

PERSONAL VALUES: inevitable aids or obstacles to neutrality ?

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Aims of this Session

- **To explore what helps and hinders effective decision-making**
- **To recognise some common cognitive illusions**
- **To perceive how our personal values and factors such as fatigue intrude upon fact-finding**
- **To explore what tribunal officers can do about these phenomena**



INTRODUCTION

- Think for a few moments about a particular judicial or tribunal officer you have encountered whose rigid views have caused difficulties
- What do you think limited their viewpoints?
- Now discuss your thoughts with the person sitting next to you

Judicial recusal rules concentrate on ***appearance*** of bias

Ebner's Case: disqualification based upon “personal, social, financial or ideological association”

We need to go beyond appearances because:

- Duties to disclose and recuse apply as much to a biased trappist as a chatterbox
- Judges and tribunal officers aspire to be unbiased adjudicators
- Not all biases are bad
- All humans are prone to having their perception and judgment skewed by ***unconscious*** and ***inherent*** predispositions to error

Stanford Law Review survey of US asylum adjudications

- Female judges 44% more likely to grant asylum than male
- 16% of those without legal representation were successful, compared to 40% of those legally represented
- The longer the judge worked for the government, the lower the grant rate
- **Does the survey reveal anything to be concerned about?**

R v RDS Canada

[(1997) 3 SCR

484]

Facts:

- A youth tried for assaulting a police officer
- Police officer was the only prosecution witness
- Prosecutor argued “Why would the officer lie?”
- Trial judge acquits
- Judge’s reasons include “Police officers have been known to mislead the court in the past.”
- The prosecution appeals.

What is the legal issue?



R v RDS (continued)

Does the framing of that issue change if the judge added:

“Police officers do overreact, particularly when they are dealing with non-white groups.”

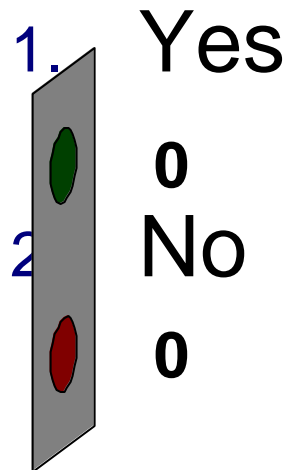
R v RDS (continued)


Does your perception of the issues change when told:

- the youth was black
- the police officer was white
- the trial judge was the only black judge in Nova Scotia?

Should the trial judge's decision to acquit have been upheld ?

(clickers)





How important is it that judges and
tribunal officers bring

- diverse life experiences
- diverse attitudes

to their tasks?




Cognitive illusions

The following 3 Cognitive Reflection Tests
(CRTs)
were designed to distinguish
intuitive from
deliberative
mental processing

A bat and ball cost \$1.10 in total.
The bat costs \$1.00 more than the ball.
How much does the ball cost?

- | | | |
|----|----------|---|
| 1. | 1 cent | 0 |
| 2. | 2 cents | 0 |
| 3. | 5 cents | 0 |
| 4. | 10 cents | 0 |
| 5. | 12 cents | 0 |
| 6. | 15 cents | 0 |
| 7. | 20 cents | 0 |
| 8. | 90 cents | 0 |
| 9. | 1 dollar | 0 |




If it takes 5 machines 5 minutes
to make 5 widgets,
how long would it take 100 machines
to make 100 widgets?

1. 1 minute
2. 2 minutes
3. 5 minutes
4. 7 minutes
5. 10 minutes
6. 15 minutes
7. 20 minutes
8. 30 minutes
9. 100 minutes

In a lake, there is a patch of lily pads.
Every day, the patch doubles in size.
If it takes 48 days for the patch to cover the
entire lake, how long would it take it for the
patch to cover half the lake?

- | | | |
|----|---------|---|
| 1. | 7 days | 0 |
| 2. | 10 days | 0 |
| 3. | 14 days | 0 |
| 4. | 24 days | 0 |
| 5. | 38 days | 0 |
| 6. | 47 days | 0 |
| 7. | 52 days | 0 |



The CRT measures “cognitive reflection”

ie the ability or disposition to **resist** reporting the response that first comes to mind.

Most people are unable or unwilling to resist the impulsive response.

CRT taken by 250 Circuit Judges in Florida


- average score of 1.23 out of a possible 3
- 30% got none right
- 31% got 1 right
- 23% got 2 right
- 14% got 3 right

This was lower than the 17% found from testing all subjects



Shane Frederick, who devised the CRT, found that:

- Adults perform poorly on the CRT even though the questions are simple on reflection
- The more complex questions are better dealt with
- Even those who responded correctly often considered the intuitive answer first
- Those who select intuitive answers more likely to see the questions as easy



We would go crazy if we did not use mental shortcuts all the time.


Intuitive answers are not necessarily wrong



“Heuristics”: Greek heuriskein, to discover

Experience-based techniques that help in problem solving, rules of thumb, intuitive methods, simple common sense


Mental shortcuts for making complex decisions



The **problem** is that they lie under our radar screen **AND** they can create cognitive illusions of judgment

“Just as certain patterns of visual stimuli can fool people’s eyesight, leading them to see images that are not really present, certain fact patterns can fool people’s judgment, leading them to believe things that are not really true. The systematic nature of the errors can be analogized to the sort of errors that an expert marksman makes if his rifle sight is out of alignment: his shots land in a tight cluster, but away from the bullseye.”

[Guthrie, Rachlinski and Wistrich, “Judging by heuristic: Cognitive illusions in judicial decision making” (2002) 86 *Judicature* 44]



Study after study shows that no group is immune from cognitive or heuristic illusions

The following illusions are selected because of their relevance to the assessment of witnesses and fact-finding generally:

- ***Egocentric biases***
- ***Hindsight illusion***
- ***Framing biases***
- ***Anchoring***
- ***Halo effect***



We pay attention to what is...

- ***Accessible***
- ***Familiar***
- ***Memorable***
- ***Recent***
- ***First or last***
- ***Fits our own belief system***
- ***Scarce, special***
- ***Visual and simple***

THE ISRAELI PAROLE JUDGE STUDY

- Eight judges spend entire days on parole applications listed randomly
- Each matter averages 6 minutes
- Overall 35% of requests are approved

- Three food breaks are taken (morning and afternoon tea and lunch)
- After food, approvals spike to 65%
- Thereafter, approval rate drops steadily to almost zero, before next break

What does this tell us about:

- The impact of fatigue and hunger on “sound” decision-making?
- The impact of default rules (here, unless persuaded, refuse application)?
- Equal justice?



In Summary

- Know yourself and your own biases/pitfalls
- Keep energy levels up
- Think about thought processes to avoid foolish errors
- Suspend judgment as long as practicable
- Avoid immediate ex tempore decisions unless really sure of reasons