

Iudex non Calculat?

Judges and the Magnitude of Mass Litigation from a Behavioural Perspective

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Mass harm situations caused by corporate misbehaviour, defective products, harmful pharmaceuticals, accidents or environmental disasters nowadays multiply and create new challenges for legal actors and society at large. In its 2013 Recommendations, the EU Commission highlighted that 'a key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively'. The role of judges therefore turns out to be essential: they are expected to behave as watchdogs scrutinizing the overall admissibility of mass claims, as active case managers ensuring that cases make orderly progress, and as shepherds ensuring that all interests at stake are sufficiently protected. A key issue to be explored remains the influence of the mass context on decision-making which may potentially lead judges to depart from policymakers' expectations. Interestingly, the mass context is nowadays an element often discarded by judges themselves. Yet, in the context of mass litigation, cases involve and consolidate in one lawsuit hundreds of represented claimants who have suffered a similar harm. The magnitude of the case - that is the number of people involved and/or the size of the loss at stake - is therefore likely to be considerable. Even though judges discuss and exchange with a limited number of protagonists during hearings - e.g. with representative bodies such as associations or leading counsels - judges must preserve the interests of absent parties. Behavioural studies have shed important light on ways groups are perceived by external observers, and on the impact of number and size on information processing. By investigating in greater details the effects associated with the case magnitude on decision-making, this paper aims at providing an alternative viewpoint on the issue of collective redress which will be of particular interest for courts and regulators at both national and European levels.

I. Introduction.

A few decades ago, Cappelletti predicted that the rise of 'big businesses' as by-products of 'a massification

of societies' characterized by ever-increasing production and consumption and changes in social relations would, sooner or later, require the implementation of 'big judiciaries'.¹ 'Mass harm situations'² caused by corporate misbehaviour (e.g. anticompetitive practices, misleading market information), defective products, harmful pharmaceuticals, accidents or environmental disasters nowadays tend to multiply and create new challenges not only for legal actors but also for society at large. In spring 2011, the replies received by the European Commission to its public consultation on collective redress indicated European stakeholders' strong interest in seeing judiciaries play 'prominent' and 'leading' roles in the supervision and monitoring of procedures which enable groups of claimants to seek together compensation

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1 M. Cappelletti, *Le pouvoir des juges*, Economica, Paris, 1999, at p. 61; from the same author, 'Vindicating the Public Interest through the Courts: a Comparativist's Contribution', (25) *Buffalo Law Review*, 1975, pp. 643-690

2 Terminology used by the EC Commission in its 2013 Recommendations on Common Principles for Injunctive and Compensatory Collective Redress Mechanism in the Member States Concerning Violations of Rights Granted under Union Law, (21), 2013/396/EU, 11 June 2013.

for damage caused by mass events.³ In its 2013 Recommendations, the EU Commission further highlighted that 'a key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively'.⁴ The role of judges therefore turns out to be essential: they are expected to behave as watchdogs scrutinizing the overall admissibility of mass claims, as active case managers ensuring that cases make orderly progress, and as shepherds ensuring that all interests at stake are sufficiently protected.⁵ Importantly, judges are thus expected to be neutral, unbiased and robust agents, while assuming heavy responsibilities under a considerable burden

Yet, a key issue to be explored remains the influence of the *mass* context which may possibly lead judges to depart from policymakers' expectations. Interestingly, the mass context is nowadays an element often discarded by judges themselves. As an illustration, in an interview given in October 2012 to the Newspaper *Le Monde*, the President of the German Constitutional Court was asked whether a lawsuit filed by 37,000 individuals weighed more than a lawsuit filed by a single plaintiff. His reply was blatantly negative: 'we do not count but we ask ourselves whether the claim is meritless or not'.⁶ His response demonstrated the predominance of the legalist tradition which, in the western tradition at least, personifies Justice under the traits of a blindfolded goddess, omniscient, unbiased and insensitive to the identities of the parties and to the context in which decisions are taken. As the Latin maxim says: *iudex non calculat*.⁷ From the viewpoint of judges wishing to protect their social prestige and impartiality, no other response could have been expected. While trying to look beyond a so-called 'mythology of legal decision-making', other scholars have nonetheless argued that 'it is certain that what these decision-makers claim they do has very little resemblance to what they actually do'.⁸ Insights from behavioural sciences may thus offer an alternative view on this pivotal question.

Behavioural researchers and psychologists have stressed the importance of contexts in decision-making and problem-solving,⁹ and showed that *numerosity* can influence behaviour.¹⁰ Importantly, contexts do influence the way judges take their decisions.¹¹ In the framework of mass litigation, cases involve and consolidate in one lawsuit potentially hundreds of represented claimants who have suffered a similar

harm. The magnitude of the case - that is, the number of people involved and/or the size of the loss at stake - is therefore likely to be considerable. Even though judges discuss and exchange with a limited number of protagonists during hearings - for instance with representative bodies such as associations or leading counsels - judges must behave as 'fiduciaries' preserving the interests of absent parties.¹² In other words, they take most of their decisions in the shadow of numerous represented plaintiffs, that is, *in the shadow of number*. Mass claims may therefore have an important psychological impact on parties and judges: issues at stake are usually highly sensitive societal concerns extensively relayed in the media. The fact that numerous individuals have been victims of a same misbehaviour often induce large emotional arousals, specifically at a period described as a 'victims' time', a general tendency observable in several European countries which tend to place suffering individuals at the core of policy agenda.¹³

3 Public Consultation (EC), 'Towards a Coherent European Approach to Collective Redress', 2011, www.ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html (see specifically Question 23: 'What role should be given to the judge in collective redress proceedings?').

4 Recommendation (EC), *supra* note 3; see also: EU Parliament, Resolution 'Towards a Coherent Approach to Collective Redress', 2 February 2012.

5 A.P. Biard & L.T. Visscher, 'Judges and Mass Litigation: Revisiting the Judicial Cathedral through Rational Choice Theory and Behavioural Economics', *Aansprakelijkheid, Verzekering & Schade*, 2014/7, pp. 39-48.

6 *Le Monde*, 'L'Europe à l'épreuve des tribunaux', interview with A.Voskuhle, 1 October 2012, translation from the author (his remark was made in a context different than the one hereafter described).

7 'Judges do not count'.

8 V.J. Konecni V.J. & E.B. Ebbesen, 'The Mythology of Legal Decision-Making' (7) *International Journal of Law and Psychiatry*, 1984, pp. 5-18

9 E. Fantino & S. Stolarz-Fantino, 'Decision-Making: Context Matters', (69) *Behavioural Processes*, May 2005, n°2, pp. 165-171.; E. Fantino, 'Context: A Central Concept', (54) *Behavioural Processes*, 2001, pp. 95-110.

10 R. Adaval, 'Numerosity and Consumer Behavior', (39) *Journal of Consumer Research*, 2013, n°5, pp. 11-14

11 C. Guthrie, J.J. Rachlinski & A. Wistrich, 'Context Effects in Judicial Decision Making', Paper presented at the annual meeting of the American Psychology-Law Society, 2010; K. Viscusi, 'How Do Judges Think About Risk?', (1) *American Law and Economics Review*, 1999, n°1/2, pp. 26-62.

12 *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279-80 - 7th Cir. 2002 (Judge Posner stating: 'we and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries').

13 C. Eliacheff & D. Soulez-Larivière, *Le Temps des Victimes*, Albin Michel, Paris, 2006, 293 p.

This paper aims at investigating in greater details the effect of the case *magnitude* on decision-making. In doing so, it sheds some light on an issue that seems to this day still under-explored in the literature, at least to the author's knowledge. The term *magnitude* – which is commonly defined as ‘the great size or extent of something’ – hereafter more specifically encompasses the large number of litigants, the scope of the dispute, or the perspective of dealing with groups. Behavioural studies have shed important light on ways groups are perceived by external observers, or on the impact of number and size on information processing. Importantly, such insights will turn out to be informative and relevant to all stakeholders. *Vis-à-vis* policymakers, they question and challenge the cornerstones roles assigned to judiciaries for the treatment of mass disputes in Europe, in the United States and elsewhere. *Vis-à-vis* litigants, they point out matters where judges are likely to make erroneous or misleading decisions. Finally, and crucially, *vis-à-vis* judges, they play the role of alarm bells highlighting possible points of concerns which will require enhanced vigilance.

