

Facilitating Settlement: The Use of Settlement Counsel and Risk Analysis

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FRASER MILNER CASGRAIN LLP

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Dispute Resolution 101



What is Settlement Counsel?

- Litigators litigate
- Settlement Counsel settle
 - Engagement is to focus exclusively on resolution of the dispute outside of the litigation arena

Why Separate Roles?

- Different task
- Different focus
- Different tools

Different Task

- Role of Settlement Counsel:
 - Focus is exclusively on problem solving and negotiated resolution
 - Develops options, settlement goals and strategy with client
 - Orchestrates settlement events
 - Prepares client for and participates in settlement events
 - Zealous pursuit of settlement goal
 - Does not participate in the litigation process

Different Task

- Role of Litigation Counsel
 - Litigators (colleagues inside or outside the firm) litigate
 - Zealous pursuit of litigation / adjudication
 - Legal analysis of the case (opinions and risk factors)
 - Does not participate directly in the settlement process

No Confusion of Roles

- Client controls both settlement and lawsuit
 - Separate reporting
- Three party agreement
 - Settlement Counsel may not offer stand-still agreement or get involved in discovery or other litigation steps
 - Litigation Counsel must refer all settlement overtures to Settlement Counsel and client

Different Focus

Litigation Counsel

- Past (rear-view mirror)
– what happened?
- Facts
- Positions
- Legal adjudication

Settlement Counsel

- Future (windshield) –
how do we move
forward?
- Relationships
- Interests
- Problem solving

Not Duplicative

- Litigation is a rights based process focusing on the application of the law to historical facts
- Settlement is an interest-based process focusing on the future, parties' interests and options
 - Facts for litigation are only partially relevant to the settlement process
 - discovery vs. disclosure
 - Legal “rights” are rarely resolved in settlements

Information Flow is Usually One Way

- Settlement discussions are confidential
- Client and Settlement Counsel agree NOT to use information in litigation or share it with Litigation Counsel
 - Having separate Settlement Counsel makes this a believable undertaking
- Conversely, discovery in litigation is intended to inform decision maker and is available for use in settlement discussions
- Client and Settlement Counsel use and rely upon Litigation Counsel's opinions and risk analysis

Different Tools

- Settlement Counsel
 - Well schooled in dispute resolution practices, problem solving and interest based negotiation
 - Orchestrates and prepares client for settlement events
 - Asks different (open, interest based) questions
 - Focuses on broader issues, not just legal aspects, to determine options
 - Value creating before value claiming
 - Uses different information sharing techniques
 - Uses risk analysis tools
 - Develops creative options for settlement

Advantages of Settlement Counsel

- Not invested (actual and/or perceived) in the analysis of the underlying rights
- Achieving a fair and durable settlement early in the process
- Avoids / minimizes the escalation of conflict
- Can reduce the need for formal discovery
- Opportunity for savings are substantial

Perceived Disadvantages and Responses

- Increased cost with second set of counsel
 - Up front investment to achieve early and beneficial resolution
 - Virtually all cases go through settlement efforts - a significant portion of the costs likely to be incurred in any event
 - Frees both litigation counsel and settlement counsel to focus on their respective roles
 - Settlement Counsel operate under creative alternative fee structures

Perceived Disadvantages and Responses

- Increased dedication of client internal resources
 - Yes, in the short term
 - More productive than senior executives and employees spending weeks in discoveries
 - Longer term cost savings
 - Builds relationships

Why Use Settlement Counsel

- “Early and effective resolution” are welcome words to clients
- Demonstrates a commitment to the client’s business interests
- Flexible – resolution options not limited to binary result of adjudicative process
- Prompts opponents to focus on settlement
- Can result in true cost savings

Settlement Counsel – Ethics

- Use of Settlement Counsel should satisfy requirement for consideration of ADR
- May present some challenges when Settlement Counsel and Litigation Counsel are from same Firm – consider need for “Ethical Screen”
- Restrictions on marketing Settlement Counsel services?

Advanced Dispute Resolution

Appreciating your options (and risks!)



Facilitating Settlement with Risk Analysis

- A client walks into your office...



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Your Client's Legal Problem

- Wrongful dismissal claim by a former executive
- P was paid \$1M salary; \$1M annual stock options
- Our defence: mandatory retirement policy
- P's arguments:
 - Didn't know of policy
 - Policy didn't apply to him as an executive
 - legislation allowing such policies violates *Charter*
- P says he is entitled to 24 months
- D says, if any, 12 months

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To Settle or Not to Settle

- Claim seeks \$4M in damages
- P has offered to settle for **\$1.5M**
- The client's question: is this offer to settle a reasonable one?

