The Science Behind Judicial Decisionmaking

By M.C. Sungaila

Justice John Paul Stevens' announcement of his retirement from the U.S. Supreme Court has unleashed speculation about who President Barack Obama will — or should — appoint as his successor. The announcement has also reignited a debate over how judges should decide cases: whether judges should be "activists" or "umpires," whether judges of any political persuasion can help being "activist" in cases of constitutional importance, and what role a nominee's personal and professional experience should play in judicial decisionmaking. But none of the debate has taken into account how our brains actually make decisions.

This is where neuroscience can help. In "*How We Decide*," Jonah Lehrer surveys current data and theories from neuroscientists around the world to paint a picture of what scientists now know about how the brain makes decisions. What scientists have found is that there seems to be a place for both reason and emotion, for the deliberate and the intuitive, in the decisionmaking process; they are intertwined. One informs the other. The findings about the role of emotions in decisionmaking are particularly enlightening.

Without emotion, we cannot make a decision at all. Emotions allow us to choose in the first place. As Chief Justice Charles Evans Hughes once told his colleague Justice William O. Douglas, "[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." Or, as science writer Lehrer puts it, "the world is full of things, and it is our feelings that help us choose among them."

Neurologist Antonio Damasio studied patients with brain damage that made them unable to feel emotion; they were in every other way intelligent. But their lack of emotion made even everyday decisions difficult. One patient, Elliott, "endlessly deliberated over irrelevant details, like whether to use a blue or black pen, what radio station to listen to, and where to park his car. When he chose where to eat for lunch, Elliott carefully considered each restaurant's menu, seating plan, and lighting scheme, and then drove to each place to see how busy it was. But all this analysis was for naught: Elliott still couldn't decide where to eat. His indecision was pathological." The reason Elliott and those like him could not make a decision was because they did not know how they felt about a particular choice; without a feeling to tilt them one way or another, they simply could not choose. In Lehrer's words, "[i]f it weren't for our emotions, reason wouldn't exist at all."

Intuition is more than a feeling. It is a feeling based on experience, and is the result of our neurons firing and making connections faster than we can register.

Sometimes we make decisions based wholly on an intuitive flash — we know the right answer, but we cannot explain why or how we know it. This was the case with a marine monitoring radar screens for oncoming enemy fire during Operation Desert Storm in Iraq. Based on his reaction to a radar blip whose identity he could not confirm (friend or foe), but which turned out to be an enemy missile, he opened fire. He had monitored the radar system for hours. He had seen radar blips that were American fighter jets. The blips were the same green color as the missile. Nothing appeared to distinguish them. So why did he get a "bad feeling" about the one he felt needed to be shot down? A cognitive psychologist investigating the incident discovered a subtle difference:

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because of the altitude they flew, American fighter jets appeared on the first radar sweep; missiles, which flew at a lower level and were masked initially by ground interference, were not visible until the third radar sweep. The difference was a matter of seconds. The marine was unconsciously evaluating the differing altitude levels and comparing what he was used to seeing (a fighter jet) with a new set of data (generated by the missile). Given what the marine was used to seeing, the missile looked wrong. It did not fit the pattern.

The marine's brain was processing information faster than he knew, or could explain, through dopamine neurons. As Lehrer explains: "The conscious brain is ignorant of its own underpinnings, blind to all that neural activity taking place outside the prefrontal cortex. That is why people have emotions: they are windows into the unconscious, visceral representations of all the information we process but don't perceive."

Intuition is based on experience. Our brains gain experience by making mistakes. The unpleasant feelings we get from mistakes retrain and redirect our neurons, cause us to revise our models, and make better decisions in the future. In other words, expertise is the result of a whole host of so-called "learning opportunities." As Lehrer concludes: "Once you've developed expertise in a particular area — once you've made the requisite mistakes — it's important to trust your emotions when making decisions in that domain. It is feelings, after all...that capture the wisdom of experience. Those subtle emotions saying shoot down the radar blip...are the output of a brain that has learned how to read a situation."

Moral decisionmaking, too, is a matter of intelligently-applied emotion. Moral decisionmaking is about sympathy as well as empathy. We treat others fairly because we know what it feels like to be treated unfairly. Those with particularly active sympathetic regions of the brain are more likely to exhibit altruistic behavior: because they more "intensely imagine the feelings of other people, they want to make other people feel better," even at personal expense.

People in positions of power, however, are in danger of becoming disconnected from others and losing a crucial sense of sympathy. According to UC Berkeley psychologist Dacher Keltner: "The experience of power might be thought of as having someone open up your skull and take out the part of your brain so critical to empathy and socially appropriate behavior. You *can* become very impulsive and insensitive, which is a bad combination."