The rest of this paper is divided as follows: Section II. sets the background and describes judges and the act of judging as perceived by behavioural researchers and psychologists. In this view, judges will be portrayed as boundedly rational agents, prone to biases and receptive to emotions. Then, Section III. will refer to the notion of ‘entitativity’ in order to better understand how groups of claimants and groups

of defendants are likely to be perceived and how this impacts decision-making. Section IV. will highlight several key heuristics which may convey misleading information for the resolution of mass disputes, as well as possible solutions for debiasing decision-making.

II. A Behavioural Approach to the Judicial Mind: Bound, Bias and Emotion

The behavioural literature portrays judges as boundedly rational actors acting as ‘satisficers’ (1), likely to be prone to biases (2) and receptive to emotions (3). This section turns out to be essential to better understand the potential impact associated with the magnitude of mass litigation on decision-making.

1. Bounded Judges Acting as ‘Satisficers’

The notions of *bounded rationality* and *satisficing*, coined by Simon in the 1950's and proposed as an alternative to the model of the optimizing behaviour based on the rational choice theory,¹⁴ have recently been extended to explore and understand judicial attitudes. Mimicking Posner who, in 1993, considered that judges maximize the same things as everyone else,¹⁵ researchers have been a step further and suggested that judges may well behave as boundedly rational individuals prone to the same cognitive limitations as the rest of us.¹⁶ When taking their decisions within real-world constraints, they are more likely to behave as satisficers seeking outcomes that are merely good enough.¹⁷ In addition to the inherent limits of human mental abilities, environments also limit the scope of their knowledge. Like in other administrations, they are subject to budget-constraints and have limited resources, both human and financial. They may struggle with heavy case-load and work under the time-pressure of several deadlines. Experiments conducted on the effect of time pressure on decision-making have actually revealed that time-pressure could lead to greater filtering during the information-gathering process and to a shift to less complex decision strategies.¹⁸ In complex cases, judges may lack knowledge and heavily rely on the opinions of experts.¹⁹ In situations of uncertainty where they face a lack of evidence, they may not

14 H.A. Simon, ‘A Behavioural Model of Rational Choice’, (69) *The Quarterly Journal of Economics* 1955, p. 99-118; H.A. Simon, ‘Rational Choice and the Structure of the Environment’, in *Models of Man: Social and Rational – Mathematical Essays on Rational Human Behaviour on a Social Setting*, New York: John Wiley & Sons 1957, p. 241-257.

15 R.A. Posner, ‘What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)’, (3) *Supreme Court Economic Review* 1993, p. 1-41.

16 G.M. Gulati & S.M. Bainbridge, ‘How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions’, (51) *Emory Law Journal*, 2002, pp. 51, pp. 83-151.

17 A. Tsaoussi & E. Zervogianni, ‘Judges as Satisficers : a Law and Economics Perspective on Judicial Liability’, (29) *European Journal of Law & Economics* 2010, p. 333-357.

18 B. Verplanken, ‘Need for Cognition and External Information Search: Responses to Time Pressure During Decision-Making’, (27) *Journal of Research in Personality*, 1993, pp. 238-252 (reviewing the literature on this issue).

19 M. Faure & L. Visscher, ‘The Role of Experts in Assessing Damages – A Law & Economics Account’, (3) *European Journal of Risk Regulation*, 2011, pp. 376-396; C.R. Sunstein, *Why Societies Need Dissent*, Harvard University Press, 2003, 246 p. (at p. 17).

have clear views about all possible alternatives, make errors and be short-sighted on the concrete consequences and implications of their decisions. Given their length and complexity, mass disputes are particularly likely to constitute fertile grounds for procedural heuristics.²⁰ Heuristics are indeed aimed at facilitating the work of boundedly rational judges who, like every human being, have limited cognitive capacities. As Ulen and Korobkin point out, 'complexity beyond human cognitive capacity is a sufficient condition for an actor to substitute a simplified decision strategy for a complete expected utility calculation'.²¹ Yet, even though heuristics may indeed help decision-makers by focusing their attention on relevant information, they may also lead them to make cognitive errors and erroneous mental shortcuts.

2. Biased Judges

As Kahneman and Tversky pointed out, 'the reliance on heuristics and the prevalence of biases are not restricted to laymen'.²² Although considered as legal experts, judges are viewed by behavioural researchers as human beings subject to cognitive illusions and mental shortcuts.²³ Recent empirical research on the role of heuristics in judicial decision-making has shed new light on these assumptions. In turn, judges are likely to remain unaware of their heavy reliance on heuristics, and often continue to

believe that their decisions are taken without bias.²⁴ Yet, in an experiment conducted in 1994, Rakos and Landsman already challenged the ideal of judicial self-control and showed that judges may fail to behave as 'masters of their biases', truly able to control their intuitive reactions and emotions.²⁵ Through multiple experiments, Rachlinski, Guthrie and Wistrich similarly cast doubt on the ability of judges to perform better than laymen and to monitor their biases. They found evidence that judges do not systematically dismiss inadmissible information when taking their decisions,²⁶ or that they could be subject to multiple cognitive errors, such as anchoring, framing effect or the hindsight bias.²⁷ As Spellman ultimately points out, it turns out to be 'difficult to envision how a mere desire, or an admonition, to stop thinking like a human being could be effective'.²⁸

3. Emotions and Judicial Decision-making

When applied to judges, the issue of emotion is often criticized for being erratic and disturbing. Regarded as unreliable, inconstant, depending on highly contingent factors, arbitrary and uncontrollable,²⁹ emotions are usually viewed as impairing the correctness and impartiality of judicial decisions. Interestingly, throughout centuries, external justifications have therefore multiplied to avoid tackling the issue of judges' personal emotions.³⁰ The climax of this 'judicial dispassion' - which still nowadays influ-

20 Heuristics are mental conscious or unconscious simplifications or short-cuts aimed at coping with the limited cognitive capacities of the human brain, as well as with the complexity and uncertainty of environments in which individuals evolved. They help select information in order to only focus on a set of key factors that are relevant for decision-making (see notably: D. Kahneman, *Thinking Fast and Slow*, Farrar, Straus and Giroux, New York, 2011, 500 p.; G. Gigerenzer and W. Gaissmaier, 'Heuristic Decision-Making', (62) *Annual Review of Psychology*, 2011, pp. 451-482).

21 T.S. Ulen & R.B. Korobkin, 'Law & Behavioural Science: Removing the Rationality Assumption from Law & Economics', (88) *California Law Review*, 2000, n°4, pp. 1051-1144 (at p. 1077).

22 D. Kahneman, A. Tversky & P. Slovic (Eds.), *Judgment under Uncertainty: Heuristics and Biases*, Cambridge University Press, 1982, 555 p.

23 N. Vidmar, 'The Psychology of Trial Judging', (20) *Current Directions in Psychological Science*, 2011, pp. 58-62, (reviewing the literature).

24 G. Gigerenzer, 'Heuristics', in: C. Engel and G. Gigerenzer (Eds.), *Heuristics & The Law*, Dahlem Workshop Reports, 2006, Dahlem University Press, pp. 17-44 (at p. 28).

25 S. Landsman and R. F. Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in

Civil Litigation', (12) *Behavioural Sciences & The Law*, 1994, pp. 113-126.

26 M. Chorтек, 'The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials', (32) *Review of Litigation*, 2013, pp. 117-143.

27 C. Guthrie, J.J. Rachlinski, A. Wistrich, 'Inside the Judicial Mind', (86) *Cornell Law Review*, May 2001, n°4; C. Guthrie, J.J. Rachlinski and A. Wistrich, 'Blinking On the Bench: How Judges Decide Cases', *Vanderbilt Law & Economics Research Paper*, 2007, n°07-32.

28 B.A. Spellman, 'On The Supposed Expertise of Judges in Evaluating Evidence', (157) *University of Pennsylvania Law Review*, 2007.

29 J. Hamer, 'Sensitive Judges – How to Resolve the Tangle of Legal Decision-Making and Emotion', (8) *Utrecht Law Review*, 2012, pp. 189-199.

