Risky Business: A Toolbox for Managing Litigation Interests and Risks

CPR Annual Meeting
St. Petersburg, Florida
February 27, 2020
Experts for This Program

- **John Lande**, Isidor Loeb Prof. Emeritus, Univ. of Missouri
- **Heather Heavin**, Assoc. Dean & Assoc. Prof., Univ. of Saskatchewan
- **Michaela Keet**, Prof., Univ. of Saskatchewan
- **Duncan MacKay**, Deputy GC & COO, Eversource Energy
- **Conna Weiner**, Mediator, Arbitrator, Special Master
- **You**
Today’s Agenda

- Survey audience about your use of litigation interest and risk assessment (LIRA) techniques
- Simple LIRA framework
- Sophisticated tools
- Experienced practitioners’ perspectives
- Audience discussion
Stone Soup Process Today

- We will use Stone Soup research process to disseminate knowledge from this program
- Notetaker will take notes without names
- Summary will be published in Alternatives
- I will post summary on Indisputably blog – including this powerpoint
- If you don’t want your statements to be included, let notetaker know
- Questions?
We will ask questions about your background and use of LIRA techniques.
You will use clickers to answer questions.
There should be clickers on everyone’s table. Does anyone need a clicker?
Your responses will be anonymous and immediately displayed in aggregate.
If a question isn’t applicable, please skip it.
Audience Survey

- You will have 15 seconds to answer each question and you will see a countdown clock on the screen.
- To get the best information we can, it’s important that you answer candidly.
- Any questions before we begin?
Informed Consent

You are being invited to participate in a research study that involves participating in an anonymous survey. Participation is voluntary. If you have questions about the research, please contact John Lande, landej@missouri.edu or 573-234-1745.
Who Are You?

Let’s get a sense of who’s in the audience. Are you:

1. an inside counsel
2. a lawyer in a law firm
3. an executive in a law firm (even if you have a law degree)
4. a private neutral
5. other
Inside Counsel

If you are an inside counsel, are you:
1. the general counsel
2. other inside counsel
Lawyers in Law Firms

If you are a lawyer in a law firm, are you:

1. a partner
2. an associate
3. other lawyer
Private Neutrals

If you are a private neutral, are most of your cases:
1. mediations
2. arbitrations
3. about half of each
4. other
Procedures in Your Cases

● We want to learn about the actual use of various procedures in your cases. Please answer these questions about the degree to which your company or firm has actually used these decision-making processes or tools.

● If you don’t know or the question is not applicable, please skip the question.
Systematic Assessment

When your company or law firm assesses litigation risk in your cases, how often is the process a systematic, formal assessment process:

1. in most of our cases
2. in about half of our cases
3. in a substantial proportion of cases, but less than half of our cases
4. in almost none of our cases
The next question is about how often your company or law firm uses early case assessments (ECA).

For this purpose, an ECA involves basic factual investigation, legal analysis, estimation of likely court outcome, and estimation of the costs of going all the way to trial.
Frequency of ECA

In the cases that your company or law firm litigates, which best describes its use of ECAs?

1. we routinely use ECAs in most types of cases
2. we routinely use ECAs in certain categories of cases (e.g., amount at stake, subject matter, reputational interest)
3. we often use ECAs, on a case-by-case basis
4. we rarely use ECAs
When you do ECAs, how often do you assign a monetary value to intangible costs such as harm to internal operations, damage to reputation or relationships, diversion of time from business activities, loss of opportunities, etc.?

We routinely assign monetary values:
1. in **most** of our ECAs
2. in **about half** of our ECAs
3. in **a substantial proportion** of ECAs, but **less than half** of our ECAs
4. in **almost none** of our ECAs
Formal Decision Trees

In what proportion of your cases do you use formal decision trees?
1. in **most** of our cases
2. in **about half** of our cases
3. in a **substantial proportion** of ECAs, but less than **half** of our cases
4. in **almost none** of our cases
Technological Tools

In what proportion of your cases do you use other technological tools such as databases of comparable cases or statistical models (e.g., Monte Carlo simulations)?

1. in most of our cases
2. in about half of our cases
3. in a substantial proportion of ECAs, but less than half of our cases
4. in almost none of our cases
Internal Database

Does your company or firm maintain an internal database of dispute characteristics, process used, and/or the outcomes?

1. yes
2. no
Pre-Suit Mediation

In what proportion of your cases do you mediate before an arbitration or lawsuit is filed?

1. in **most** of our cases

2. in **about half** of our cases

3. in a **substantial proportion** of ECAs, but **less than half** of our cases

4. in **almost none** of our cases
Litigation Interest and Risk Assessment

A Methodological Approach to Early Case Assessment in Litigation and Settlement
Smith vs. Jones

- 5 yrs ago, Mary entered a construction zone as a member of the public, and suffered head injury when hit by a rock in a construction blast.

- 5 years into litigation, discovery of documents is complete, and expert medical and engineering reports have been shared.

- Claim is for $1.5 million.

- Defendant has just made a without prejudice offer of $250,000.

- Assume you are Mary. On what basis would you decide whether to accept?
Getting it wrong?

- Randall Kiser, *Beyond Right and Wrong*:
  - 61% plaintiffs, 24% defendants rejected settlement offers to do worse at trial
  - Plaintiff error: $43,100, Defendant error: $1,140,000
Understanding Decision-making

- Patterns of Behaviour
  - Anchoring
  - Framing and Loss Aversion

- Cognitive Biases and Heuristics
  - Overconfidence/Self-serving/Confirmation Bias
  - Acceptability Heuristic
What language do you use...?