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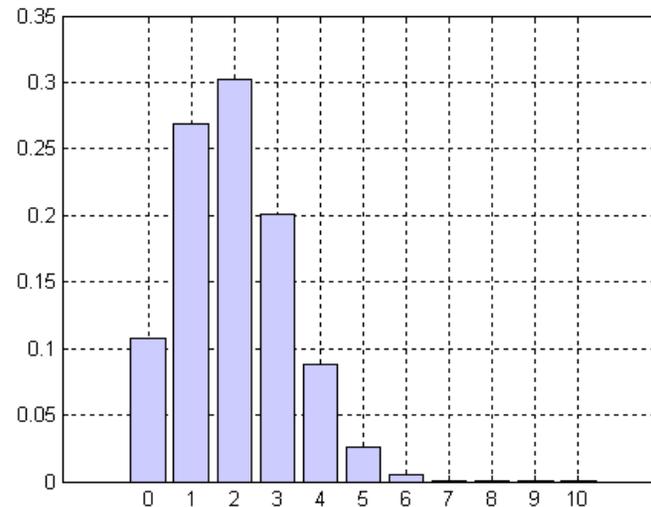
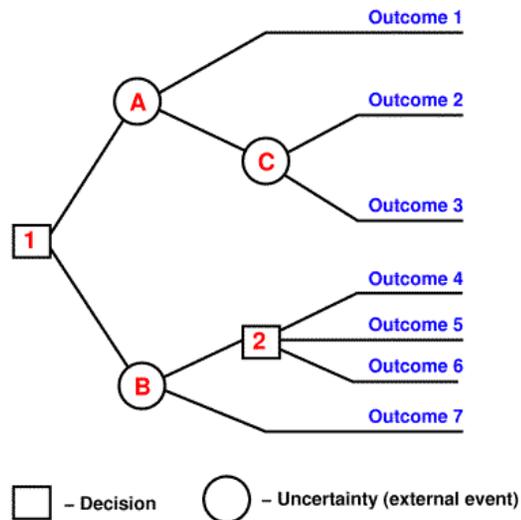
Traditional Application of Professional Judgment: **Gut feeling**

- “good chance”, “almost a sure thing”, “some possibility”, etc.



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Advanced Application of Professional Judgment:
Risk Analysis



Subjective judgment only → Applying subjective judgment systematically
 “Just trust me” → Empirically supported conclusion

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How is Risk Analysis applied in Litigation?

- The application of “decision tree analysis” to litigation and lawsuits
- A method to systematically quantify the risks and uncertainties inherent in the litigation process
- Allows counsel to think about and express themselves as to the value of the case in a more rigorous, scientific manner
- Breaks down a complex legal proceeding into its basic parts
- Be objective – “garbage in, garbage out”
- Use assessments of litigation team

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Applied to our Wrongful Dismissal example...

A 5-Step Process

1. Identify Uncertainties
2. Define Outcomes
3. Assign Probabilities
4. Do the Math
5. Interpret the Results

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1. Identify Uncertainties (adjustable as the litigation progresses)
 - Availability and admissibility of evidence
 - Impact of performance of witnesses
 - Possible significant interlocutory determinations
 - Application of law to facts
 - Who will be the judge
 - Appeals?

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2. Define Outcomes

On Liability: wrongfully dismissed or not?

- P knew and agreed to retirement policy **OR** P did not know
- **IF** P didn't know:
 - Policy did not apply to executives **OR** Policy applies to everyone
- **IF** policy applies to everyone:
 - Policy lawful **OR** Policy unlawful