30 J.Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, Yale, 2008, 276 p. (at p. 17); T.P. Gallanis, 'Reasonable Doubt and the History of the Criminal Trial', (76) *University of Chicago Law Review*, 2009, p. 941-963; T. Schelling, 'The Life You Save May Be Your Own', in: S.B. Chase (Ed.), *Problems in Public Expenditure Analysis*, Brookings Institution, Washington D.C., 1968, pp. 127-176.

ences the way judges are perceived in the legal literature - is certainly to be found in the 18th century Enlightenment ideals and their associated Cult of Reason.³¹ Under this framework, the ideal judge does not solely ground his decision on Reason – which, in turn, guides him and dictates him the appropriate course of action - but also behaves as the guardian of Reason taming the emotions of parties and society.³²

The vision of emotion as solely disruptive to rationality has however evolved. Psychological works have progressively set forth the role of emotions on the way information is processed and pointed out their positive and constructive effects which may lead individuals to better face and solve problems.³³ Importantly, the study of emotions has also pervaded the legal sphere.³⁴ Cross-disciplinary perspectives dealing with the impact of emotions on law have blossomed and the relationship between law and emotion is nowadays ultimately perceived as a ‘field whose time has to come’.³⁵ In this context, the influence of emotions on judicial decision-making has been given enhanced attention. A stream of research

has for instance investigated the effect of terror management on judicial decisions. Terror management theory posits that fear of death (the so-called ‘mortality salience’) and reminders of one’s personal vulnerability may exert a powerful influence on decision-making. Research has notably found extensive empirical evidence showing that reminding people of their own mortality motivates them to defend their beliefs, and eventually to be harsher *vis-à-vis* those who do not share or threaten their views.³⁶ This influence on judicial reasoning has been for instance evidenced in an experiment conducted on American municipal court judges by Rosenblatt and his team.³⁷

In conclusion, the behavioural literature and empirical insights have shown that judicial behaviour is in reality far more complicated than the traditional vision of judges applying law to facts as often spearheaded by the legal literature. The identities of the parties, the context in which judges take their decision, or the way problems are framed and presented may all have long-lasting implication on judicial decision-making. The *mass* context of mass litigation can similarly have key consequences on the decisions that judges take.

31 T.A. Maroney, ‘The Persistent Cultural Script of Judicial Dispassion’, (99) *California Law Review*, 2011, pp. 629-682.

32 T.A. Maroney, *idem* (observing: ‘the judge came to be seen as the primary figure guarding this realm of rationality, by taming the emotions of litigants, ignoring the emotions of the public, and divesting herself of her own’).

33 Y. Hanoch, ‘Neither an Angel nor an Ant: Emotion as an Aid to Bounded Rationality’, (23) *Journal of Economic Psychology*, 2002, pp. 1-25.

34 K. Abrams & H. Keren, ‘Who’s Afraid of Law and the Emotions?’, (94) *Minnesota Law Review*, 2010, pp. 1998-2072; D. Chin, ‘Sentencing: A Role for Empathy’, (160) *University of Pennsylvania Law Review*, 2012, pp. 1561-1584; M.K. Miller, E. Greene, H. Dietrich, J. Chamberlain & J.A. Singer, ‘How Emotion Affects the Trial Process’, (92) *Judicature*, September-October 2008, n°2; J. Chamberlain & M.K. Miller, ‘Stress in the Courtroom: Call for Research’, (15) *Psychiatry, Psychology and Law*, 2008, n°2, pp. 237-250; H. Bennett & G.A. Broe, ‘Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning’, (42) *Australian Journal of Forensic Sciences*, March 2010, n°1, pp. 11-18.

35 B.H. Bornstein and R.L. Wiener, ‘Emotion and the Law: A Field whose Time Has to Come’, in: B.H. Bornstein and R.L. Wiener (Eds), *Emotion and the Law*, Nebraska Symposium on Motivation, 2010.

36 J. Arndt & al., ‘Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision-Making’, (11) *Psychology, Public Policy and Law*, 2005, n°3, pp. 407-438; see also: M.B. Jones and R.L. Wiener, ‘Effects of Mortality Salience on Capital Punishment Sentencing Decisions’, (33) *Basic and Applied Social Psychology*, 2011, pp. 167-181.

37 A. Rosenblatt & al., ‘Evidence for Terror Management Theory: The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values’, (57) *Journal of Personality and Social Psychology*, 1989, n°4, pp. 681-690.

III. In the Shadow of Number: The Effect of Groups, Number and Scope on Decision-making

It is now time to take into consideration the context in which boundedly rational and biased judges take their decisions. How do judges may process information when dealing with groups? What are the plausible cognitive errors they could make when controlling the shape and size of groups? Do situations involving many participants lead decision-makers to exert more effort than situations involving one person only? Answers to these questions are pivotal and will ultimately provide insightful information on the roles assigned to judges for the treatment of mass disputes.

1. Perceiving Groups v. Perceiving Single Individuals

Facing a group or facing a single individual has an impact on the way information is processed, and on the way such information is used to infer judge-

ments.³⁸ On the one hand, individual targets are assumed to be coherent and structured entities. Observers expect such unity and try to capture this coherence. They will thus be particularly alert and sensitive to the presence of inconsistencies in the behaviour of an individual target.³⁹ On the other hand, groups are assumed to be less unified. Perceivers do not expect the same degree of coherence among group members as they usually do for single individuals. They are also less sensitive to inconsistencies across group members' behaviour. Consequently, perceivers may be able to better recall, organize and process information when dealing with an individual than when dealing with group members.⁴⁰ Extensive research has been conducted to understand the conditions under which an aggregate of individuals could *per se* be considered as a meaningful group. In this view, behavioural researchers have suggested that a key factor lies in the degree of 'entitativity' that perceivers seek to associate with the target. The term entitativity was initially coined by Campbell in 1958 and used to define the manner social groups are cognitively evaluated and assessed. The key tenet lies in the extent to which groups can be envisaged as being entitative, that is as 'having the nature of an entity'. Put simply, the term entitativity aims at capturing the degree of coherence and unity that perceivers seek to associate with a collection of people.⁴¹ Entitativity has thus been described as 'the glue that holds (or is perceived as holding) a group together'.⁴² Campbell suggested that among useful clues for assessing the group's entitativity stand proximity and similarity among group members, as well as the existence of common goals or a common fate which leads participants to 'move together in the same direction'. He therefore observed that 'a band of gypsies is empirically harder, more solid, more sharply bound than the ladies aid society, and the high-school basketball team (...) falls somewhere in-between (...)'.⁴³

Building on this notion, scholars have shown that the cognitive process that is engaged when perceivers deal with groups is dependent on the degree of the target's perceived entitativity.⁴⁴ Information about highly entitative groups is more likely to be processed in the same way as information about individuals. In such circumstances, perceivers expect the same unity and coherence across the behaviour of group members as they usually do for individuals. In other words, the perceived unity and coherence of the group make the group resemble an individual.⁴⁵ Con-

versely, information about lower-entitativity group is less likely to be processed in the same way as information about individuals: perceivers will therefore expect less unity and coherence in the behaviour of group members.

Several empirical works have illustrated changes in behaviour of professionals when they are asked to face a group or a single individual. Tversky and Redelmeier for instance investigated whether physicians tended to 'make different judgements in evaluating an individual patient as compared with considering a group of similar patients'.⁴⁶ They found that their decisions actually did diverge: physicians dealing with one patient were more likely to order additional tests, expend time directly assessing a patient, avoid raising some troubling issues, and recommend a therapy with a high probability of success but with the chance of an adverse outcome. The authors ultimately noticed that 'physicians give more weight to the personal concerns of patients when considering them as individuals and more weight to general criteria of effectiveness when considering them as a group'.⁴⁷ Going a step further, a research conducted by Tenbrunsel and his team pointed out that negotiators are more likely to engage in unethical behaviour when dealing with groups than when

38 D.L. Hamilton & S.J. Sherman, 'Perceiving Persons & Groups', (103) *Psychological Review*, 1996, n°2, pp. 336-355; J. Susskind & al., 'Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions', (76) *Journal of Personality and Social Psychology*, 1999, n°2, pp. 181-191.

39 D.L. Hamilton & S.J. Sherman, *supra* note 38.

40 *Idem*.

41 D.T. Campbell, 'Common Fate, Similarity and Other Indices of the Status of Aggregates of Persons as Social Entities', (3) *Behavioural Sciences*, 1958, pp. 14-35.

42 D.L. Hamilton, 'Understanding the Complexities of Group Perception: Broadening the Domain', (37) *European Journal of Social Psychology*, 2007, pp. 1077-1101 (here at p. 1087).

43 D.T. Campbell, *supra* note 41, at p. 17.

44 D.L. Hamilton & S.J. Sherman, *supra* note 38.

45 S.J. Sherman and E.J. Percy, 'The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members', (137) *Journal of Law and Policy*, 2011, pp. 137-170 (stressing that 'the difference between perceptions of individuals and groups virtually disappears when a group is high in perceived entitativity', at p. 149).

46 A. Tversky and R.A. Redelmeier, 'Discrepancy between Medical Decisions for Individuals Patients and for Groups', (322) *The New England Journal of Medicine*, 1990, pp. 1162-1165.

