

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.

HOW 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

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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.

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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.

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