The Trial Lawyer's Guide to Cognitive Biases

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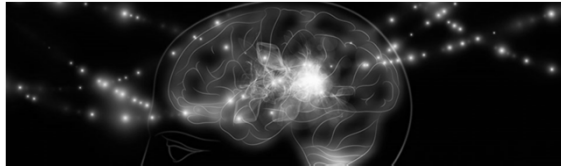
TRIAL LAWYERS' GUIDE TO COGNITIVE BIASES

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MEMORY BIASES

ROSY RETROSPECTIVE

Definition – Recalling a past event more positively than when the event occurred.

Example – Study performed in 1992 by Robert Sutton asked subjects to rate their experience during a trip to Disney World. Subjects remembered the experience more positively afterwards than during (hot, tired, cranky kids, average food) and after.

Application – Witnesses' memories of events are traditionally more positive than what they experienced at the time.

PEAK END RULE

Definition – Experiences are remembered not in terms of the entirety of the event but in highs and lows.

Example – Study performed in 1993 by Kahneman, et al. submerged subjects' hands in 14° water for 60 seconds, and the second set of subjects submerged hands in 14° water for 60 seconds and an additional 30 seconds at 15°. The study found that the second set had a favorable memory.

Application – Pain and suffering damages remembered differently for parties who have seen even slight improvement at the time of trial.

EGOCENTRIC BIAS

Definition – Recalling the past in a self-serving manner.

Example – Experiment conducted in 1978 in by Ross and Sicoly examined graduate students' recollection of their contributions to their theses as compared to their supervisors. It was determined that the students were "cognitively self-focused" meaning that "self-generated inputs [were] likely to be more available in recall."

Application - Parties in comparative negligence scenarios will recall an incident and attribute more blame to others than what is objectively true.

LEVELING AND SHARPENING

Definition – Memory distortion that is based upon details which are either emphasized or discounted depending upon attitudes of subject.

Example – 2001 study by Ganske and Hebl showed subjects two stories, John's Story and Sylvia's Story. The stories were identical except with respect to name and gender pronouns. The story:

"John received a letter in the mail notifying him that he had lost the Texas State Achievement in Math Competition. He had wanted to win and was unhappy with the results. He had been the best student in his math class last year. Losing really hurt his self-esteem. He found out that Terry Browning had done better than him. He hated Terry Browning for that. To make himself feel better he cried, baked cookies, beat pillows, kicked something, took a long bath, and talked to his best friend. After that, he went to the mall where he shopped and played video games in the arcade until he had beaten all the records. He then went running and came home to watch The Princess Bride."

LEVELING AND SHARPENING

Gender leveling students forgot that Sylvia hated Terry (67%), beat pillows (83%), and went running (92%). Fifty-four percent of students added information consistent with female stereotypes. For instance, students added that Sylvia "hugged her teddy bear," "complained and pouted," "shopped all day long," and "worried about her weight."

Gender leveling students forgot that John cried (89%), took a long bath (85%), baked cookies (67%), and talked to his best friend (89%). Forty-four percent of students added information consistent with male stereotypes. For instance, students added that John "played violent video games," "became very aggressive," "played basketball," "worked out," "broke things," "beat his head against the wall," and "drank a beer."

Application – Eyewitness' emphasize aspects of accounts which expectations and discount those aspects of the event which do not fit what is anticipated.

CONTEXT EFFECT

Definition – Out of context memories are more difficult to recall than memories in context.

Example – A 1975 study by Godden & Baddeley asked subjects to learn words under 4 conditions – learning words on land and recalling on land, learning words on land, recalling under water; learning under water recalling under water, learning under water, recall on land. In the underwater condition this was at 20ft below surface. Study revealed that approximately 50% showed better recall when learning and recall were under the same condition, and 40% more words were misremembered under different conditions. In other words, learning on land were better able to recall on land as compared to learning the words on land and recalling underwater.

Application – Pyschodrama is an effective tool to assist with witnesses' memory recall.

ILLUSION OF TRUTH EFFECT

Definition – People are more likely to believe a statement or sentiment that they've heard before, even once (otherwise known as cognitive fluency).

Example – Several studies have shown that familiarity is associated with truth while complex disfluency is associated with a cognitive alarm wherein people exhibit wariness and discomfort.

Application – Litigation themes need to incorporate universally held beliefs to anchor jurors to your position.

TELESCOPING EFFECT

Definition – People recall recent events being more distant and distant events being more recent.

