public confidence objective is required. But the report concludes that public safety must sit at the top of the hierarchy of objectives and cautions against regulators imposing moral judgments in essentially private matters, saying:

‘We strongly urge the regulators – and their fitness-to-practise panels – to consider

carefully regulatory interventions which do not take some colour from the need to protect the public.’<sup>3</sup>

### Impaired fitness to practise

The law provides that a person’s fitness to carry out their profession may only be treated as impaired by reason of one or more statutory grounds.

The report proposes that the uniform statutory grounds should, in summary, be:

- Deficient professional performance.
- Disgraceful misconduct.
- Inclusion on a barred list.
- A determination by another regulator that fitness to practise is impaired.
- Adverse physical or mental health.
- Insufficient proficiency in the English language.
- Convictions or cautions.
- Certain other court disposals.

This is a long list and these are only the gateways through which an allegation may enter. Whatever the grounds, the facts will require to be proved (see below) and it will also be necessary to show that the proven facts amount to impairment. While the broad headings are uniform, it is proposed that standards of conduct and performance expected of each profession will continue to be set by the separate regulators. The breach of such standards may be taken into account in fitness-to-practise proceedings. So uniformity of procedure does not equate to homogenisation of the distinct professions and their professional codes.

At first sight it appears confusing that, to attract regulatory intervention, my misconduct has

*While the broad headings are uniform, it is proposed that standards of conduct and performance . . . expected of each profession will continue to be set by the separate regulators.*

to be disgraceful whereas my performance has merely to be deficient. One regulatory lawyer commented:

‘I anticipate that panels will struggle with the proposed qualification that any misconduct has to be “disgraceful”. Although we accept that not all matters of misconduct require the intervention of the regulator, our experience in presenting cases suggests that panels find such concepts difficult.’<sup>4</sup>

Having struggled with this myself, on reflection the report provides a sound explanation.

Defining deficient professional performance so broadly will bring misconduct arising in the course of professional duties under that heading. For example, a single instance of negligent treatment will, by statute, meet the definition of deficient performance. This leaves a residue of misconduct possibly unconnected with exercise of the profession. As the report says:

‘The separation of deficient professional performance and disgraceful misconduct has the added advantage that most cases would in future be dealt with as matters of deficient performance. This would emphasise that public safety should be the main justification for regulatory interventions, and that there are limits to intervention based on matters of private conduct and belief...’<sup>5</sup>

The new statutory ground of insufficient proficiency in the use of English will enable regulators to investigate concerns before mistakes happen which have an impact on public health.

Readers may wonder how a statutory ground of adverse health can be reconciled with the Equality Act 2010 and the rights of persons

with disabilities. The report takes this concern seriously but decides reluctantly to retain the health ground. It says that regulators may need to take preventative measures to assist a practitioner before their performance or conduct is affected to an extent falling within one of the other statutory grounds. However, it warns:

‘It would not be open to the regulators to determine that a practitioner is impaired without any evidence of behaviour that calls into question their ability to practise safely. In other words, a diagnosis alone would rarely – if ever – suffice.’<sup>6</sup>

*Readers may wonder how a statutory ground of adverse health can be reconciled with the Equality Act 2010 and the rights of persons with disabilities.*

Panellists will need to be vigilant and keep the provisions of the Equality Act in mind when dealing with cases where the allegation is advanced on grounds of a health condition which comes within the protected characteristic of disability.

#### **Investigation**

The report proposes that vexatious cases or those where five years has elapsed, should not proceed unless it is in the public interest. All cases of criminal convictions resulting

in a custodial sentence should go directly to an adjudication panel. There should be the presumption of removal from the register in respect of very serious criminal convictions such as murder and rape.

The regulators would be given flexibility as to how to investigate allegations. Some may use investigation committees while others may use case examiners.

The test for onward referral to adjudication will in all cases be the realistic prospect test. All cases should be referred if there is a realistic prospect of a finding of impairment, except where it is not in the public interest to do so. The report proposes a wider range of disposals available

at the investigation stage including issuing advice and warnings, agreeing undertakings or voluntary removal. Regulators will also have greater powers to review their own investigation decisions where the case has not been referred to a fitness to practise panel. Grounds for such review would be new information or a materially flawed decision.

Clearly the aim is to speed up the investigation stage so that vexatious or stale cases are closed, while the most serious cases are fast-tracked to adjudication and the rest are promptly and efficiently investigated. This may mean a reduced role for panellists wherever regulators think that they can achieve efficiencies and reduce delays by using case examiners to decide on realistic prospect. This does not detract from the Article 6 rights of registrants, as no determination of their right to practise their profession is made at this investigation stage.