- Very likely
- Quite unlikely
- Very good possibility
- Reasonably likely
- Fighting chance
- Almost a sure thing
- REMOTE POSSIBILITY
Mary Smith

Your lawyer has told you that there are three issues in the claim:

1. Proving Standard of Care
   - Industry standard – how many and what type of blast mats were required?
   - “This could go either way.”

2. Contributory negligence
   - There were signs, warning public not to enter, but some question as to placement and visibility of signs

3. Damages
   - Most of claim is for future loss of income. You have a pre-existing back injury, and have had difficulty committing to prescribed treatment. = Causation of loss (pre-existing injury and mitigation)
Step 1: Understand and Calculate Risks on Liability

Break each cause of action into its elements.
Assign probability: consider law and evidence (proof).
Assess overall probability of success: COMPOUND
Go through the same process with respect to DEFENSES.

Step 2: Project Damages/Remedy

Break it down into heads/types of damage.
Assign a most likely outcome (considering probability) for quantum on each. Consider law and evidence (proof).
Add up #2 for each head of damage.

Step 3: Assess – multiply steps 1 and 2

Liability projection $\times$ Damage projection $=$ Risk-Adjusted Outcome
Mary Smith

Step 1: Liability and Defenses
- Standard of care  50%
- Contributory negligence  40% chance of 25%

Step 2: Projected Damages
- Damages
  - Past (pecuniary and non) – 80% of $500,000 (some evidentiary problems)
  - Future (loss of income) – 40% of $1,000,000 (60% chance she will be found to be a crumbling-skull plaintiff, rather than thin-skull plaintiff)
    
    $400,000 + $400,000 = $800,000
Mary Smith

Step 3:
• $800,000 x 50% = $400,000 less Contributory negligence (40% x 25% = 10% reduction)

Weighted Average for CN
• OR, use a decision tree ...
• 40% x .75 ($300,0000) = $120,000
• 60% x 1.0 ($400,000) = $240,000

Projected Outcome
• $360,000
Step 4: Process Costs

Consider the Direct (Legal) Costs of Litigation

Consider and evaluate the Impacts of the Litigation on Mary
Aspects of the litigation process that cause stress...

- Adversarial nature of the Process
- Delay
  - Postponements, adjournments
- Intensity
  - Moments of ‘too much, too fast’
  - Accelerated processes
Aspects of the litigation process that cause stress...

- Meetings with lawyers, other professionals
  - Interviews

- Examinations/depositions

- Testifying
Identify and Value Costs:

**Individual:**
- financial goals and stability
- career, education, ‘productive work’
- relationships, family, community
- health and wellness
- previous litigation experience

**Organizational:**
- opportunity costs
- reputational/brand costs
- psychological health of organization
Mary Smith

- Step 4: Process costs

- Time/delay and present value of the money (opportunity costs)

- Psychological and health impact of being involved in the conflict

- Direct legal costs

$360,000 – process costs = Overall Risk-Adjusted value of the case
Sophisticated Tools

- **Systematic Approaches to identifying and weighing risks**
- **Other professional disciplines (Business, Engineering etc.) predicting in the future**
- **Checklists:** helpful for identifying, tracking and managing tasks, but lack methodologies for estimating the quantitative probabilities of various contingencies/options
Decision Analysis – Decision Trees

- Three stage process:
  1. Identify all significant uncertainties in the legal case that may affect the finding of liability or damages
  2. Determine all the reasons for a favourable and unfavourable finding for each uncertainty
  3. Estimate the probability of each outcome for each identified uncertainty
Legal Analysts

Create and analyze a model to quantitatively analyze a case so you can best advise your clients before proceeding to trial. Attorneys and clients need to assess all scenarios with respect to verdicts and damages in order to plan for settlement negotiations and trial strategy.

Model the Case

Create a model to mirror the flow of a case from settlement to points to be made at trial to damage estimates, including all possible outcomes. This process helps the client and legal team consider all the legal points that could lead to winning or losing the case.

Analyse the Model

Quantitative analysis of the case, considering all possible scenarios and damage awards, provides an overall expected value for the case. Graphically study the range of scenarios to consider the overall risk of proceeding.
Litigation Risk Analysis, Inc.

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Generate better strategies and more accurate predictions so that you can win better litigation results.
Data Analytics

- using data from legal sources (databases) to provide detailed statistical information about past events such as courtroom outcomes and/or settlements

- Popular products on the market in the U.S. and other large legal markets
Litigation Analytics - WestLaw Edge

Litigation Analytics

Gain a strategic edge with data-driven insights

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Search

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Loom Analytics

Structura is a web-based analytics and data management platform that provides an intuitive, customisable environment that consolidates and makes usable all of a company’s data. With easy-to-use statistical modelling capabilities, any data available to Structura can be plugged into a predictive model, allowing users to mitigate risk and anticipate outcomes without a data science team.

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Picture it Settled
Model-based Analytics

- Using mathematical algorithms to generate future predictions
  - Monte Carlo simulations
  - Bayesian Analysis
Oracle Crystal Ball

Unparalleled Insight into the Critical Factors Affecting Risk

Oracle Crystal Ball is the leading spreadsheet-based application for predictive modeling, forecasting, simulation, and optimization. It gives you unparalleled insight into the critical factors affecting risk. With Crystal Ball, you can make the right tactical decisions to reach your objectives and gain a competitive edge—even in an uncertain market.

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Accept
Considerations for Using Tools

- Client communication and expectations
- Inclusion of other factors in to the analysis
  - Psychological and impact costs to clients
  - Business and Organizational costs
- Sufficient understanding of the data sets or the methodology that is being used by these products
  - Reliance on historic data?
  - Confidence in the modelling?
LIRA in practice...
Additional Resources

Litigation Interest and Risk Assessment
Help Your Clients Make Good Litigation Decisions

MICHAELA KEET, HEATHER HEAVIN, AND JOHN LANDE