Example – Study led by Brown et al. establish that people estimate dates (rather than remember them) based upon the level of detail recalled. Another study led by Thompson indicated that people estimate events based upon the number of events that have personally occurred since that time.

Application – During discovery depositions explore expressions like "all the time" and "everyday" which tend to cue telescoping because there is no anchor event. To avoid telescoping, ask specific questions which establishes temporal parameters.

VON RESTORFF EFFECT

Definition – Easier to recall items that stand out.

Example – Study in 1933 by Hedwig von Restorff conducted memory experiments such as:

- Baseball
- Football

FIRE

- Hockey
- Basketball
- Soccer
- Golf.

Application – When presenting critical information to a jury, make it stand out.

DEESE/ROEDIGER-MCDERMOTT PARADIGM

Definition – Tendency to misremember the inclusion of thematically related words in a list.

Example – Subjects were given a series of words such as "table, couch, lamp, and desk." Participants reported related words which were not presented such as "chair" suggesting that they heard the tester say these words.

Application – Incorrect positive responses or false memories may be more prevalent in deposition testimony under these conditions.

DECISION MAKING BIASES

FRAMING

Definition – Factually equivalent information leads to differing outcomes depending upon how the information is phrased.

Example – Vrij conducted a study which asked subjects "about how fast were the cars traveling when they contacted each other?" Other subjects were asked the same question except the word "contacted" was replace with "hit," "bumped," "collided" or "smashed." The speeds were 31, 34, 38, 39, and 40, respectively. A week later 32% of respondents who were given the "smashed" condition also stated that they had seen broken glass at the crash site, even there was none.

Application – Framing a question properly can have a dramatic influence on a witness' memory and a juror's perception of the case.

HYPERBOLIC DISCOUNTING

Definition – Tendency to discount greater reward for immediate gains and minor harm for greater risk of harm in the future.

Example – (See Graphs)

HYPERBOLIC DISCOUNTING

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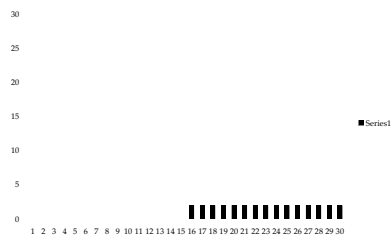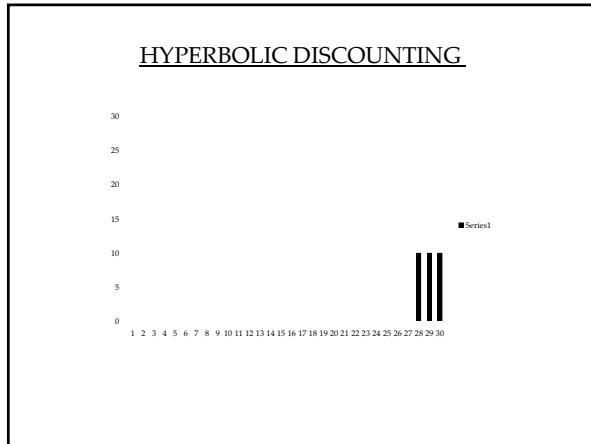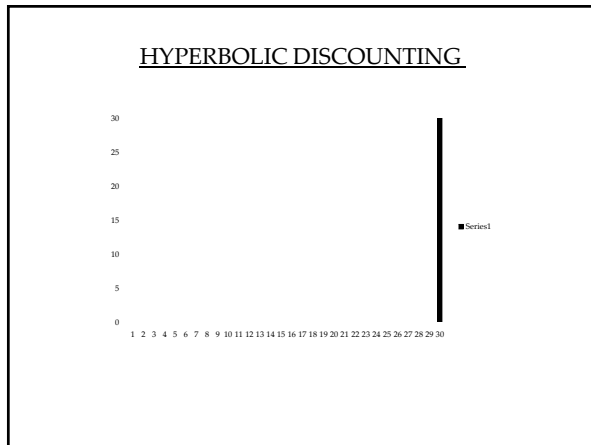
HYPERBOLIC DISCOUNTING

Application –A plaintiff is more likely to accept a lesser award immediately than accept a greater reward over time, and a defendant is more likely to accept a larger award later than a lesser award immediately.

OMISSION BIAS

Definition – The tendency to prefer harmful omissions over harmful commissions.

Example – A study by Ritov and Baron in 1990 considered attitudes toward vaccinations. Subjects were less likely to accept some risk of death or serious side effects from a vaccine, when the alternative was a greater risk of the same outcome without vaccinations.