### Adjudication

The report is clear that the adjudication stage must comply with Article 6<sup>7</sup> of the European Convention on Human Rights, without having to take into account rescue by appeal to the courts. The draft Bill therefore specifies the requisite procedural elements in order to achieve internal Article 6 compliance.

All fitness-to-practise hearings will be required to be conducted by at least three members (including at least one lay member). Each regulator will have to establish a body or person responsible for appointments, appraisal and continued development of panellists. The report recommends that appeals against refusal of registration be referred to registration appeals panels which should meet the same procedural standards.

The civil rules of evidence and the civil standard of proof (balance of probabilities) are applied to hearings. Regulators would be required to comply with a request that a hearing takes place in the UK country where the registrant resides or incident took place, unless there are reasons that justify refusing the request. This will assist some regulators to avoid the absurdity of current requirements, for example that a registrant living in Berwick has to attend a hearing in London, rather than in nearby Edinburgh.

Most hearings will be in public but interim order hearings (which consider urgent restrictions

or suspension of practice before the facts of the case have been determined) will now always be in private unless the registrant exercises the right to have the hearing in public. Some regulators are currently required to hold interim order hearings in public. This exposes the registrant to the danger of publicity at an early stage, often during investigations and before the regulator has determined if there is even a case to answer.

The Government will have power to give guidance about procedures, including in the form of model rules. All panels will have the same powers to impose sanctions or disposals including advice, warnings, conditions of practice, suspension and removal from the register.

Immediate orders may be issued pending the outcome of any appeal to the higher courts. Regulators would be required to have systems for imposing and reviewing interim orders.

Statutory rights of appeal against substantive sanctions or interim orders would remain to the High Court in England and Wales, the Court of Session in Scotland and the High Court of Justice in Northern Ireland.

*Most hearings will be in public but interim order hearings . . . will now always be in private unless the registrant exercises the right to have the hearing in public.*

### Objectives of adjudication panels

Panellists will want clarity about their statutory objectives. We are all familiar with the significance of the overriding objective – that cases must be dealt with justly – in the Tribunal Procedure Rules. In their earlier consultation, the Law Commissions had risked a clash of objectives by proposing a paramount duty on regulators to protect the public, sitting alongside an overriding objective for their panels to do justice.

The report responds by softening both descriptors. As we have seen above, protection of the public will be described as the main objective of the regulators. Panels are to have the general objective of dealing with cases fairly and justly. Panels are also to share the other objectives of the regulator, including the main objective.

This is an improvement as the concepts of paramount and overriding which invited a clash of imperatives, have been removed. The report expects panels to consider all the objectives and weigh them in the balance according to the circumstances of the particular case. That makes sense. But going on to say that if there were some tension between the objectives the main objective of public protection would take precedence seems to reintroduce the problem by the back door.

Fortunately, the draft Bill (clause 170) does not include this ranking of panel objectives so this apparent flaw in the report's reasoning should not find its way into the statute.

### The road ahead

The proposed Bill will introduce a much more uniform hearings system, with panels across health care regulation sharing common objectives, procedures and powers.

It will be much easier for panellists to sit for more than one regulator. Regulators may find it easier to cooperate in adjudication, sharing pools

of panellists or arranging common training in common procedures.

The report is tinged with regret that the Office of the Health Professions Adjudicator, established precisely to provide a wholly independent adjudication function, was abolished and that integration with HMCTS is not currently a political option.

A number of legislative measures are therefore proposed to encourage regulators to maintain their progress towards greater independence in adjudication. The Professional Standards Authority is to oversee progress towards greater separation between investigation and adjudication and to provide best practice advice.

The Government is to have regulation-making powers to introduce a new adjudication system for any of the regulators, based on the MPTS. If, at least in the long run, the regulators have their adjudications hived off and run on these lines, panellists will benefit from serving on tribunals by name as well as function, with the advantage of judicial leadership in training, appraisal and continuing professional development.

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<sup>1</sup> Regulation of Health Care Professionals, Regulation of Social Care Professionals in England, Law Com No 345 / Scot Law Com No 237 / NILC 18 (2014).

<sup>2</sup> *Ibid*, para 2.11.

<sup>3</sup> Para 3.15.

<sup>4</sup> Bradley Albuery, response to the Law Commissions' report, Blake Laphorn website, 2 April 2014.

<sup>5</sup> Para 7.16.

<sup>6</sup> Para 7.18.