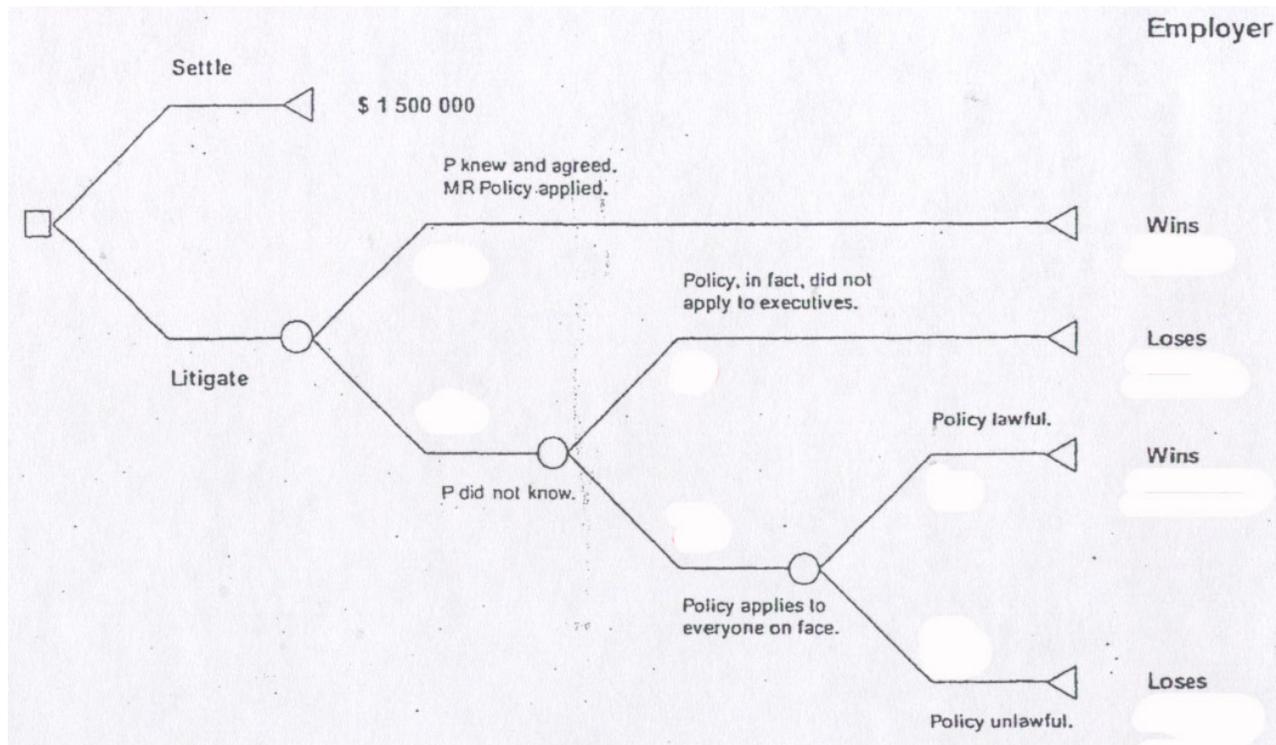
On Damages: If P wrongfully dismissed...

- P entitled to 12 months notice **OR** 24 months notice
- P entitled to stock options **OR** P not entitled to stock options

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2. Define Outcomes: liability

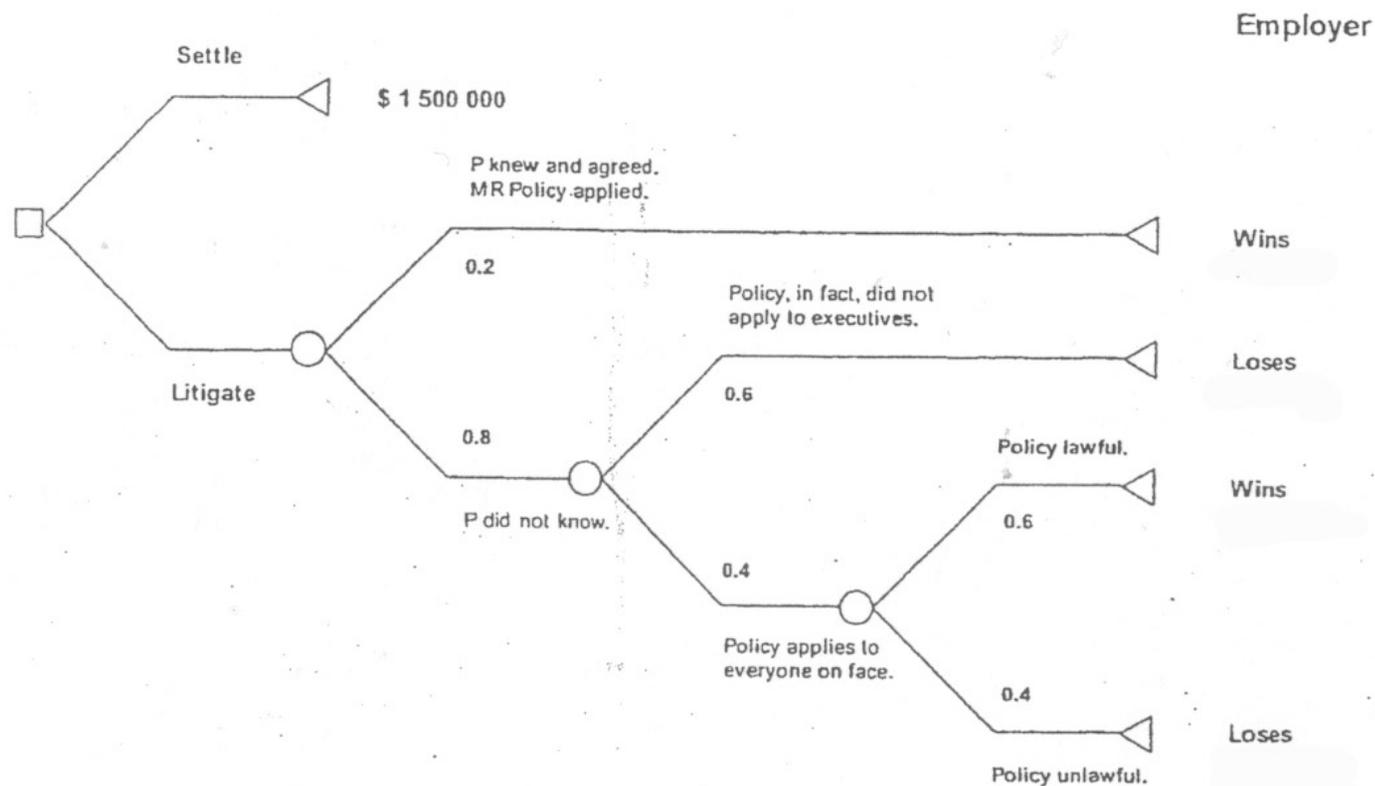
Liability Outcomes in Decision-tree format*:



*Example courtesy of the Hon. George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Limited, 2003)

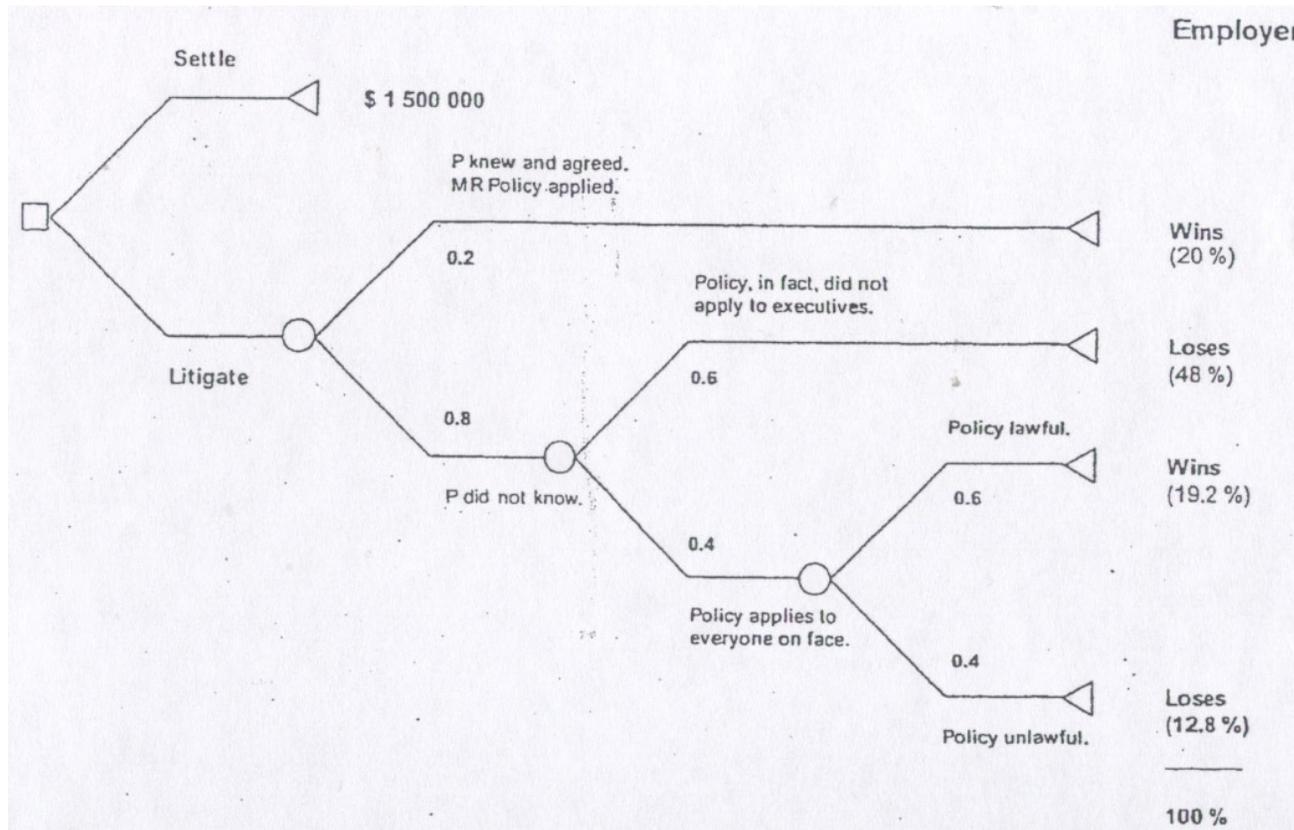
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3. Assign Probabilities: Liability