Application – Damage awards are greatest when alleging both acts of commission and omission and lowest when alleging acts of omission only. Kiser, R. Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients. Palo Alto: Springer, 2010, p. 73.

CONJUNCTIVE FALLACY

Definition – The conjunction fallacy assumes a higher probability to the conjunction than its constituents.

Example - Linda is thirty-one years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in antinuclear demonstrations. Now, which alternative is more probable: 1.) Linda is a bank teller; or 2.) Linda is a bank teller and is active in the feminist movement? See Kahneman, D. Thinking, Fast and Slow. New York: Macmillan, 2011.

Application – Juries considering that which is more or less probable may be easily swayed by preconceived ideas rather than data and probability.

OUTCOME BIAS

Definition – The tendency to judge a decision based upon the outcome as opposed the factors that led to the decision.

Example – Barron and Hershey's study in 1988 concluded that reasonable decisions are criticized by Monday-morning quarterbacks who think they might have decided otherwise, and that decision makers end up being punished for their bad luck.

Application - Subjects judged a driver as more `responsible' for an accident when the damage was more severe. Walster (1966).

IRRATIONAL ESCALATION OF COMMITMENT

Definition – Notion that when facing increasingly negative outcomes, people continue the same path because of the sunken costs already expended (AKA sunken cost fallacy).

Example – "Dollar auction." A dollar is offered for sale to the highest bidder. The highest bidder buys the dollar, and the second highest bidder has to pay his bid. After 99 cents there is no chance for a profit. The bid typically continue between the two highest bidders because they can offset their losses by winning the dollar. The auction generally ends with one bidder accepting the larger loss.

Application – Past attorneys' fees or costs can influence settlement decisions particularly when the American Rule applies to the lawsuit.

INTERLOPER EFFECT/CONSULTATION PARADOX

Definition – Tendency to value the opinion of a third party as objective, unbiased and without motive.

Example – In a personal injury suit, the parties agree to alternative dispute resolution. An "independent" mediator hears the parties' positions and then provides her "objective" and "unbiased" thoughts on the case. Dependent upon this interloper's opinion, the plaintiff accepts far less than they are entitled or the defendant far more than their actual exposure.

Application – Predictive analytics may provide better predictors of case outcomes than a single interloper's opinion.

NEGATIVITY BIAS

Definition – Individuals are more likely to remember negative thoughts or feelings than positive events.

Example – Study by Cacioppo showed people pictures of objects typical of positive feelings, neutral feelings, and then those which invoke negative feelings while recording brain's electrical activity under fMRI scans. Subjects reacted more intensely to stimuli deemed negative.

Application – Carrots can be less effective than sticks in that people generally learn more from negative experiences than positive ones.

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Application – Carrots can be less effective than sticks in litigation because people generally recall more and learn more from negative experiences than positive ones.

EXPECTANCY BIAS

Definition – The tendency to allow assumptions to influence results.

Example – Study by Rosenthal and Fode in 1963 tested the effects of experimenter expectancy. Two sets of subjects were told that rats were genetically bred to be "maze dull" or "maze bright" even though all rats were ordinary lab rats. The rats were randomly classified as "dull" or "bright." The results showed that "bright" rats ran mazes more quickly than "dull" rats.

Application – Attorneys' and more importantly judges' beliefs may be revealed to jurors nonverbally through micro behaviors.

MORAL CREDENTIAL EFFECT

Definition – A track record of moral behavior and decision making has the tendency to increase the likelihood of future immoral decision making which is "believed" to be moral.

Example – Study by in 2001 by Monin and Miller found that subjects who disagreed with blatantly sexist statements were more likely to favor a man for a stereotypically male position.

Application – Defense attorneys may have difficulty persuading their generally moral client to accept a reasonable settlement because the defendant feels the consequence of one wrong is disproportionate to a life of otherwise good behavior.

ENDOWMENT EFFECT

Definition – The tendency to demand more to give up an item than one would pay to acquire it.

Example – In a 1990 study by Kahneman, subjects demanded a higher price for a coffee mug that they had been given ($7), than they placed on a mug of equal quality they did not own ($3).

Application – In cases of eminent domain or adverse possession, unnecessary conflict will likely arise in the mind of the landowner who may believe the land's value exceeds the offer.

BELIEF BIASES

SURVIVORSHIP BIAS

Definition – The tendency to concentrate on winners of a process while ignoring the losers.