<sup>7</sup> Article 6(1) of the ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

# MY MIND IS MADE UP, DON'T CONFUSE MATTERS



Research suggests that human beings are capable of repeatedly and consistently making irrational decisions. *Lydia Seymour* analyses examples with advice on how to minimise bias.

**H**OW DO WE ACTUALLY make judicial decisions? It's not an easy question. We can follow the steps of the decision-making process (reading documents, hearing witnesses etc) but it is more difficult to explain how we actually make the decision. That is because our brains do it for us. We might like to think that the process of decision making is an entirely rational process – that we gather all the relevant evidence, decide what to believe, determine the correct law to apply, and then reach a conclusion based solely on those factors.

But do people really behave rationally when they make decisions? Over the last 50 years or so, there have been more and more studies looking at irrationality in decision-making, which show that there are a number of situations in which human beings repeatedly and consistently make irrational decisions.

One of the simplest of these was the following study in relation to financial decision-making.

## **\$3 or 300 cents**

Participants were asked to make various decisions about whether or not to cooperate with each other in a particular scenario. Once they had made their decisions the participants were offered a financial incentive to change their minds. Some were offered \$3 while for others it was 300 cents.

Despite the fact that the value of the two offers was identical, there was a difference in the behaviour of the two groups, with significantly more of the people who were offered 300 cents agreeing to change their minds. It seems that we are influenced by the mere size of the number rather than the actual amount of money.

## **Buying a ticket**

On a similar theme, consider the following two scenarios. What would you answer to these questions?

- 1 Imagine you bought a theatre ticket for £10 but then lost it on your way there. Would you buy a new ticket?
- 2 Now imagine instead that on your way to buying your ticket you lost £10 in the street. Would that stop you buying a ticket?

When people were asked what they would do in these situations, 46% said 'yes' to question 1, while 88% answered yes to question 2. Yet the loss is identical in both cases.

These studies were carried out by a group of behavioural economists interested in how apparently irrational and extraneous factors influence decision-making. They have now moved beyond their original focus on economic choices and into other areas of decision-making. This relatively new area of research has interesting things to say to us as judges.

## **Confirmation bias**

Confirmation bias is the process whereby, once we have formed a view on something, we hear all subsequent information about it in a biased way because we don't want to change our minds. Put another way, when we hear or see something that accords with what we already believe, we believe it very easily, but we tend to reject or ignore information that casts doubt on our views.

Here's a very simple example. The numbers 2, 4, 6 form a sequence. What do you think the next three numbers in the sequence are?

Most people will (slightly suspiciously) ask whether the next number is 8, and if told yes, will go on to say 10 and then maybe 12. If told that these are also correct they will say (still thinking that this is all too easy) that the rule is adding two each time.

In fact there are various possible rules that could be being applied here – one being simply that each subsequent number is greater than the one before. So anyone who suggested the ‘adding two’ rule would be wrong. This feels like a trick, but it isn’t. The participants could easily have checked to see if their rule was correct by asking whether the next number was 7 (or 9, or 57) but they didn’t, because they had already formed the view that the answer was probably ‘adding two’ and it didn’t occur to them to look for evidence that it wasn’t.

That ‘latching on’ to one possibility among many, and then only being open to information which confirms rather than denies your view is confirmation bias. The general principle that can be seen in the ‘2, 4, 6’ example extends well beyond mathematical puzzles and affects much wider aspects of our behaviour.

Here is another example, taken from American author Dan Gardner’s book ‘Risk: The Science and Politics of Fear’.

During the US election in 2004, researchers conducted an experiment on a group of people with strong views about the outcome of the election. Half were committed Democrats and half were committed Republicans. Each group was shown video clips of three statements by George Bush which were contradictory. Perhaps unsurprisingly, when asked to rate how contradictory the statements were, or to suggest reasons for the apparent contradictions, the committed Republicans were a great deal more forgiving and more inclined to ‘explain them

away’ than the committed Democrats. When the two groups were shown three contradictory statements by John Kerry the results reversed – again as would be expected.

The extraordinary thing about this study is not so much that the participants displayed bias in their responses to their more or less favoured political candidate, but the fact that they were shown the video clips while lying in MRI (magnetic resonance imaging) scanners. These showed that the two groups of people used different parts of their brains when they were hearing the clips from ‘their’ candidate from the parts they used when listening to the ‘other side’.