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4. Do the Math: Liability

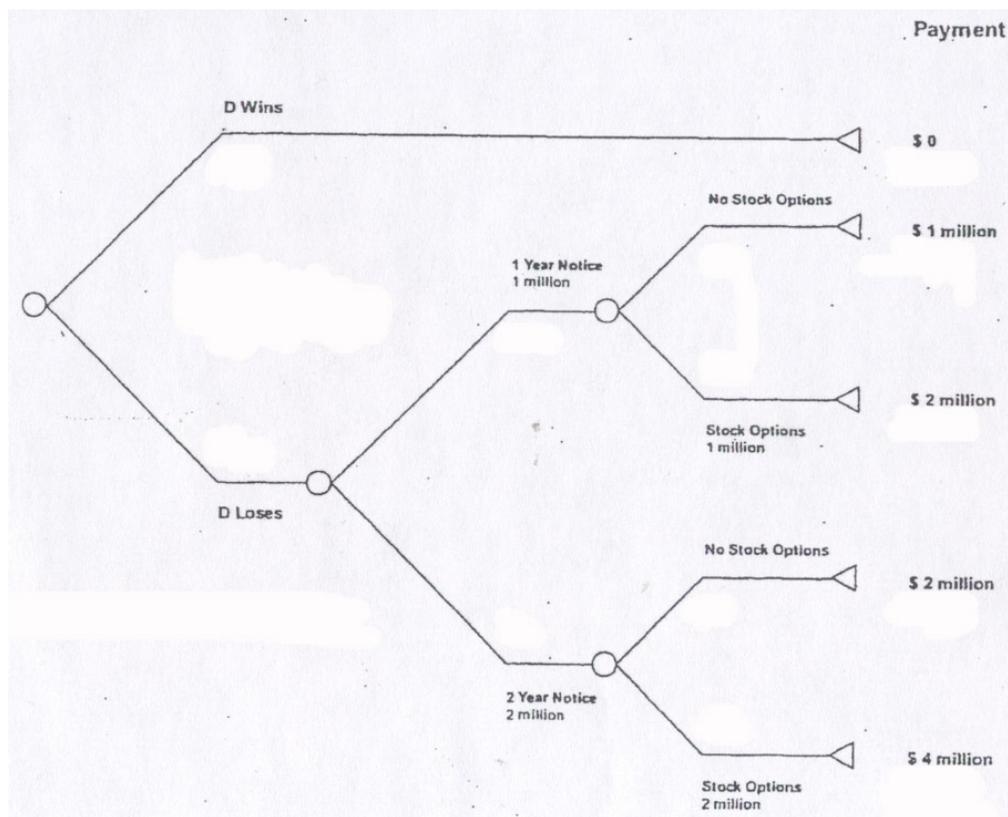


60% chance of being found liable; 40% chance of no liability

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