47 Noteworthy, subsequent experiments conducted by Dekay and his team failed to replicate these findings, see: M.L. Dekay & al., 'Further Explorations of Medical Decisions for Individuals and For Groups', (20) *Medical Decision-Making*, 2000, pp. 39-44.

dealing with individuals.⁴⁸ In one of their experiments, Nordgren and Mc Donnell observed that subjects were less prone to make 'a difficult but ethical decision when more victims were involved'.⁴⁹ Finally, Sah and Loewenstein found evidence that advisors with financial conflict of interest are more likely to give biased advice to multiple and unidentified recipients than to single identified individuals.⁵⁰ Importantly, the authors reported that 'only advisors with single identified recipients demonstrated both awareness of the bias in their advice and a motivation to undo it'. Importantly, in the mass litigation context, the concept of entitativity can be applied to plaintiffs as well as to defendants. Let's now consider these two situations separately.

2. Entitativity and Groups of Plaintiffs

How entitative is a group of plaintiffs? Response to this question depends on the nature and peculiarities of the case at hand. Do plaintiffs constitute a mere loosely bounded aggregate in which members share little similarities, or do they form a group that can be perceived as a single and coherent unit, a highly entitative group? In a study conducted jointly in the United States and in Poland, Lickel and his team investigated the degree of entitativity that perceivers usually associate with different types of groups.⁵¹ 40 groups were clustered into several categories including notably 'intimacy groups' (encompassing among

others: members of a family, of a rock band...), groups with an explicit objective – also named 'task groups' – (members of a jury, of a labour union...), groups without any explicit objective (people in a romantic relationship...) or linked by loose associations (people standing in line at the bank, people in the audience at a movie...). The author found that higher entitativity was more likely to be associated with intimacy groups, while, by contrast, lower entitativity characterized loose associations. The group's perceived entitativity mainly depended on the perceived interactions between group members, on the existence of common goals and common outcomes, and on similarities between group members. Conversely, others variables such as the group's size or its permanence were ultimately perceived as being less relevant.

Groups of plaintiffs stand in a continuum delimited at its two extremes by intimacy groups and loose associations.⁵² Consider two simple scenarios. For matters of clarity, these examples are simplified, and between these two extremes, groups of plaintiffs obviously vary in their unity and consistency. In the first scenario, 1000 consumers have bought the same product which, after a while, turns out to have an identical technical problem. The group sues the manufacturer and asks for reimbursement. In such circumstances, the group of plaintiffs is likely to be viewed as being highly entitative from the judge's point of view: group members share important similarities, they all have bought the same product, manufactured by the same manufacturer and the problem they encounter is identical. In this case the situation of one single claimant can therefore safely be extended to the group as a whole. In a second scenario, 1000 individuals have been exposed to chemicals over a long period of time and have consequently developed various chronic diseases. From the judge's perspective, the entitativity of the group will be perceived as lower: the length of exposure and the magnitude of the harm may for instance drastically vary across group members. The only similarities tend to remain the presence of chemicals that caused the harm. As Yeazell points out, on several occasions, courts have indeed '[viewed] the class less as an entity than as a collection of individuals, (...) not [as] a collectivity but [as] many individuals'.⁵³ Interestingly, differences in groups' entitativity may also appear in the terminology employed to depict mass litigation. Some authors indeed refer to the notion of 'group litigation', while others prefer the concept of 'aggregate litigation'.

48 A.E. Tenbrunsel & al., 'Unethical behaviour directed toward group versus individuals: The Role of Target Type In Promoting Misrepresentation', *unpublished manuscript* (cited in: T.Kogut and I.Ritov, 'The Singularity Effect of Identified Victims in Separate and Joint Evaluations', (97) *Organizational Behaviour and Human Decision Processes*, 200, pp. 106-116.

49 L.F. Nordgren and M.-H. Mc Donnell, 'The Scope-Severity Paradox: Why Doing More Harm is Judged to Be Less Harmful', (2) *Social Psychological and Personality Science*, 2011, pp. 97-102 (at p. 100).

50 S. Sah and G. Loewenstein, 'More Affected = More Neglected: Amplification Bias in Advice to the Unidentified and Many', (3) *Social Psychological and Personality Science*, 2012, pp. 365-372.

51 B. Lickel & al., 'Varieties of Groups and the Perception of Group Entitativity', (78) *Journal of Personality and Social Psychology*, 2000, pp. 223-246.

52 S.J. Sherman & E.J. Percy, *supra note 45* (observing on a broader level that 'all groups can be characterized as having some degree of entitativity, on a continuum from very low -heterogeneous, little connection between group members- to very high - strong group level impression, high cohesiveness among group members').

53 S.C. Yeazell, 'Collective Litigation as Collective Action', *University of Illinois Law Review*, 1989, pp. 43-68.

These two notions can nonetheless be distinguished: Group litigation focus on a holistic approach (the group *as a whole*), while aggregate litigation emphasises on the mere collection of single individuals.⁵⁴

Which lessons can ultimately be drawn from the notion of entitativity when applied to the group of plaintiffs? The psychological aim of the certification process during which judges play the role of watchdog filtering claims and supervising the shape and size of the group tends to be clearer from this new perspective. From a legal point of view, the filtering process ensures the group viability and helps determining the scope of plaintiffs who are ultimately entitled to compensation. Going a step further, psychological insights tend to suggest that the certification process also facilitates the way information about the group is cognitively processed. When reviewing the numerosity of plaintiffs or the commonality of their claims, judges assess the extent to which the group of plaintiffs can be viewed as being of lower or higher entitativity, or, in others words, its likelihood to constitute a single and coherent unit.⁵⁵ This procedural step is likely to have long-lasting implications on the management of mass claims.

Indeed, groups that are perceived as single and structured units have found to be more likely to trigger emotions, feelings of concern and enhance reactions. From an analysis of the influence of entitativity on charity donations, Smith, Faro and Burson found for instance that higher level of perceived entitativity of recipients increased the amount of donations.⁵⁶ The authors hence theorized that 'presenting a large number of victims in a way that makes them seem unified may be another way to increase support'.⁵⁷ From the judge's viewpoint, a high perceived entitativity may lead them to exert greater concerns and attention *vis-à-vis* the group. High-entitativity groups may also facilitate higher levels of confidence when taking decisions, as well as greater emotional concerns.⁵⁸ On the contrary, attention tends to lose focus when it targets lower-entitativity groups. Experiments manipulating groups' perceived entitativity have also revealed that group stereotypes are more likely to be generalized to all members in highly entitative groups.⁵⁹ Wilder found for instance evidence showing that perceivers tend to generalize the characteristics of a single group member to the whole group in highly entitative group. Subjects indeed expect members of a same group to share similar beliefs and behaviour even though - and it is an inter-

esting point - they had previously been informed that the group had been arbitrarily constituted.⁶⁰ Others studies have revealed that greater implicit comparison is engaged between group members of highly entitative group,⁶¹ or that membership of highly entitative groups ultimately makes the process of comparison between its members faster and easier.⁶²

3. Entitativity and Group of Defendants

The issue of groups' entitativity does not only apply to plaintiffs, but also concerns defendants who may be collectively targeted by a group lawsuit as well. One example among many is the class action lawsuit *Sindell v. Abbott Laboratories* brought against eleven companies manufacturing and selling diethylstilbestrol (DES), a drug used to prevent miscarriages which turned out to have detrimental effects on health.⁶³ Interestingly, experimental evidence has revealed that the degree of perceived entitativity impacts on the view of the group as a causal agent responsible for its action and behaviour.⁶⁴ Newheiser, Sawaoka and Dovidio found evidence that groups with higher perceived entitativity tend to be punished more harshly than lower-entitativity groups 'because they are perceived to be more morally account-

54 Aggregate is defined as a 'composite', 'a collection of items that are gathered together to form a total quantity'.

55 Interestingly, in *Wal-Mart*, judges also pointed out the the lack of 'glue' holding plaintiffs' claims together (*Wal-Mart Stores Inc. v. Dukes*, 564 US, 2011)

56 R.W. Smith & al., 'More for the Many: The Influence of Entitativity on Charitable Giving', (39) *Journal of Consumer Research*, 2013, pp. 961-976.

57 *Idem*.

58 *Idem*.

59 M. Crawford & al., 'Perceived Entitativity, Stereotype Formation, and the Interchangeability of Group Members', (83) *Journal of Personality and Social Psychology*, 2002, n°5, pp. 1076-1094.

60 D.A. Wilder, 'Perceiving Persons as a Group: Effects on Attributions of Causality and Beliefs', (41) *Social Psychology*, 1978, n°1, pp. 13-23.