Dan Gardner suggests that this demonstrates that the human brain is ‘hard-wired’ to exhibit confirmation bias. It is almost certain that we are affected by it when making judicial decisions. This isn’t necessarily the sort of bias that we are used to thinking about – that is, bias caused by individual political or religious attitudes, for example, nor anything as crass as preferring claimants to respondents, or believing that

second-hand car salesmen are inherently shift. It is much more complicated than that, and requires constant consideration throughout a hearing.

There are three particularly important aspects of confirmation bias as it applies to judges conducting hearings:

- 1 Actively seeking out evidence that fits what we already believe.
- 2 Interpreting evidence presented to us in a biased way according to our initial views.
- 3 Selective memory and witness evidence.

#### *Actively seeking out evidence*

Looking first at how confirmation bias affects the fundamental question of what evidence even

*It is almost certain that we are affected by [confirmation bias] when making judicial decisions.*

reaches the tribunal, the studies below show that once we have formed a view about something we are keen to seek out evidence that confirms our beliefs and may never even elicit which challenges them.

This is what is happening in the 2, 4, 6 example, and also in the following study.

Participants were told that they were going to meet a stranger and that they needed to find out information about them. Some of them were told that the person might be an extrovert. Other subjects were told that the person might be an introvert. They were then asked to choose questions from a list to ask the person.

The list contained 26 different questions, 11 of which dealt with more extrovert topics (for example, ‘What would you do to liven up things at a party?’), and 10 of which were more introverted questions (for example, ‘What is it about large groups that make you feel uncomfortable?’) The remaining five questions were neutral (for example, ‘What kinds of charities do you contribute to?’)

The results indicated a very strong confirmatory bias. Those who were told that the person they were speaking to might be an extrovert were significantly more likely to select the more ‘extrovert’ questions, with the reverse being true for those told that they might be speaking to an introvert.

As with 2, 4, 6, people are only looking for information which fits the facts that they already believe.

This is an important issue for us as judges – particularly those of us who deal with unrepresented litigants and who sit in tribunals which have an inquisitorial function. People who are not represented are less likely to have

had the resources and understanding necessary to ensure that all of the relevant evidence is put before the tribunal, and part of our role in these circumstances is to use our inquisitorial role to bring that evidence out. But studies on confirmation bias suggest that once we have formed a view we are inherently reluctant to hear evidence that contradicts it, and hence that we may, without even realising it, be selective in the evidence we seek out.

Of course, the problem of confirmation bias has the potential to affect all litigants, represented or not, but there is a particular risk of this aspect of confirmation bias acting against an unrepresented party, because the relevant evidence will never even get before the tribunal.

#### ***Interpreting evidence in a biased way***

Turning to confirmation bias in assessing evidence, and another study by the same authors about introversion and extroversion.

Participants read one week’s events in the life of ‘Jane’. The story was deliberately constructed so that it contained equal numbers of

references to ‘extroverted’ and ‘introverted’ behaviours. For instance, one of the extroverted examples involved Jane in animated conversation with another patient in the doctor’s office; and one of the introverted examples involved Jane spending her office coffee break by herself.

Two days later the participants were told that Jane was being assessed for a new job and were asked to try to recall examples of her behaviour. Half were told that Jane was being considered for a job as a research librarian; half were told that she was being considered for a job selling real estate. The group who were trying to think of examples of behaviour that were relevant to the job as research librarian recalled many more examples of introvert behaviour than extrovert behaviour. The reverse was true for the real estate sales job.

*... people are only looking for information which fits the facts that they already believe.*

The participants were then asked to rate Jane on her suitability for the job. Those who had been asked to evaluate Jane for the research librarian job (and who had recalled many examples of her introverted behaviour) rated her as much more suitable for that position than for the real estate job. And the opposite was true for those who had initially evaluated Jane for the real estate sales job.

Essentially, the participants sought out, and then relied more heavily upon, the evidence that fitted their hypothesis (in this case a stereotype about personality type and suitability for particular jobs) and ignored the evidence that didn't. So despite the fact that the two groups were given precisely the same information at the outset, they ended up forming, and then reinforcing, two completely different views.

### **Selective memory and witness evidence**

It is not only us as judges who are affected by confirmation bias. It may also affect witness evidence in the form of (honest) selective memory. Take the second stage of the 'Jane' study, for example. The participants all found it much easier to access memories of Jane's introverted behaviour when they were thinking about her librarian job and extrovert behaviour when considering her for a job as an estate agent.

Think, for instance, about a case in the Employment Tribunal where the evidence suggests that the claimant has a reputation for making complaints all the time – former colleagues giving evidence may be trying to be honest but they are likely to 'over' recall incidents which support their view of the claimant as a complainer and 'under' recall occasions when the person got on with things without complaint.