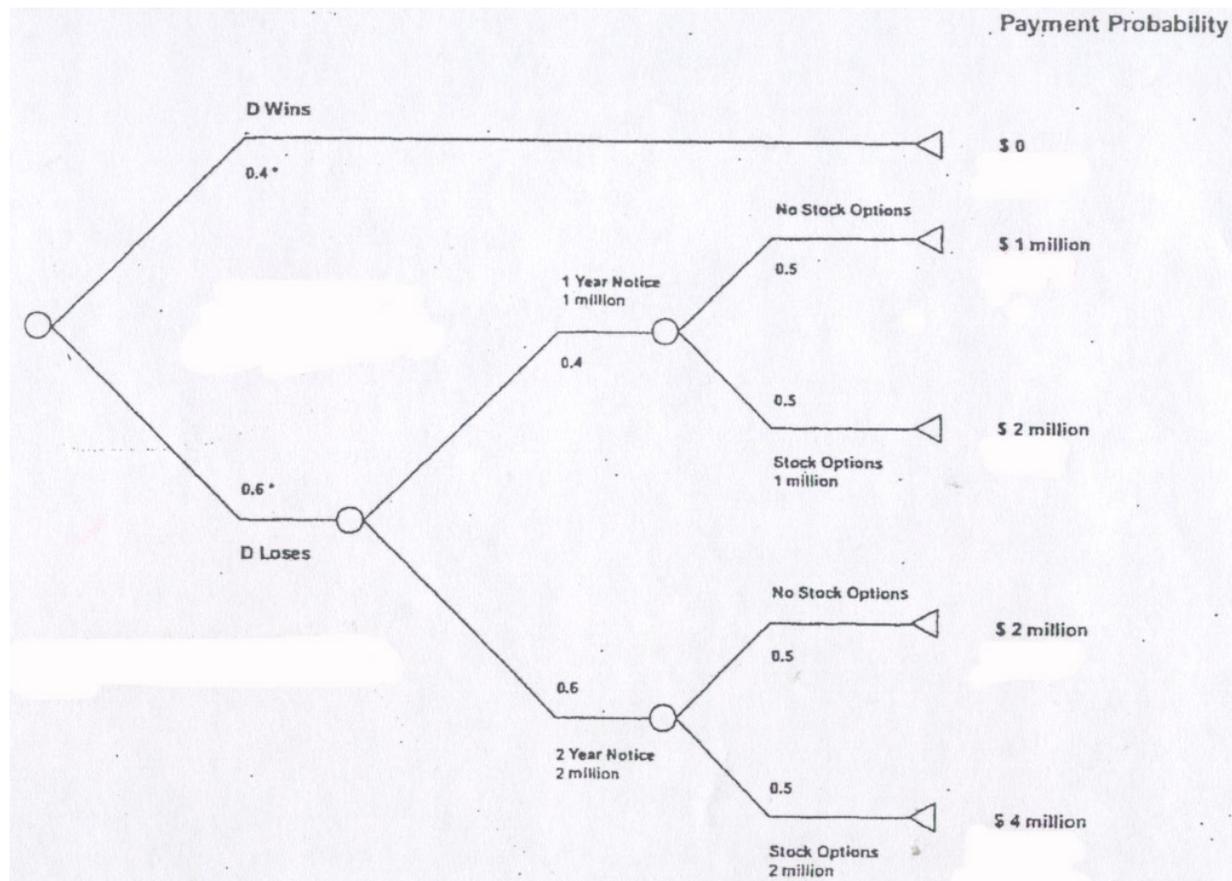
2. Define Outcomes: Damages

Damages Outcomes in Decision-tree format:



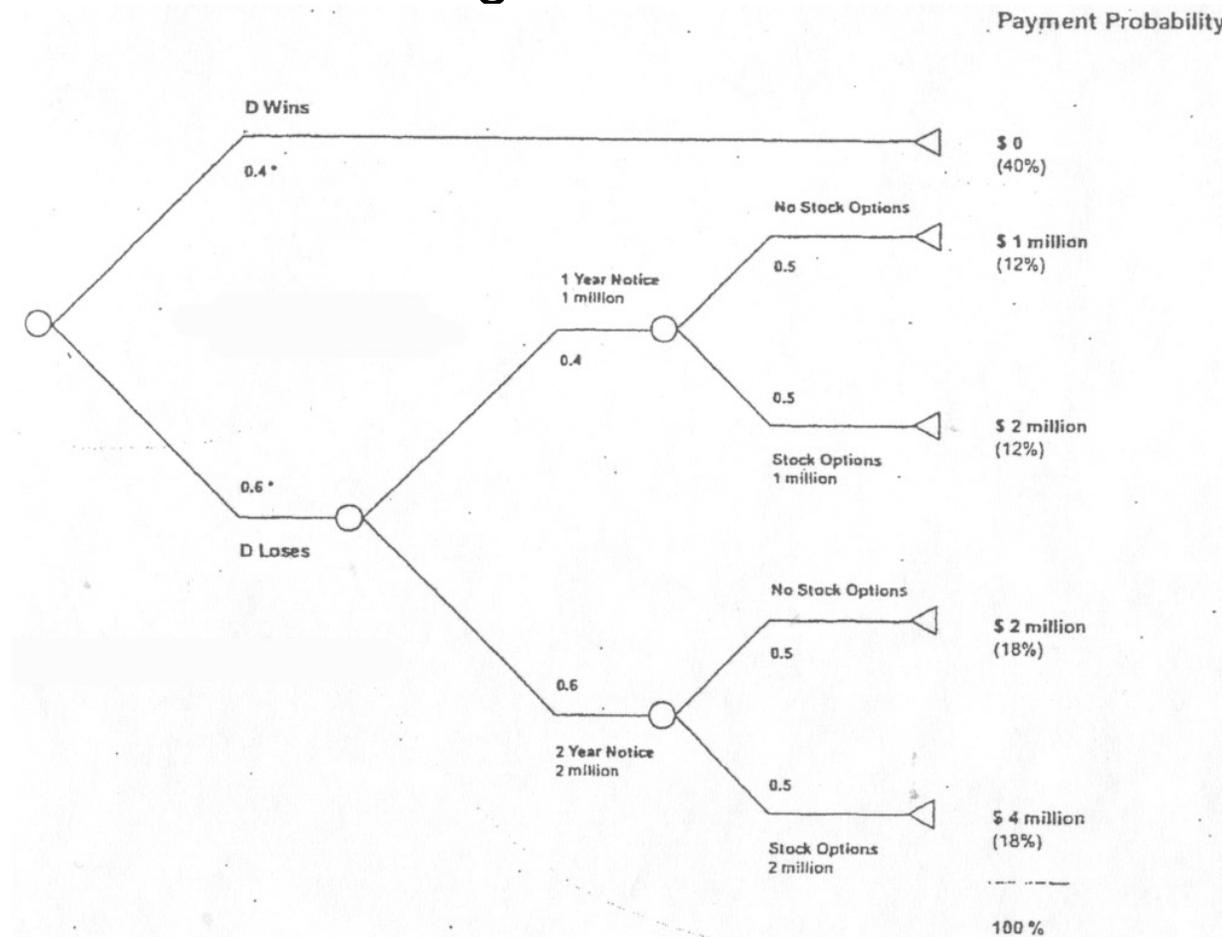
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3. Assign Probabilities: Damages