There are dangers in becoming too certain as well. Neuroscience teaches that a certain amount of dissonance in the brain is good: by paying attention to data that disturbs entrenched beliefs, or information we do not want to think about, we make sure we consider all avenues and make better decisions. Debate and discussion between members of a community with very different viewpoints can serve as checks and balances and ensure that a decision is not based on a false consensus.

So the lesson from neuroscience seems to be: Pay attention to your intuition. But let reason and debate play a role too. A lesson that seems to apply as much to the judicial decisionmaking process as the judicial selection process itself.

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The Tidal Wave of Wage and Hour Class Actions

By Julie A. Vogelzang

If you Google any combination of the words "California," "wage and hour" and "class actions," you will get thousands of hits. A tsunami of sorts has arrived and those companies that do not know or acknowledge it stand the greatest risk of being sued for wage and hour violations.

The number of these lawsuits increases significantly each year. Wage and hour class actions are relatively easy to prosecute because they address systemic programs or practices, like hiring, overtime, meal and rest breaks, pay stubs, equipment and uniforms. Plaintiffs' class action lawyers are assured a large chunk of the settlement pie for their fees, and so they are motivated to find and exploit these types of issues in the workplace.

Julie A. Vogelzang is a partner in the San Diego office of Duane Morris. She focuses her practice on employment law with an emphasis on California wage and hour class actions. She regularly defends large, medium and small companies sued for alleged wage and hour violations.

Court reports reveal that these cases are filed weekly, if not daily, up and down the state, and that significant amounts of money are at stake. While the trend started largely in California, it has become a wave moving throughout the country. Certainly, large employers' misfortunes receive the publicity. Wal-Mart settled for over $640 million for dozens of class actions claiming it did not pay employees for all hours worked. A federal judge in Minnesota recently upheld a class certification ruling of more than 1,500 call center employees of Qwest Communications International Inc., who claimed they had not been paid for time spent booting up and shutting down their computers. An Arkansas judge certified a class of former Butterball employees who claimed that the company did not pay them for putting on and taking off their clothing and equipment. Workers for UPS argued they had been improperly treated as independent contractors instead of employees, and that class action recently settled for over $18 million. Though the most high-profile cases involve large employers, this epidemic is not limited to them.

Many employers mistakenly think it is not a big deal if they are out of compliance on their paystubs or applications. Traditionally, these omissions were relatively minor in nature. Currently, however, they are the stuff of class action litigation.

One employee can bring a claim on behalf of all employees in similar categories. These wage claims are typically brought in conjunction with a business violation claim under California Business and Professions Code Section 17200 et seq., which expands the claim and permits the complaining party to go back four years from the filing of the lawsuit. This means that for current and former employees who were/are paid weekly, the employer will need to analyze back pay data (and possibly pay employees) on a weekly basis for each employee, going back four years from the lawsuit's filing date and up to the present.

Potential damages in these cases can be enormous. Employers face paying weekly back pay for four years for all class members, often a difficult calculation to run and a large number by the end of the calculation process. Employers may also be required to pay interest on the back pay. In addition, employers face penalties for each employee, amounts which can often be greater than the back pay amounts. Damages, interest on damages, and penalties are just the beginning.

The big ticket item is attorneys' fees. Attorneys who sue an offending employer for unpaid wages are entitled to recover attorneys' fees, costs and interest. Attorneys' fees may amount to 30 to 40 percent of the plaintiffs' total recovery.

Here are the top five tips to prevent a wage and hour class action lawsuit:

Conduct a Comprehensive Internal Audit: Companies should focus serious attention on these issues and take a hard look at their policies, practices, and procedures. As some examples, the following areas should be analyzed and brought into compliance with state and federal laws, if necessary: hiring documentation; categorizing employees; pay practices; bonuses, pay stubs; meal and rest breaks, job descriptions; and performance evaluations. For example, all exempt positions should be reviewed to determine whether the employees in those positions are actually doing exempt work and are being paid correctly pursuant to the applicable exemption. As part of this process, job descriptions and performance evaluations should be audited to confirm that these employees are actually required to and are doing exempt work. Once a "major" audit has occurred and changes have been implemented, then, at least quarterly spot-check audits should occur.

Train HR and Supervisors: It is critical to educate your company about the serious nature of these lawsuits, the applicable laws and regulations, and ways to minimize the chances of your company being targeted. Human resources personnel and supervisors should have training about California's payroll and time-keeping requirements, data retention, job descriptions, and performance evaluations. It is extremely beneficial to companies when their lawyers are able to describe to plaintiffs' lawyers the training and audit practices the companies utilize. This sort of behind-the-scenes work on the part of companies can and does serve as a deterrent to these lawsuits.