Equally, it is easy to see how stereotypical assumptions can become magnified. For example, imagine that there is a stereotype that women with young children are more likely to take time off work at short notice. Selective memory would suggest that an employer who

held that stereotype would be more inclined to remember occasions when women with young children took such time off than when others did. This selective memory would in itself reinforce the stereotype and so on. Clearly this does mean that on any particular occasion the evidence is wrong, just as confirmation bias in a judge may not determine the final outcome. However, they are all interesting and important effects to consider both when looking at our own behaviour and when thinking about witnesses.

### **Conclusion**

I have no magic solution to the problem of confirmation bias, nor a way to ensure that you, personally, are immune to it. But we can consider its effects on judicial decision-making and ways in which we might minimise its effects. We can also be aware of ways in which it could be used in a tribunal setting. Certainly, the advocates who appear before us are (perhaps instinctively rather than deliberately) highly aware of the importance of spinning a case towards their client from the start – think about the use of opening notes or speeches to set the scene in favour of their client, or pointless arguments about the precise terms of chronologies as examples of this.

Perhaps one way to limit the effect of confirmation bias can be taken from the simplest of the above examples – the 2, 4, 6 study – in which people asked only the questions which confirmed their existing views, rather asking the questions that would have demonstrated that they were wrong. As judges we can try to avoid this in a judicial setting by taking a step back from the evidence that has been presented, and thinking for a moment about what sort of evidence could establish (or defend) the claim that the party is making. This approach would help us to ask the questions which would elicit that evidence (if it exists) rather than only those which confirm our initial view.

**Lydia Seymour sits as a part-time employment judge in the London South region.**



# THE RICH SEAM OF A GENUINE COMMITMENT



**Jeremy Cooper** illustrates the wide range of methods used to ensure that the social context in which judging occurs plays a central role in training.

WE ARE ALL profoundly influenced by our social present. Each of us is a product of our social past. This means that the nation in which we live, the groups to which we belong, and the views that such groups embrace can profoundly influence the way we see the world.

When the Judicial College came into existence in 2011, the Board stated its vision for the College to become ‘a world leader in judicial training’.<sup>1</sup> As part of this process the Board defined judicial training as incorporating three inalienable features:<sup>2</sup>

- Ensuring expertise in relevant law and procedure.
- Training judges in judicial skills, including judgecraft.
- Training in the social context of judging (which includes diversity).

The European Commission 2014 report *Best Practices in the Training of Judges in Europe* commends the Judicial College’s triple-pronged definition of judicial training as a ‘best training practice’ that could well be adopted by other judicial training institutions across the European Union. The Commission considers that the approach towards this issue adopted by the College provides an excellent template to ensure that the College’s strategic vision and associated policies are fully entrenched in training practices. Without such a commitment it can be only too easy for training programmes to focus unduly on substantive and technical issues and lose sight of the crucial importance of a judge’s understanding the social context in which he or she is sitting in judgement.

*... programme designers are showing ingenuity and determination in the ways in which they respond to new challenges of social context.*

The Judicial College Tribunals’ Committee was invited by the College Board to verify and monitor how in practical terms this duty to train in the social context of judging is achieved. Following a lengthy exercise, the College Board discovered a rich seam of innovative training practices operating in a number of tribunal jurisdictions providing reassurance that much care is taken when constructing tribunal training events to ensure that the social context in which judging occurs plays a central role in the training

activities.<sup>3</sup> This article illustrates the wide range of methods by which this is achieved. It is clear that this is a dynamic rather than a static process, and programme designers are showing ingenuity and determination in the ways in which they respond to new challenges of social context.

## The First-tier Tribunal

Many tribunal training courses make use of one or more of the following techniques in their approach to social context training:

- Although tribunal training programmes remain under judicial direction and control, a number of jurisdictions invite speakers to address delegates on social issue of relevance to their work and to enter into more informal discussions with smaller groups of trainees in the course of the event. The list is voluminous and includes disabled users, specialist academics, deaf interpreters, audiologists, speech and language therapists, and representatives of specialist bodies such as the police, the Probation Service, Stonewall,

the Scottish Transgender Alliance, Southall Black Sisters, the Ethnic Minority Law Centre, Combat Stress and the British Legion.