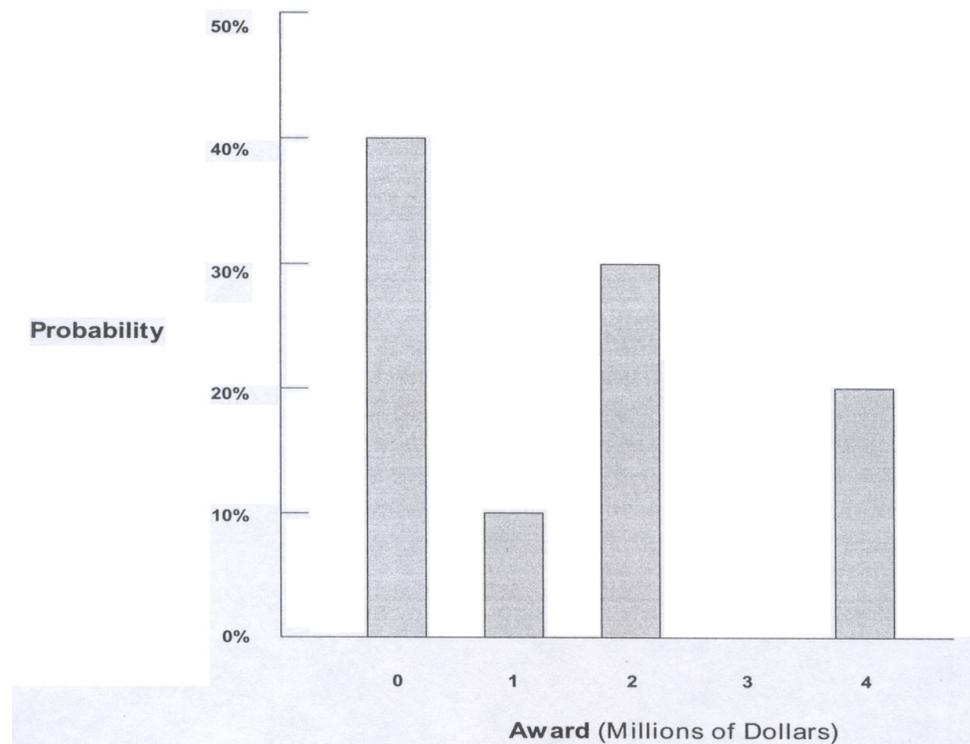
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4. Do the Math: Damages



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5. Interpret the Results: Probability Distribution