61 C.L. Pickett, 'The Effects of Entitativity Beliefs on Implicit Comparisons between Group Members', (27) *Personality and Social Psychology Bulletin*, 2001, pp. 515-525.

62 C.L. Pickett & D.A. Perrott, 'Shall I Compare Thee? Perceived Entitativity and Ease of Comparison', (40) *Journal of Experimental Social Psychology*, 2004, pp. 283-289.

63 *Sindell v. Abbot Laboratories*, 26 Cal 3d 588 (1980) 607 P. 2d 924 (hereafter '*Sindell*').

64 M.J. O' Laughlin & B.F. Malle, 'How Do Explain Actions Performed by Groups and Individuals', (82) *Journal of Personality and Social Psychology*, 2002, pp. 33-48.

able for their actions.⁶⁵ Conversely, lower entitativity groups are more likely to benefit from the existence of mitigating circumstances.⁶⁶ Additionally, the work of Lickel and his team(s) has shown that judgments on collective responsibility tend to be highly dependent on the degree of perceived entitativity: the more entitative the group is perceived, the more likely its members will bear responsibility collectively.⁶⁷ Members of highly entitative groups are viewed as interchangeable, regardless of their personal implications in the wrongdoing. They are collectively responsible for the offence perpetrated, simply because of their shared characteristics with the offender.⁶⁸

Groups of defendants perceived as highly entitative may therefore impact on the assessment of pivotal legal issues of mass claims. Let's consider the *Sindell* affair previously mentioned. One of the main difficulties that plaintiffs faced in this case consisted in the impossibility to distinguish, within the group of defendants, the particular manufacturer that had produced the ingested drug. In a landmark decision, American judges ruled that every defendant had to contribute to plaintiffs' damages according to the percentage of their respective shares on the DES market.⁶⁹ This solution, more commonly known as mar-

ket share liability, has been extensively commented and debated in the legal literature.⁷⁰ From a psychological and behavioural perspective, does this decision also make sense? Answering this question first requires assessing the degree of entitativity associated with the group of defendants. From the point of view of the court, the group of defendants was likely to be perceived as highly entitative. Even though defendants objected that 'there [was] little likelihood that all manufacturers who made DES at the time in question [were] still in business or that they [were] subject to the jurisdiction of California courts', Justice Mock emphasised that 'all defendants [had] produced a drug from an identical formula'.⁷¹ Moreover, the negative effects of DES on health were at that time known: in 1971 the US Food and Drug Administration had indeed already alerted the public opinion and physicians against the toxic effects associated with this drug.⁷²

A second step consists in connecting the degree of perceived entitativity with the view of the group as a causal agent. Empirical evidence previously presented has revealed that members of highly entitative groups tend to be seen as interchangeable and collectively responsible for wrongdoings committed by one of their peers, regardless of their personal implication. The decision that judges took in *Sindell* seems therefore to be explainable from a psychological perspective. As Yeazell highlighted about this case, courts 'treated defendants as a group' by defending 'group causation'.⁷³ When facing a highly-entitative group of defendants, judges may be more eager to consider defendants as interchangeable, and thus to retain a collective and shared responsibility, even in situations where one or several defendants did not take – or did to a lesser extent – an active part to the wrongdoing.

To go a step further, consider the 2010 ruling from the French Court of Cassation – also concerning DES – and its successive developments which may also be illustrative of the effect of defendants' entitativity on the assignment of liability. Two companies who had manufactured DES in the 1960-1970's were targeted by a lawsuit brought by a plaintiff. Like in the American case, it was extremely difficult to identify which manufacturer had actually produced the ingested drug. However, unlike the American situation, the DES market was at that time *strongly unequally divided* between two companies only: UCB Pharma on the one hand, and Borne (today, Novartis Santé Familiale) on the other.⁷⁴ UCB Pharma had the largest

65 A.-K. Newheiser, T.S. Awaoka & J.F. Dovidio, 'Why Do We Punish Groups? High Entitativity Promotes Moral Suspicion', (48) *Journal of Experimental Social Psychology*, 2012, pp. 931-936.

66 *Idem*.

67 B. Lickel & al., 'The Roles of Entitativity and Essentiality in Judgments of Collective Responsibility', (9) *Group Processes & Inter-group Relations*, 2006, pp. 43-61 (As the authors highlight, the term collective responsibility more precisely refers to situations where perceivers 'assign blame to individuals who were not direct causal agent of negative events, but do share a social association with the wrongdoer').

68 B. Lickel & al., 'Vicarious Retributions: The Role of Collective Blame in Intergroup Aggression', (10) *Personality and Social Psychology Review*, 2006, pp. 372-390; S.J. Sherman and E.J. Percy, *supra* note 44, at p. 153.

69 *Sindell*, *supra* note 63.

70 The literature on market share liability is extensive. From an example in the American literature, see R.P. Murray, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, (69) *California Law Review*, 1981, pp. 1079-1203. For an example in the French legal literature, see: J.-S. Borghetti, 'Responsabilité du fait du DES: En route vers la Market Share Liability', *Revue des Contrats*, January 2010, No1, p. 90.

71 *Sindell*, *supra* note 63.

72 'Selected Item from the FDA Bulletin: Diethylstilboestrol contraindicated in pregnancy: Drug's Use Linked to Adenocarcinoma in the Offspring', *California Medicine – The Western Journal of Medicine*, November 1971, p. 85

73 S.C. Yeazell, *supra* note 53.

74 J.-S. Borghetti, *supra* note 70.

market share on the DES market during this period (around 97%) when compared to its competitor (around 3%).⁷⁵ From the court's viewpoint, the defendants were here again perceived as being highly entitative: they were only two, had produced the same drug with the same formula, whose harmful effects were known, and at the same period of time. In its decision, the Court of cassation held the two companies jointly liable.⁷⁶ In the aftermath of this decision, scholars heavily discussed whether companies should be required to pay equal amount of damages, or if these amounts should be calculated on the basis of their respective liability or market shares. The market share theory was however contested.⁷⁷ Interestingly, in a ruling delivered in October 2012, the Paris Court of Appeal decided that the two companies had to pay *equal amounts* of damages (50/50), even though the position of the two companies on the market was at that time strongly uneven.⁷⁸ If this decision may be explained in many different ways, one may not exclude that judges – while perceiving the companies UCB Pharma and Novartis as members of a highly entitative group - considered them as being interchangeable, and thus collectively responsible, *regardless of* their respective implication which, in this case, was significantly asymmetric.

IV. (Mis)understanding the Group? Heuristics and their Effects on Mass Litigation

When presiding over mass claims, judges must supervise the claimant group. They must notably determine the criteria that plaintiffs must meet to be included into the group. Given the complexity of mass cases, judges are likely to rely on a set of heuristics to facilitate their work. Some heuristics may however be misleading and tend to convey a biased image of the group. This section focuses on the outlier effect (1), the affect and availability heuristics (2), the identifiable victim effect and the vividness heuristics (3), as well as on possible solution for debiasing decision-making (4).

1. The Outlier Effect

A first relevant error for the mass litigation context concerns the so-called *outlier effect*.⁷⁹ An outlier is

commonly defined as 'an observation in a set of data that is inconsistent with the majority of the data [because] it is substantially lower or higher than most of the observations'.⁸⁰ This effect is well-known in descriptive statistics since the presence of outliers is likely to alter the mean and variance of a distribution, ultimately biasing results. The main psychological tenets of the outlier effect are first that members of a group are not assigned the same weight within the group, and second that decision-makers are often blinded by the presence of a stronger claimant. The outlier effect is thus comparable to the previously-mentioned anchoring effect: the impression of the group *as a whole* is influenced and sketched from its most extreme and most idiosyncratic single members. Among the reasons explaining the existence of the outlier effect, one is associated with the complexity of dealing with groups. This complexity increases when the number of group members increases. In an experiment conducted with mock jurors, Horowitz, Brolley and Forster Lee found evidence that jurors facing complex cases and high information load are less and less able to distinguish between plaintiffs.⁸¹ Information about a group member that stands above the average is thus more likely to be easily recalled. Relatedly, Rothbart and his team suggested that because of availability heuristics, group members who can more easily be mentally retrieved tend to be disproportionately represented when assessing the group.⁸²

Outliers can influence the way the group is perceived from different manners. On the one hand, the

75 F. G'Sell-Macrez., 'La Preuve du lien de causalité : comparaisons franco-américaines à propos des arrêts Distilbène', *Les Petites Affiches*, 29 Octobre 2010, p. 6.