- The Lord Chief Justice has recently acknowledged the inevitable need for hearings to become more inquisitorial where there is an increase in litigants in person. ‘Placing the user first’ is the mantra underpinning the great majority of tribunal training which reflects the fact that most tribunals tend to be inquisitorial and that the majority of users are unrepresented. Such training can only be conducted from the viewpoint of the user, which requires an understanding of the social context of their lives.
  - Challenging common misconceptions in the security of a small-group training forum through guided discussions of case studies, analysis of unconscious bias in individual participants, and its relevance to issues of recusal is a frequently used technique made possible by the College’s guarantee that the Chatham House Rule applies to all training events, and that they are conducted in a way that enable trainees to be open and honest with one another.<sup>4</sup>
  - Ensuring office-holders are trained to build flexibility into the conduct of hearings to respond to disability, or lack of communication skills or other disadvantages experienced by tribunal users at a hearing is widespread, and is a technique further expanded a developed in the Equal Treatment Bench Book.
  - Tribunal trainers encourage judges to engage directly with the expertise of specialist tribunal members with particular understanding of social context issues (medical and psychiatrist members, educationalist and social worker members etc) both in training programmes and in managing a hearing.
  - Using observations of the conduct of other hearings as a format for self-assessment
- regarding response to social context issues is used in some jurisdictions as a supplementary form of training. For example, the mental health tribunal runs a training session entitled *The More Productive Tribunal* which focuses on the range of tribunal skills required to understand and address the negative impact of social background of some users on their capacity to experience a fair hearing.
- Some jurisdictions provide special training sessions on ‘communicating with vulnerable adults’ and the use of language (including body language) generally as a facilitation of a fair hearing. Much emphasis is given more generally in training events to ensure that, in hearings and any prior or subsequent documentation, the language used (both oral, and written) is easily understandable by parties and that all reasonable adjustments are made to facilitate parties full participation in hearings.
  - The Special Educational Needs Tribunal has invited training delegates to examine the forms that are used by users applying to a tribunal, to provide feedback on their (in)appropriateness in certain social contexts with a view to changing them if necessary.
  - Several jurisdictions provide special sessions on equal treatment issues at induction programmes. The College is also in the process of developing an online orientation programme for all newly appointed judges. This programme specifically addresses the judges understanding of issues of social context, including a self-test on how much the new judge actually knows about a range of social issues as they affect UK citizens.
  - Particularly good examples of using complex case studies that concentrate specifically on problems that arise from different social contexts can be found in Health, Education and Social Care and the Property Chambers.

- Some jurisdictions provide compulsory, tailored training for certain categories of adjudication (e.g. discrimination cases in the Employment Tribunal and specialist ‘tickets’ in the Social Security and Child Support Tribunal).
- The Employment Tribunal in Scotland provides a balanced and well-nuanced model of training judges and members in the social context of their work. As in England and Wales, all judges and members have to undergo specific training before being allowed to sit on discrimination cases. Typically such training will devote a full two days to awareness issues, with the stated objectives of raising awareness of the dynamics of inequality as they relate to the protected characteristics; exploring the impact of this on the panels’ interactions with witnesses and parties; ensuring that participants are familiar with the current concepts in equality and the way that this is reflected in language; exploring when and how it is appropriate to challenge language and behaviour; and exploring in more depth, three equality themes: lesbian, gay and bisexual issues, transgender issues and mental ill-health. In addition, most training events include consideration of the wider social context in which judging takes places, including sessions on ethnic minority claimants – the *Interface between Employment and Immigration Law and Cultural Factors as a Service Use* and *When Law and Religion Meet: the Limits of Pluralism*, the latter session discussing the particular issues affecting Muslim employees in the workplace and in accessing the justice system.

*‘I pause before the programme is signed off to ask whether there is something included about social context, a phrase I take to include diversity and equal opportunities.’*

‘Whenever I am planning a training day, I pause before the programme is signed off to ask whether there is something included about social context, a phrase I take to include diversity and equal opportunities. This is obviously different from black letter law – although sometimes it can be woven in to sessions dealing with black letter law especially if these are syndicate discussions of vignettes. Recent examples include in the Gambling tribunal, a talk from a leading academic about problem gambling, its extent and nature; in the Information Rights Chamber a session looking at the perception of the tribunal by litigants in

person. We have also developed a series of vignettes to promote discussion as to how best the tribunal can be flexible when dealing with people from diverse backgrounds, incorporated into a module on recusal, which includes a personal challenge to judges to identify what biases they naturally have and how to work to overcome them.’

