

Risk Analysis

A Methodological Approach to Early Case Assessment in Litigation and Settlement

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Mary Smith

- **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?

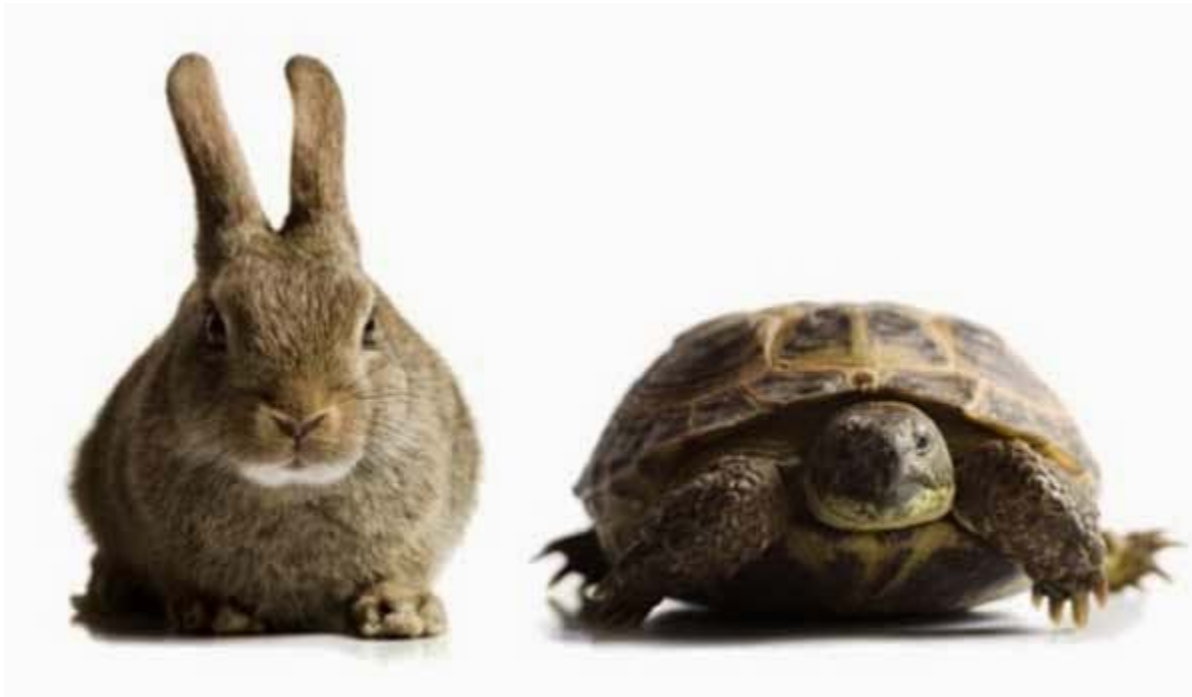
- **Randall Kiser, Martin Asher and Blakeley McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations* (2008) 5(3) *Journal of Empirical Legal Studies* 551**
- **61% plaintiffs, 24% defendants rejected settlement offers to do worse at trial**
- **Average 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

DecisionSet

Decision Trees

Win Before Trial

TreeAge Pro

Total Litigator

Loom Analytics

DATA MINING

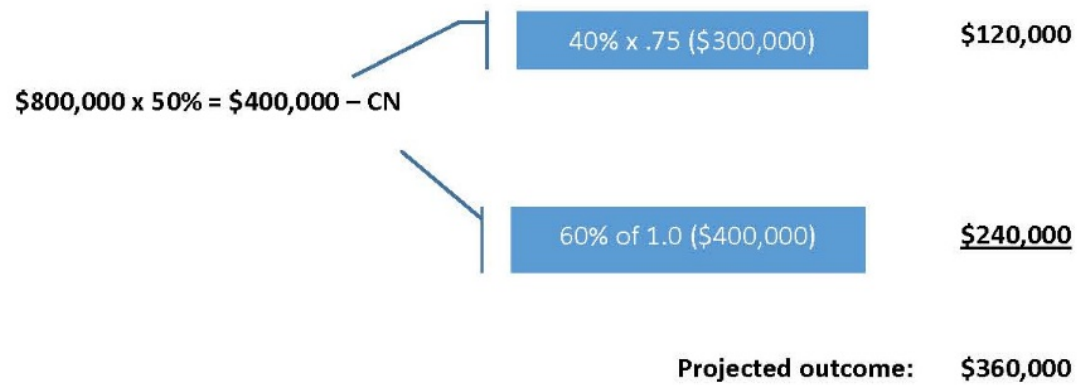
Step 1:

- 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:



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**