76 Cass.civ. 1e, 24 September 2009, pourvois n°08-10081 and n°08-16305.

77 H. Lecuyer, 'En Route Vers la Market Share Liability ? Quelles suites à la Jurisprudence relative à la responsabilité du fait du DES ?', *Petites Affiches*, 22 mai 2012, p. 3.

78 Paris Court of Appeal, 26 October 2012, n°10/18297; F. G'SELL, 'DES Daughters Cases: Cour de Cassation 24 September 2009 and 24 January 2010 and CA Paris 26 October 2012', (2) *European Review of Private Law*, 2013, pp. 587-590.

79 Also developed in: A.P. Biard and L.T. Visscher, *supra note 5*.

80 D.J. Sheskin, 'Outlier', in: N.J. Salkind (Ed.), *Encyclopaedia of Research Design*, 2010.

81 I.A. Horowitz, I. Brolley and L. Forster Lee, 'Effects of Trial Complexity on Decision-Making', (81) *Journal of Applied Psychology*, 1996, n°6, pp. 757-768.

82 M. Rothbart & al., 'From Individual to Group Impressions: Availability Heuristics in Stereotype Formation', (14) *Journal of Experimental Social Psychology*, 1978, n°3, pp. 237-255.

presence of an outlier may lead to the assimilation of all cases – even the weakest ones – to the situation of the outlier. On the other hand, the presence of the outlier may reinforce a contrast effect between plaintiffs making weak claimants appear much weaker than they are in reality.⁸³ A study conducted by Leon, Oden and Anderson pointed out the tendency to assess a group by the attributes of its extremes components.⁸⁴ Subjects principally focused on the most serious offenses, but ultimately ignored the less serious ones. In an experiment replicating the pattern of mass litigation, Horowitz and Bordens similarly found evidence highlighting the influence of outliers in the decisions of simulated civil juries dealing with aggregated plaintiffs. As the authors observed, juries seemed to use the judgement of the outlier ‘as a threshold test [:] if they decided that the company was indeed liable for the outlier’s injuries than all plaintiffs benefitted. If not, then all suffered.’⁸⁵ Following the same logic, judges might be receptive to contrast effects where their attention is ultimately distracted when worthless or weaker arguments are added to a brief of several arguments. By contrast, weaker arguments make other arguments appear stronger. There is thus reason to believe that stronger claims mixed with weaker aggregated plaintiffs will also appear

stronger than they actually are. Alternatively, weaker aggregated plaintiffs will suffer from the presence of outliers since their claims will be perceived as being all the more weaker when compared to one of the stronger claimants. There is thus a chance that weaker aggregated plaintiffs would receive less in this situation than if their cases were brought individually and separately.⁸⁶ The presence of an outlier is therefore likely to have important implications on verdicts on liability or on assessments of damages.

The asbestos class action lawsuit *Cimino v. Raymark Industries Inc.* is on this point quite illustrative. For case management reasons, plaintiffs who had been exposed to asbestos at workplaces were divided into five clusters depending on the severity of their disease. In his report, the Special Master first recommended to exclude from the group mesothelioma plaintiffs because they only represented a small percentage of the claims (32 persons suffered from mesothelioma while 1,050 from asbestosis) but their disease was far more severe than pleural or asbestosis plaintiffs.⁸⁷ Interestingly, it was thus feared that ‘the jury may be *unduly influenced* by dramatic illness which make up a small percentage of the plaintiffs’ class’.⁸⁸

2. Affect and Availability Heuristics

Slovic and his colleagues have identified the *affect heuristic* to refer to situations wherein people ‘consult their affective feelings when making judgements and decisions’.⁸⁹ Put differently, feelings and affects act as mental shortcuts channelling decision-making and subsequent judgements on risks and benefits.⁹⁰ Mass claims are often emotionally charged and deal with highly debated societal issues such as, for example, asbestos, DES, breast implants and other large-scale damage. As an illustration, the Agent Orange class action brought by American veterans who had been exposed to a harmful herbicide used to defoliate forested land during the Vietnam War is a good example of emotionally charged mass claim. Judge Weinstein who was in charge of the dispute was personally convinced that the United States had a debt towards the Vietnam veterans and thus heavily and actively contributed to an active resolution of the case. As an observer highlighted, judge Weinstein ultimately channelled the lawsuit through ‘his [own] concept of the best solution’,⁹¹ and used his powers

83 I.A. Horowitz and K.S. Bordens, ‘The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?’, (22) *Law & Psychology Review*, 1998, p. 43-66.

84 M. Leon, G.C. Oden and N.H. Anderson, ‘Functional Measurement of Social Values’, (27) *Journal of Personality and Social Psychology*, 1973, n°3, pp. 301-310.

85 I.A. Horowitz and K.S. Bordens, ‘The Effects of Outlier Presence, Plaintiff Population Size, & Aggregation of Plaintiffs on Simulated Civil Jury Decisions’, (12) *Law & Human Behaviour*, 1988, n°3, pp. 209-229.

86 *Idem*

87 J. Ratliff, ‘Special Master’s Report in *Cimino v. Raymark Industries Inc.*’, (10) *The Review of Litigation*, 1991, pp. 521-546.

88 *Idem* (emphasis added)

89 P. Slovic & al., ‘Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics’, (31) *Journal of Socio-Economics*, 2002, pp. 329-342; P. Slovic & al., ‘The Affect Heuristic’, (177) *European Journal of Operational Research*, 2007, pp. 1333-1352.

90 A.S. Alhakami and P. Slovic, ‘A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit’, (14) *Risk Analysis*, 1994, pp. 1085-1096; see also P. Slovic & al. ‘Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics’, (31) *Journal of Socio-Economics*, 2002, pp. 329-342 (highlighting that ‘people base their judgements of an activity or a technology not only on what they *think* about it but also on what they *feel* about it’, at p. 333).

91 K. O’Neill, ‘Agent Orange on Trial: Mass Toxic Disasters in The Courts – Book Review’, (15) *Review of Law and Social Change*, 1986-1987, pp. 415-428

in 'an aggressive way' by taking decisions that a majority of plaintiffs was not necessarily eager to adopt.⁹² The behaviour of Judge Weinstein in the Agent Orange class action can therefore be viewed as symptomatic of a decision influenced by the affect heuristic. His feelings and his own sense of what was good and right indeed strongly influenced his views and treatment of the case.

Relatedly, the availability heuristic can also trigger the affect heuristic. Research has shown that these two cognitive mechanisms could indeed interact.⁹³ The availability heuristics posits that decision-making is influenced by the number of occurrences that can easily come to mind. Media very often play a key role in this respect.⁹⁴ The quality of the information provided is thus essential. A study conducted by Bailis and Mc Coun has however reported that media tend to provide a distorted image of tort litigation by over-representing the most controversial cases, exaggerating the number of cases decided by a jury, over-representing plaintiffs' success or providing a distorted picture of the awards distributed.⁹⁵ The authors concluded that media reports 'provide dubious basis for sound decision making by potential claimants, manufacturers, health-care providers, lawyers and government officials'.⁹⁶ One could argue that insulated judges are less likely to be influenced by such media coverage. Yet, judges, as other human beings, read newspapers too. They may therefore consciously or unconsciously be influenced by the magnitude of mass cases extensively relayed in the media.

3. The Identifiable Victim Effect and the Vividness Heuristics

It was previously suggested that decision-makers process information differently when it concerns individual or group targets. Adding to this edifice, they also behave differently when facing individual *and* identified targets or when facing numerous *and* unidentified ones. From a utilitarian perspective, one could theoretically expect that extra attention and extra care will be dedicated to decisions that impact on the welfare of a large number of people, no matter if the targets are clearly identified or not.⁹⁷ This issue is essential in the context of mass litigation. In procedures based on the opt-out system (where plaintiffs must step forward to be excluded from the group), numerous plaintiffs are not identified but nonetheless included into the claimant group. In procedures following the opt-in system (where plaintiffs must step forward to be included into the group), plaintiffs are depersonalised, their names being simply recorded in a register. Some authors have then pointed out a process of 'depersonalization' since plaintiffs are not identified but simply viewed *en masse*.⁹⁸ Others have further observed that one of the 'tragic aspect of mass torts is that individual harm becomes routinized',⁹⁹ or that plaintiffs tend ultimately to be perceived more '*more as object than as subjects*'.¹⁰⁰ From the viewpoints of judges expected to take care of the interests of represented parties who are absent during hearings, this issue appears pivotal.¹⁰¹

92 K. O'Neill, *idem*. Judge Weinstein for instance insisted in keeping the government as a party to the litigation even though it had been dismissed by the preceding judge and even though a majority of litigants did not want to sue the government. as pointed out by the author, judge Weinstein fiercely 'believed that the government had neglected the veterans and was determined to force it to participate in a benefit program for them'. Additionally, Novey observed that judge Weinstein's great involvement in the lawsuit was fiercely criticized by many US veterans who considered that the final settlement was '*almost entirely his own construction*' (see L.B. Novey 'Collective Judicial Management of Mass Toxic Tort Controversies: Lessons and Issues From the Agent Orange Litigation', (27) *Social Science & Medicine*, 1988, n°10, pp. 1071-1084).