### **The Upper Tribunal**

Social context training is by no means limited to the First-tier Tribunal. The subject matter which

forms some 80% of the work of the Upper Tribunal Administrative Appeals Chamber comprises Social Security and Child Support cases on appeal from the Social Entitlement Chamber. A significant part of the remainder of the work relates to criminal injuries compensation cases, and a large number of those appearing before the tribunal have been the victims of violent crime including violent sexual assault, and enduring psychological injuries are frequent. Many of those appealing to the Upper Tribunal are unrepresented, and where oral hearings are held (in only about 20% of cases) judges have to be particularly aware of the

The President of the General Regulatory Chamber<sup>5</sup> reports a number of interesting approaches adopted in the training events in that particular chamber:

difficulties which litigants in person encounter in this jurisdiction which is concerned with errors of law and not factual matters, which many come prepared to argue.

In the Upper Tribunal training, it is almost inevitable that the practical examples used as vehicles to discuss the legal technicalities (and the vast majority of the work of this chamber is appellate work, involving legal interpretation rather than fact-finding, so they must spend time dealing with the technical legal issues) are based on the circumstances of those who form the ‘client base’. The latter are typically claiming benefits due to ill-health and disability, age or a problem finding or retaining work. This in turn is frequently due to problems with literacy, language skills and other difficulties that may place them on the margins of society.

Social context training in the Immigration and Asylum Chambers (Upper and First-tier) is incorporated in three ways.

First, by responding to specific training needs. In recent years, the chambers have brought in external expertise to assist in training judges in relation to sexual orientation issues, transgender issues and rape victims, victims of trafficking and medical reports. The experts they have made particular use of are Stonewall, Nuffield Foundation researchers, Southall Black Sisters, specialists from relevant Home Office and police units and Freedom from Torture (formerly the Medical Foundation).

Secondly, by challenging common misconceptions through guided discussions, where small groups of judicial office-holders discuss case scenarios. Those scenarios often contain elements that will challenge preconceptions and stereotypes with the

aim of helping judges deal with such issues dispassionately and without reliance on their own opinions or prejudices.

Thirdly, by providing programmes on judicial ethics. The fact that there is significant public interest in immigration and asylum issues means the work of these chambers is very much in the public eye. The chambers provide their judges and other members with regular advice and training regarding judicial ethics, including dealing with the media. Such training requires direct and indirect reference to social context issues.<sup>6</sup>

*The fact that there is significant public interest in immigration and asylum issues means the work of these Chambers is very much in the public eye.*

### Conclusion

Although the above examples present only a partial snapshot of the overall training provided through the Judicial College to judicial office-holders in HMCTS tribunals, it leaves us nevertheless with a compelling picture of the College’s genuine commitment to and engagement with issues of social context. The examples provided are dynamic, imaginative, and wide ranging in their levels of penetration. I am confident that this

commitment will continue along similar lines as new training programmes are designed and developed.

**Professor Jeremy Cooper is the Judicial College’s Tribunals Director of Training.**

<sup>1</sup> College Strategy Vision para 12.

<sup>2</sup> College Strategy 2011–14 paras 15 and 16.

<sup>3</sup> The courts are currently identifying the range of their social context training via the feedback and evaluation process.

<sup>4</sup> The most effective judicial training is that which requires active participation by judicial office-holders in a supportive environment and gives them the opportunity to practise and develop skills: Judicial College Strategy para 22.

<sup>5</sup> Nicholas Warren.

<sup>6</sup> The College also runs a very successful cross-jurisdictional course three times a year on the topic of *The Business of Judging* which also incorporates these issues.

# ‘WE ALL MAKE MISTAKES’

**Paula Gray** offers her ‘10 top tips’ on how tribunal judges can avoid having their decisions overturned.



UNTIL ABOUT a year ago I bought into the myth that the wicked, conniving judges of the Upper Tribunal were out to get the blameless, hard-working judges of the First-tier Tribunal. Indeed, my vision was of one of them manning the guillotine and the others sitting, like the tricoteuses, watching for the heads to roll and gloating. What happened to dispel that myth? Well, of course I learned better after I was appointed to the UT, or, some may say, after I treacherously changed sides. Now, as I prepare an induction course for yet more newly appointed potential tricoteuses, despite my many inadequacies I feel that I am sufficiently fledged to share some home truths. So this is, put simply, my 10 top tips to avoid getting turned over!

## Fact-finding

First, believe me, the UT have enormous respect for the fact-finding jurisdiction of the FTT. Actually, we love your fact-finding role so much that we wish you would do more of it . . . a lot more. Far and away the main reason FTT decisions are overturned is inadequate fact-finding. Sometimes there is none at all, merely a recitation of the evidence without an explanation of what you made of it. What you make of the evidence constitutes your facts. We like to say that mere disagreement with the facts found is not a point of law. If you tell us what those facts are, and if they were available for you to find on the evidence before you, we will not wade in . . . unless, of course, you have not adequately explained how you arrived at them. No longer can we follow the advice of Lord Mansfield: ‘Never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.’