Example – In World War II, the Army attempted to make bombers safer. Engineers examined planes that had returned damaged. The damage was clustered in the wings, body and rear gunner. Engineers advised the Army to reinforce these areas. A statistician named Abraham Wald pointed out that the planes survived this damage, and it was the rest of the plane which required reinforcement.

Application – In considering legal research, lawyers may disproportionately focus on decisions which are favorable rather than cases which are unfavorable but may be better predictors of outcome.

CLUSTERING ILLUSION

Definition – The tendency to interpret patterns where no patterns exist.

Example – Study done by Clarke in 1946 showed impact of V2 rockets in London was effectively random despite Londoners belief that patterns in rocket strikes existed.

Application – AI and big data analytics can assist attorneys in eliminating false patterns in decisional law and verdicts.

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DISREGARD OF REGRESSION TOWARD MEAN

Definition – Tendency to believe that extreme performance will continue.

Example – Countless studies have shown that "hot-hand" streaks are an illusion based upon arbitrary end points.

Application – Avoid small sample sizes. Courts may arbitrarily limit discovery based upon seemingly reasonable temporal endpoints in disputes over lost business profits, emotional distress, etc. which may exclude the true mean.

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HAWTHORNE EFFECT

Definition – The tendency for an individual to change their behavior because they are aware that they are being studied.

Example – Hawthorne Work commissioned studies to determine if the level of light in its building impacted productivity. The workers increased productivity when any variable was manipulated because the workers were aware they were being watched.

Application – Focus groups are particularly susceptible to the Hawthorne Effect and as a result, poorly run mock trials may be poor predictors of jury verdicts.

LAST ILLUSION

Definition – The belief that someone must know what is happening.

Example – You are stuck in a long line at a store during the holidays and there is no cashier. One first assumes that something there is a problem, that someone knows what the problem is, and that the cashier must be working to fix the problem.

Application – Attorneys defending bad faith insurance actions may need to overcome a juror's belief that someone at the insurance company knew what was happening all along.

LAST ILLUSION

Definition – The tendency to choose an option where the probability of a favorable outcome is known over an option where the probability of a favorable outcome is unknown.

Example – Consumer has a choice between two cars which are virtually identical in every meaningful way. Consumer has a Carfax report for Car A but no report for Car B. Consumer is most likely to choose Car A.

Application – When jurors are deciding between two verdicts, they will likely choose the verdict which has the least ambiguity or uncertainty in application. It is therefore important to inform the jury what result they can expect if finding in your client's favor.

SOCIAL BIASES

IN-GROUP/OUT-GROUP BIAS

Definition – Favoring members of one's in-group over others even when the group seems arbitrary or random. Conversely to in-group bias, negative categorizations are made about those who are not part of the in-group.

Example – Robbers Cave Experiment pertains to a study of two groups of 12 year old boys all white, all middle class, all Protestant, and all from two parent homes. The two groups were initially kept separate and bonded. They were then pitted against each other to fight for limited resources. Verbal insults, physical altercations and thievery occurred.

Application – Many studies show that judges' in-group biases effect rulings.

SUPERIORITY BIAS

Definition – The tendency to overestimate own qualities and abilities in relation to the same qualities in others.

Example – Comparative study by Zuckerman and Jost in 2001 considered several findings. "The great majority of people believe that they drive better than the average person (Svenson 1981). Most people also seem to think that they are fairer than the average person (Messick et al. 1985) and that they have better health prospects than the average person (Weinstein 1980). Examples of such patterns are ubiquitous. To cite one recent case, 87 percent of Stanford MBA students recently rated their academic performance to be in the top two quartiles ('It's Academic' 2000)."

Application – "Not only do incompetent people make unsound or disadvantageous decisions, but their own ineptness denies them the ability to realize it." In order to develop better insight, one must better their skill level.

STATUS QUO BIAS

Definition – Similar to omission bias, status quo bias is a preference to prefer doing nothing or keeping things the same.

Example – Study regarding university health insurance plan enrollments noted that a plan with better premiums and deductibles gained favor with new employees but not older enrollees.

Application – Settlement negotiations which require a party to change a behavior may be more difficult than one that compensates parties monetarily.

STATUS QUO BIAS

Definition – Tendency to view oneself as complex and others as predictable and stereotypical because our own feelings and emotions are more observable.

Example – 1982 study by Kammer found that individuals judged their friends' behaviors as more consistent than their own and attributed higher trait intensities to themselves than to their friends.

Application – Incorrectly ascribing traits to individuals perpetuates prejudices which must be overcome in trial settings by showing witnesses and parties as complex figures.