93 T. Pachur & al., 'How Do People Judge Risks: Availability Heuristic, Affect Heuristic or Both?', (18) *Journal of Experimental Psychology: Applied*, 2012, pp. 314-330.

94 C.R. Sunstein & T. Kuran, 'Availability Cascades and Risk Regulation', (51) *Stanford Law Review*, 1999, pp. 683-768 (taking as example the Love Canal Affair where the starting point appeared to be 'frightening stories in the Niagara Falls Gazette', at p. 692).

95 D.S. Bailis & R.J. Mc Coun, 'Estimating Liability Risks With the Media as Your Guide: A Content Analysis of Media Coverage of

Tort Litigation', (20) *Law and Human Behaviour*, 1996, n°4, pp. 419-429.

96 *Idem*, at p. 427.

97 S. Sah & G. Loewenstein, 'More Affected=More Neglected: Amplification Bias in Advice to the Unidentified and Many', (3) *Social Psychological and Personality Science*, 2012, pp. 365-372.

98 E.J. Cabraser, 'The Essentials of Democratic Mass Litigation', (45) *Columbia Journal of Law & Society*, 2012, pp. 499-523 (emphasis added).

99 A.D. Lahav, 'The Law and Large Numbers: Preserving Adjudication in Complex Litigation', (59) *Florida Law Review*, pp. 383-436 (at p. 384, emphasis added).

100 D. Hensler, 'Justice for the Masses? Aggregate Litigation & its Alternatives', (143) *Daedalus*, summer 2014, n°3, pp. 73-82 (emphasis added).

101 See E.J. Cabraser, *supra note 99* (highlighting: 'the function of the court as a fiduciary is a hallmark of formal class action litigation and mass litigation deemed quasi class actions are treated as if they are class actions, from the standpoint of protecting the rights and dignity of an otherwise depersonalized mass of plaintiffs/claimants', at p. 521).

In an important article on the economic analysis of the worth of human lives, Schelling claimed that people tend to assign different weights to an individual identified life when compared to statistical lives.¹⁰² While the first is seen as a 'unique event', the second fails to 'evoke these personal, mysterious, superstitious, emotional or religious qualities of life and death'. He therefore theorized that 'the more we know the more we care'. People tend therefore to be more sensitive to the condition of identified individuals, and feel less concerned by the one of unidentified victims. This decrease in sensitivity *vis-à-vis* unidentified victims is known as the identifiable victim effect. In a very similar logic, Nisbett and Ross have pointed out a so-called 'vividness heuristic' which lead people to overestimate information that is vivid and imagery-provoking as compared to highly probative, but pallid statistics.¹⁰³

The causes underlying the identifiable victim effects and the vividness heuristic are multiple.¹⁰⁴ Personalized information associated with an identified individual or event notably induces greater emotions, empathic response, greater concerns or higher concreteness. They thus lead to a higher level of commitment and involvement among decision-makers. On the contrary, larger number and larger scope often fail to do so. As Slovic highlights, 'the number fail to spark emotion or feeling and thus fail to motivate action'.¹⁰⁵ Numbers and scope are, in others words, realities that the human mind does not fully entertain. Based on these arguments, commentators have pointed out that the decision-making process seems primarily to be driven by emotional response and affective evaluation rather than by strict rational economic calculation.¹⁰⁶

Abundant empirical evidence has shown that people are more willing to exert a higher degree of attention and effort when their actions or decisions are directed toward identified people, suggesting therefore that this bias is actually a well-established pattern of human behaviour. Such insensitivity to scope was for instance highlighted in a study conducted by Desvousges and his team in the aftermath of several oil spills.¹⁰⁷ In their experiments, subjects were told that each year some migrating birds drown in uncovered oil ponds and were questioned about their willingness to pay to help covering the ponds with nets which could prevent 2,000, 20,000 or 200,000 birds from drowning. The experiment was thus principally aimed at investigating whether an increase in the number of protected birds triggered a higher willingness to contribute. Their study revealed that participants' willingness to pay to protect birds only slightly varies: the mean amounts were \$80, \$78 and \$88 to help saving respectively 2,000, 20,000 and 200,000 birds. Adding to the debate, the work of Slovic and his colleagues has shown that people are often more sensitive to minor changes in their environments (from 0 to 1 death), but conversely less sensitive to greater changes (such as, for instance, from 500 to 600 deaths).¹⁰⁸ Small and Loewenstein found that even a very weak change in the identification of the victim is often enough to increase caring.¹⁰⁹ Kogut and Ritov found that one individual is more likely to raise the amount of charity donations than groups of victims, even though group members are identified.¹¹⁰ Extending the literature, Small and Loewenstein have shown that the identifiable victim effect could also be applied to wrongdoers, and consequently become an identifiable wrongdoer effect. The au-

102 T.C. Schelling, *supra* note 30.

103 R. Nisbett and L. Ross, *Human Inferences: Strategies and Shortcomings of Social Judgement*, Prentice Hall, 1980, 334 p. (here p. 43-620, 'assigning weights to data: the "vividness criterion"').

104 K.E. Jenni and G. Loewenstein, 'Explaining the Identifiable Victim Effect', (14) *Journal of Risk and Uncertainty*, 1997, pp. 235-257.

105 P. Slovic, 'If I Look at the Mass I Will Never Act: Psychic Numbing and Genocide', (2) *Judgement and Decision-Making*, 2007, n°2, pp. 79-95 (highlighting that such a tendency explains the lack of sensitivity associated with mass murders like genocide).

106 D. Kahneman, I. Ritov & D. Schkade, 'Economic Preferences or Attitudes Expressions? An Analysis of Dollar Responses to Public Issues', (1) *Journal of Risk and Uncertainty*, 1999, pp. 203-235.

107 W.H. Desvousges & al., 'Measuring Natural Resource Damages with Contingent Valuation: Tests of Validity and Reliability', in: J.A. Hausman (Ed.), *Contingent Evaluation: A Critical Assessment*, pp. 91-164.

108 P. Slovic & al., 'Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioural Economics', (31) *Journal of Socio-Economics*, 2002, pp. 329-342 (at p. 337).

109 D.A. Small & G. Loewenstein, 'Helping a Victim or Helping the Victim: Altruism and Identifiability', (26) *Journal of Risk and Uncertainty*, 2003, pp. 5-16 (in their experimental design, the main difference between identified and unidentified individuals was indeed that in one scenario recipients were already determined when subjects were asked to take their decision, whereas in the other scenario recipients had still to be identified. The authors finally observed that 'if such a weak form of identifiability can produce such a dramatic difference in altruistic behaviour it seems likely that variations of identifiability will produce *even more dramatic effects* in naturalistic situations in which, for example, one usually does obtain at least some information about identifiable victims' – emphasis added, at p. 11).

110 T. Kogut & I. Ritov, 'The Identified Victim Effect: An Identified Group or Just a Single Individual?', (18) *Journal of Behavioural Decision-Making*, 2005, pp. 157-167.

thors indeed found evidence that people are more punitive toward identified wrongdoers than toward equivalent but non-identified ones.¹¹¹ Similarly, empirical research has been conducted to test the vividness heuristic. They have shown that ‘aggregated, statistical, data-summary information is often particularly probative, but it is also likely to lack concreteness and emotional interest’.¹¹² To illustrate this point, experiment conducted by Hamill, Wilson and Nisbett found for example that an individualised and vivid example is more likely to influence decision-making than pallid statistical information of greater evidential value.¹¹³ Alternatively, several laboratory and field studies conducted by Nordgren and Mc Donnell have pointed out a counter-intuitive ‘scope-severity paradox’ where harms affecting a larger number of people are ultimately perceived with less severity than harms affecting a smaller number of individuals.¹¹⁴ In one experiment, the authors specifically focused on the behaviour of real jurors in toxic tort litigation (asbestos, lead poisoning and toxic mold cases). Drawn from the analysis of a dataset of awards granted by juries in 136 toxic tort cases between 2000 and 2009, the authors found an interesting negative relation between the number of plaintiffs and the amounts of punitive damages and damages per plaintiffs awarded. As they pointed out, ‘juries have historically punished defendants less harshly when their offense harmed more people’, and ‘have historically compensated each victim less in tort cases when there are more victims’.¹¹⁵ The authors ultimately

explained their findings through ‘the diminishing identifiability’ associated with a large pool of plaintiffs.¹¹⁶

4. Debiasing Judges

If judges are likely to be misled by heuristics when solving mass disputes, a key issue then is to find possible solutions for *debiasing* their decision-making.