The modern doctrine is set out well in *Bassano v Battista* [2007] EWCA Civ 370 at para 28:

‘The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost.’

Your reasoning does not have to be long or complicated. It simply has to justify why you accepted certain evidence and rejected other evidence or, if you drew inferences from the information before you, why you came to your conclusions. And it is a test of adequacy, not a test of perfection; we genuinely do appreciate that this is a workaday document and not a candidate for a Pulitzer Prize.

## When less is more

What about the law? My own view is that, generally speaking, the less said about the law the better. With straightforward propositions such as the standard of proof, we actually will assume that you have applied the civil standard unless you tell us otherwise. On such matters, less is generally more. So far as the more complex legal propositions are concerned, there is a very good argument that quoting tracts of law is best avoided on the basis that the parties will probably not understand it and the UT ought to know it already. If you do state the law, however, make sure you do it accurately; if you try to summarise a statutory provision it may be unclear whether or not you applied the proper legal test.

Other than the lack of fact-finding, certain basic howlers will lead to a set-aside. We all use cut-and-paste up to a point. The key is to proof read. Then do it again. We are not going to set you aside for grammatical mistakes but if you consistently refer to Mr Smith in Mrs Jones’s

decision, with the associated confusion over personal pronouns, it is very hard to feel that she has had a fair deal.

We are really asking ourselves the following questions. Have you addressed the central issues? Have you made factual findings, rather than simply restating the evidence or the statutory tests? Have you explained why you came to your conclusions? Will the parties understand it? On the latter issue, I pray in aid Lord Reid:

‘We are here to serve the public, the common ordinary reasonable man . . . What he wants and will appreciate is an explanation in simple terms which he can understand. Technicalities and jargon are all very well among ourselves . . . But in the end if you cannot explain your result in simple English there is probably something wrong with it.’

If the UT can tick the boxes for the above questions, you are pretty safe. The three Ws are a basic checklist. Who won? What was decided? Why? Trite but true.

### Helpful input

In a fact-finding jurisdiction when you are sitting with another member who has particular expertise, keeping a good note of their input will help you a great deal when you come to write up. Do not, however, include your deliberations on the record of proceedings, which may be disclosable to the parties; you would not allow them to sit in and listen while you discuss your decision. Like your preliminary notes, any note of your deliberations is really part of the preparation of your judgment, and as such should not be disclosed: (*McIntyre v Parole Board* [2013] EWHC 1969 (Admin)).

Do not pussyfoot. If you start every sentence with ‘On balance we found that . . .’ you will soon lose the confidence of your audience. Your decision has been arrived at by an expert tribunal

following a full evaluation of the evidence; so say it as if you mean it. If you did not believe the appellant you must say that, and honestly, but choose your words with care; do not be unkind. Many tribunal jurisdictions deal with vulnerable people who, even if they have not been wholly frank with us, have enough problems without us destroying the little dignity they may have left. After all, if we make a mistake and are overturned we would rather that it was done with the kid gloves than the iron fist.

If you are overturned, do console yourself with the fact that we are all in the same boat, and that I am sitting here writing this just waiting for the Court of Appeal to give me a good mauling. As Lady Hale said, in the quotation that forms the headline of this article: ‘We all make mistakes.’<sup>1</sup>

Finally, let me distil this into the promised 10 top tips for judgment writing:

- 1 Good notes are the start.
- 2 Use the expertise of the tribunal.
- 3 Evaluate the evidence.
- 4 Find (and set out) the facts.
- 5 Keep the law to a minimum.
- 6 Avoid formulaic reasons.
- 7 Say it as if you mean it – but be temperate.
- 8 Check for the three Ws: who, what, why.
- 9 Proof read for consistency and issues of cut-and-paste.
- 10 If you have done the above, don’t worry – we all make mistakes.

**Paula Gray sits in the Upper Tribunal (Administrative Appeals Chamber). She adds: ‘I speak only for myself and I cannot, of course, comment upon any other chambers of the UT.’**

<sup>1</sup> *Cart v Upper Tribunal* [2011] UKSC 28, Lady Hale [37].



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## AIMS AND SCOPE

- 1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
- 2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
- 3 To provide a link between all those who serve on tribunals.
- 4 To provide readers with material in an interesting, lively and informative style.
- 5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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