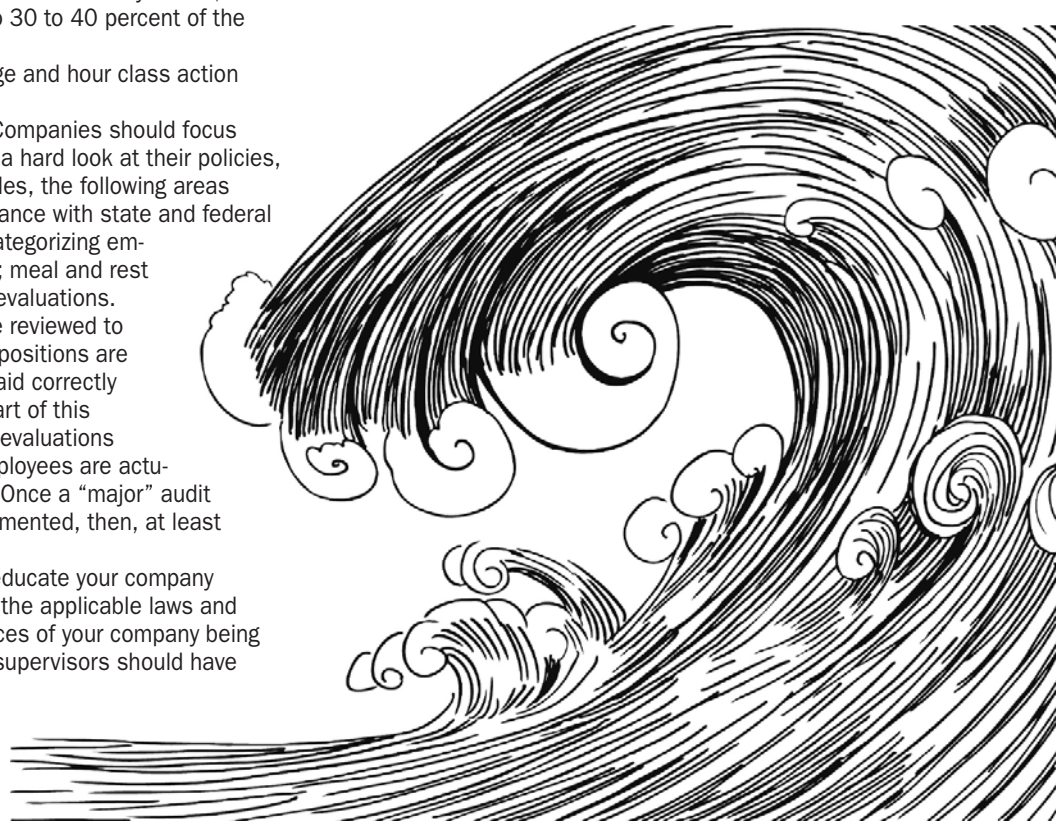
Develop Different Practices/Operations Between Employees and/or Locales: If your company can show that its practices vary by individual and/or by location, the chances of a class action succeeding against the company are minimized because the "commonality" element necessary for class action treatment will not be met. As an example, if there are managers who run local offices, consider giving them discretion to create specific practices for their locale. This way, the employees from all of the offices would have great difficulty joining as a "class" against the company because they would be subject to different operations/practices.

Create the Right Documentation: In conducting the audit noted above, the company should update and/or replace those outdated or inaccurate documents (applications, hire letters, handbooks, job descriptions, background check forms, etc.). It should make sure that payroll and time-keeping processes are accurate and accessible. It should also put into place an electronic policy about the use, maintenance and preservation of all electronic data, which has become an explosive issue in these lawsuits.

Consider Employee Morale: In addition to the audit and training items described in this article, another item that is not as obvious has to do with workforce opinions about fairness. Employees often bring lawsuits because they believe they are not being treated fairly. If the workforce perceives that decisions are made fairly and based on logic, the chances of these lawsuits are lessened. Along these lines, steps should be taken to educate employees about company policies and practices, the open door policy and respect in the workplace.

Companies in California and, increasingly, across the country should be vigilant in developing and maintaining workplace policies that reduce the significant risks associated with wage and hour class action lawsuits. The combination of back pay, interest, penalties and attorneys' fees awarded to class members if the class prevails in court can wreak havoc on a company's bottom line. The tips above outline crucial initial steps in keeping employers ahead of the oncoming tidal wave of these class actions.

Lisa K. Widdecke and Liseanne Kelly of Duane Morris contributed to this article.



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