A first possible solution is to encourage collective thinking and collective deliberation, as it can already be the case in some jurisdictions.¹¹⁷ Giving judges the possibility to discuss and exchange with their colleagues may help mitigate their biases.¹¹⁸ Experimental games have indeed revealed that groups are more rational than single individuals, and that they can better perceive strategic relationships with other participants.¹¹⁹ Other studies have highlighted that groups tend to perform better than the best individuals to complex intellectual problems,¹²⁰ or that groups ultimately appeared ‘less behavioural’ than single decision-makers, and thus more rarely prone to make cognitive errors.¹²¹ In other words, by referring to the architecture of the cognitive system as described by Kahneman, panels would enable decision-makers to switch more easily from their intuitive System 1 to their more neutral and rule-governed System 2.¹²² Yet, a closer look reveals that the effects of group on decision-making and the capacity of groups to mitigate biases are in reality more ambiguous.¹²³

111 D.A. Small & G. Loewenstein, ‘The Devil You Know: The Effects of Identifiability on Punishments’, (18) *Journal of Behavioural Decision-Making*, 2005, pp. 311-318.

112 R.Nisbett & L.Ross, *supra* note 103, at p. 56.

113 R. Hamill, T.D. Wilson & R.E. Nisbett, *Ignoring Sample Bias: Inferences about collectivities from Atypical cases*, unpublished manuscript, university of Michigan, 1979 (the content and conclusions of this experiment was reported in Nisbett and Ross, *supra* note 104, at p. 57-58).

114 L.F. Nordgren & M.-H. Mc Donnell, ‘The Scope-Severity Paradox: Why Doing More Harm is Judged to Be Less Harmful’, (2) *Social Psychological and Personality Science*, 2011, pp. 97-102.

115 *Idem*, at p. 101.

116 *Idem*.

117 In several mass proceedings, judges sit *en banc*. For instance, in High Courts of First Instance (tribunal de grande instance), French judges usually sit in panel. They will also do so in the framework of the new group action procedure (‘action de groupe’) recently adopted.

118 B.L. Bartels, ‘Top-Down and Bottom-Up Models of Judicial Reasoning’, in: D. Klein and G. Mitchell (ed.), *The Psychology of Judicial Decision Making*, Oxford University Press, 2010 (observing: ‘the possibility of having to justify one’s decision to another

person or group leads to more careful scrutinizing of the attributes and information specific to the context, and less of a reliance on the potentially biasing predisposition one brings to the case’, at p. 45).

119 G. Bornstein & I. Yaniv, ‘Individual and Group Behaviour in the Ultimatum Game: Are Groups More ‘Rational’ Players?’, (1) *Experimental Economics*, 1998, pp. 101-108

120 P.R. Laughlin & H.R. Carey, ‘Groups Perform Better Than The Best Individuals on Letters-to-Numbers Problems: Effects of Induced Strategies’, (15) *Group Processes & Intergroup Relations*, 2012, pp. 231-242; P.R.

Laughlin, E.C. Hatch, J.S. Silver and L. Boh, ‘Groups Perform Better than the Best Individuals on Letters-to-Numbers Problems: Effects of Group Size’, (90) *Journal of Personality and Social Psychology*, 2006, n°4, pp. 644-651.

121 G. Charness & M. Sutter, ‘Groups Make Better Self-Interested Decisions’, (26) *Journal of Economic Perspectives*, 2012, n°3, pp. 157-176

122 D.Kahneman, *supra* note 22.

123 N.L. Kerr, G.P. Kramer & R.J. Mc Coun, ‘Bias in Judgment: Comparing Individuals and Groups’, (103) *Psychological Review*, 1996, n.4, pp. 687-719 (highlighting ‘there can be no simple answer to the question “which is more biased, individuals or groups”’, at p. 715).

Such ambiguity also applies to judicial panels.¹²⁴ An empirical study conducted by Eisenberg and his colleagues have for instance shown that Israel Supreme Court judges' voting patterns tended to differ significantly when presiding or non-presiding over cases. The authors found that judges were more likely to vote in their preferred direction when presiding over the case than when acting as a mere panel member.¹²⁵ As other researchers have also observed, 'the group decision may actually reflect the judgment of the most powerful group member rather than the integration of all group members' judgments'.¹²⁶ Panel is therefore a starting point to mitigate the problems identified, but may not *per se* be a sufficient one.

Information provision is a second possible solution. In the Cimino class action previously mentioned, the Special Master suggested to educate jurors to mitigate the outlier effect. 'The Court', he reported, 'can take care of the possibility of prejudice by instructing the jury (...) that it must not judge all cases in the class as the most or least serious of the class representatives and perhaps by pointing out to the Jury the relatively small percentage of mesothelioma plaintiff [*i.e.* plaintiffs with the most severe injury] in the class as a whole'.¹²⁷ Following the same logic, information provision reminding judges about the rest of the group may help mitigating the outlier effect. This being said, information provision may not be a sufficient solution. Let's for instance consider the identifiable victim effect. Ford pointed out that 'a focus on collective justice requires us to resist the natural impulse to prefer dramatic narratives to hard evidence and to respond to identifiable victims with a face than to systemic social problems'.¹²⁸ The key

issue is to ensure that judges handling statistical data will not overlook the interests of absent plaintiffs. A possible solution is here again to educate judges about their possible biases. This idea was actually tested by Slovic, Loewenstein and Small with lay individuals through an experiment aimed at investigating the reactions and decisions of people who had previously been informed about the identifiable victim effect and its consequences.¹²⁹ Interestingly, the authors found that informed decision-makers gave less to identified victims, while failing to give more to statistical victims. They ultimately observed that 'people discount sympathy towards identifiable victims but fail to generate sympathy toward statistical victims'. If further solutions still need to be investigated to debias judges, an important starting point will be to raise awareness among judges and practitioners on the potential impact associated with the magnitude of mass litigation on decision-making. This pedagogic approach could for instance be carried out at the European level within the framework of the European Judicial Network *via* judicial training and information sessions.

V. Conclusion

Behavioural research shows that the magnitude of mass claims, the large number of claimants and/or defendants and the fact of facing groups can alter decision-making. This may potentially lead judges to neglect differences between members of highly-entitative groups, be biased by outlier effects, representativeness heuristic, and affect heuristic or identifiable victim effect. Put simply, their decisions may be unduly affected by the number of plaintiffs, and thus fail to behave as robust fiduciaries for absent and represented plaintiffs. Solutions for debiasing judges however exist and should be given enhanced consideration in the coming years.

The blindfolded allegory of Justice – named *Iusticia* in Latin – does neither take into consideration the idiosyncrasies of the decision-maker nor the peculiarities of the contexts in which he takes his decision. By suggesting an alternative perspective, this paper intended to show that these elements may actually matter in practice. Others representations portray Justice under the traits of a mature and open-eyed woman, careful and attentive to the world and environment in which she evolved. The specificities of

124 F.S. Ten Velden & C.K.W. De Dreu, 'Groups As Motivated Information Processors', in: R.W.M. Gaard (Ed.), *Judicial Decision Making in Civil Law – Determinants, Dynamics and Delusions*, Eleven International Publishing, 2012, 118 p.

125 T. Eisenberg, T. Fisher & I. Rosen-Zvi, 'Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court', (19) *Psychology, Public Policy and Law*, 2013, n°3, p. 282-296.

126 F.S. Ten Velden & C.K.W. De Dreu, *supra* note 124.

127 J. Ratliff, 'Special Master's Report in Cimino v. Raymark Industries Inc.', (10) *The Review of Litigation*, 1991, pp. 521-546.

128 R.T. Ford, 'Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes', (32) *Berkeley Journal of Employment & Labour Law*, 2011, pp. 513-529.

129 D.A. Small, G. Loewenstein & P. Slovic, 'Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims', (102) *Organizational Behaviour and Human Decision Processes*, 2007, pp. 143-153.

the mass litigation context, the number of individuals involved, the financial amount and the societal issues at stake make nowadays necessary a Justice with

eyes wide open on the process of judicial decision-making and on the possible pitfalls which may plague its deliberations.