Risk Analysis

A Methodological Approach to Early Case Assessment in Litigation and Settlement

CIAJ 2016 Annual Conference
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- Standard of care
  - Industry standard – blast mats?

- Contributory negligence
  - Signs?

- Damages
  - Causation (pre-existing injury and mitigation)
What language do you hear being used...?

- Quite unlikely
- Some possibility
- Very good possibility
- Reasonably likely
- Fighting chance
- Almost a sure thing
- REMOTE POSSIBILITY
Assessing risk: What is missing?

• **Systematic** approaches

• Assess weights **mathematically**

• Identify client’s particular process **interests/goals**

  •  **Weigh/assign value** – as potential “costs”
Getting it Wrong?


- 61% plaintiffs, 24% defendants rejected settlement offers to do worse at trial

- Average cost of plaintiffs’ decision error $43,100
- Average costs of defendants’ decision error $1,140,900
Lawyers’ Decision-Making

Complexity

Uncertainty
System 1 and System 2
Understanding Decision Making

- **Patterns of Behaviour**
  - Anchoring
  - Framing and Loss Aversion

- **Cognitive Biases and Heuristics**
  - Overconfidence/Self-serving/Confirmation Bias
  - Acceptability Heuristic
Tools and Methods

Settlement Analytics

Case Evaluator

Decision Trees

DecisionSet

Win Before Trial

TreeAge Pro

Loom Analytics

Total Litigator

DATA MINING
Step 1:
• Standard of care 50%
• Contributory negligence 40% chance of 25%

Step 2:
• Damages
  ▫ Past (pecuniary and non) – 80% of $500,000
  ▫ Future (loss of income) – 40% of $1,000,000
    $400,000 + $400,000 = $800,000
Step 3:

$800,000 \times 50\% = $400,000 - CN

- 40\% \times .75 (\$300,000) = $120,000
- 60\% \text{ of } 1.0 (\$400,000) = $240,000

Projected outcome: $360,000
Step 4: Process costs: goals and impact

... for Mary:

- Time/delay and present value of the money (opportunity costs)
- Psychological and health impact of being involved in the conflict
- Actual legal costs

$360,000 – impact costs = ?
Decision-making that is....

- Proportionate
- Strategic
- Informed
- Transparent