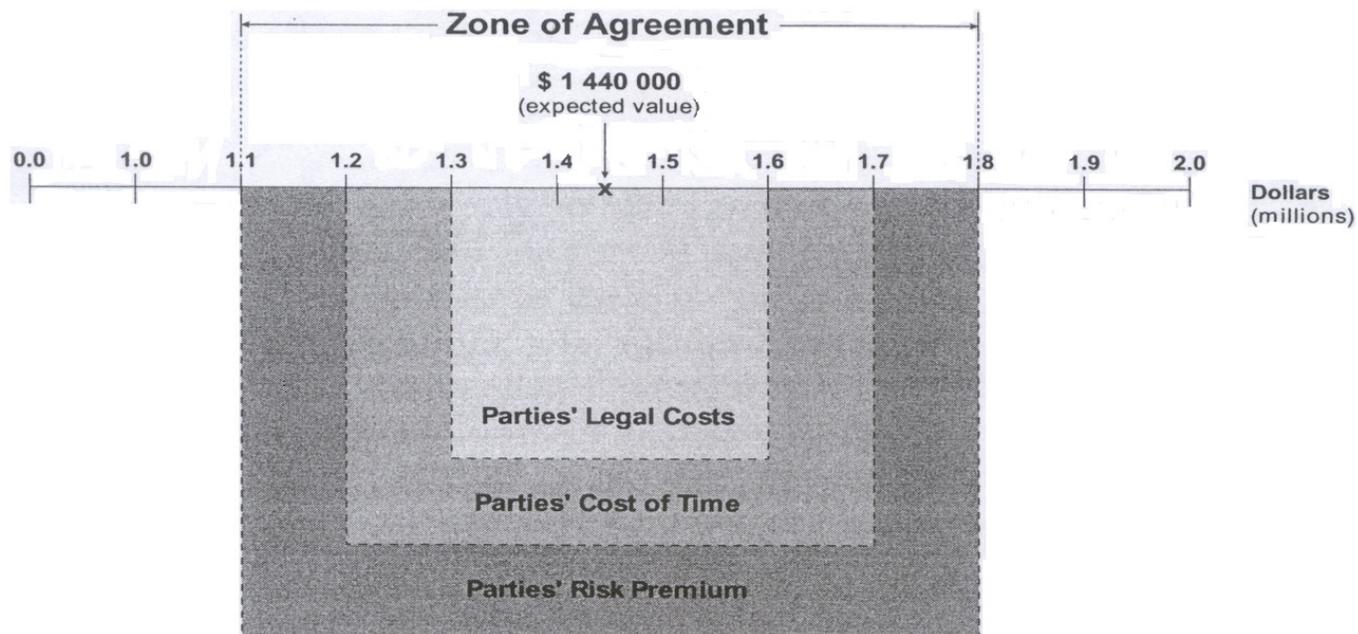
$$\text{Expected Value} = \$0(*40\%) + \$1(*12\%) + \$2(*12\%) + \\ \$2(*18\%) + \$4(*18\%) = \mathbf{\$1,440,000}$$

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5. Interpret the Results: “Zone of Agreement” Analysis

Factor in:

- Legal costs, cost of parties’ time, “risk premium”, etc.



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Alternatively other hard and soft costs can be factored directly into the outcomes with risks assigned:

- Legal costs – incurred, payable to other side, recoverable
- Internal costs (actual plus opportunity costs)
- Time value of money – calculate present value of outcomes (after expected number of years in litigation)

These “transaction costs” can have a significant impact on both plaintiff’s and defendant’s expected values

Also perform the Risk Analysis from the perspective of the other side (as best as you can)

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Advantages of Risk Analysis

- An indispensable tool for arriving at an informed settlement position
- Enhances counsel's professional judgment
- "Gut feeling" analysis is difficult to explain to client, and does not always inspire confidence
- Enables strategic settlement offers: take advantage of Ontario's Rule 49.10 more skilfully
- Helps to sort out relative importance of different issues in a case
 - Software programs can conduct "sensitivity analysis" on each issue
 - Identifies most important issues of which to persuade opposing counsel

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Risk Analysis in the ADR Context

- One of goals of ADR: to encourage each side to make a more realistic appraisal of the strengths/weaknesses of its case
- Asking parties to develop a joint risk analysis of the case advances this goal
 - Narrows issues and focuses debate over specific uncertainties
 - Issue-by-issue discussion vs. sweeping generalities
 - Focus on objective assessments and probabilistic thinking helps remove emotions from the process
 - Quantification exercise forces both sides to acknowledge that total defeat and total victory are unlikely
 - Helps to erode entrenched positions

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Risk Analysis in the ADR Context cont'd

- Can be used to better assess BATNA and WATNA, and likelihood of litigated outcomes in between
- A powerful tool to persuade settlement conference judge
 - Establishes counsel's good faith and ability to compromise (as long as haven't input 100% at every branch!)
- Effectively conveys the complexities of a case to a mediator
 - The more educated the mediator is of the case, the better
 - Visual, numeric advocacy far more powerful than verbal, qualitative advocacy

Further Reading

- William F. Coyne, Jr., “The Case for Settlement Counsel”, (1999) 14 Ohio State J. on Dispute Resolution 367
- James E. McGuire, “Why Litigators Should Use Settlement Counsel”, *Alternatives: CPR Institute for Dispute Resolution* 18:6 (June 2000)
- The Honourable George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Limited, 2003)
- Marc B. Victor, “Litigation Risk Analysis™ and ADR” in John H. Wilkinson, Ed., *Donovan Leisure Newton & Irvine ADR Practice Book* (Toronto: Wiley Law Publications, 1990)
- Evan Slavitt, “Using Risk Analysis as a Mediation Tool” (2005) 60 Disp. Resol. J. 18
- David P. Hoffer, “Decision Analysis as a Mediator’s Tool” (1996) 1 Harv. L. Negot. L. Rev. 113

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Questions?



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