HAPLESS HARVEST
MEDIATION

Teaching Note

Hapless Harvest – Mediation is one of a cluster of simulations within a Hapless Harvest suite, all drawing from the same relatively simple set of facts: Jan Hapless' slip and fall in the Harvest Plenty grocery store.

Full disclosure: I originally developed this fact pattern in approximately 2006 as a plaintiff-client interviewing exercise and follow up "Final Counseling skills Exercise" in my client interviewing and counseling course. That course inspired my book, *Client Science: Advice for Lawyers on Counseling Clients through Bad News and Other Legal Realities* (Oxford 2012), which further shaped the course. Lawyer and client role instructions for Hapless Harvest/Initial Client Interview and for the Final Counseling Skills Exercise are also available at clientsciencecourse.com. Sometime in the intervening years, a mediation workshop or two needed a relatively short, simple case and I created a mediation-ready version. This mediation simulation is a more developed and (hopefully) improved version of those earlier efforts. Hapless Harvest – Negotiation was also recently created to round out the Hapless Harvest suite.

As is true of the others, Hapless Harvest - Mediation is intended as a primarily distributive bargaining problem in a litigation context. While not specifically stated, there should be a relatively small but sufficient bargaining range for agreement if the mediator is skilled and the lawyers are realistic, or the lawyers and clients work with and listen to the mediator.

The simulation is structured in three, four, or five enacted stages, depending on how you use it:
(1) Lawyer-client interviews in a first stage.
(2) Optional: a lawyer-to-lawyer discussion about settlement, ending in no progress other than a joint decision to mediate [see details below].
(3) Optional: A preliminary conference between the mediator and counsel [details below].
(4) A pre-mediation preparation meeting between lawyers and clients on both sides.
(5) A mediation.

Before discussing the deliberate twists and challenges presented at each stage, what follows is an overview of the underlying factual and legal issues and then the dollars risks and costs.

Overview of Factual and Legal Issues

The General Information explains that Jan Hapless was injured while shopping at Harvest Plenty, a health-oriented grocery store that is part a national chain. While walking down an aisle, Jan slipped on spilled carrot juice and then fell against the shelves and backwards, sustaining serious injuries. Jan sued Harvest Plenty for negligence, alleging it knew or should have known of juice spill and, whether or not the store was on notice, the aisle was

unsafe due to poor lighting, distracting displays, excessive clutter, dirt, and over-packed shelves. The plaintiff claims those conditions made it difficult for Jan to see the floor and may have caused the juice spill itself. Harvest Plenty denies any notice of the spill maintaining that it occurred moments before when a five-year old in a shopping cart knocked the juice bottle off the shelf. It claims the lighting was adequate and the juice on the floor was visible to anyone paying attention.
If the mediation is unsuccessful, the defense has informed plaintiff's counsel of their intent to file a motion for summary judgment under the "Open and Obvious" doctrine in Ohio. Basically, Ohio law provides that if a hazard is "open and obvious" - not hidden [the plaintiff should have seen it] – the property owner is not liable.

With regard to damages: Jan Hapless claims the fall at Harvest Plenty cause serious knee and back injuries. While the knee was initially more painful, it healed relatively quickly. However, Jan's back failed to heal; the pain worsened, and Jan required back surgery. Jan alleges the whole ordeal necessitated four months away from work and has limited Jan's mobility and quality of life.
The defense disputes that Jan's back injury was caused by the fall at Harvest Plenty, alleging Jan had recently aggravated a pre-existing condition and that's why surgery was required. Even if the back injury was related to Jan's fall, they question the need for Jan to have missed work for four months.

Dollars, Risks, and Costs

Leaving aside interpersonal dynamics, insurers' jaded assumptions, clients' emotions and selective memories, and earlier negotiation missteps, the Hapless Harvest-Mediation numbers – risks, costs, exposure – should create a small overlap on the dollars. Given the strong chance of losing on summary judgment and then at trial, and the range of potential trial damages (including contributory negligence), one could argue that an economically rational plaintiff using a discounted value analysis would settle for anything over $10,000ish and Total Insurance would settle for up to $40,000ish. However, plaintiffs are not Data from Star Trek or bound to discounted values. One can argue it wouldn't be unreasonable for a plaintiff to reject a settlement in the $10,000 range because it wouldn't significantly improve his circumstances. However, a $40,000 settlement would more than cover the plaintiff's out-of-pocket losses even after deducting the attorney's contingency fee and expert costs, etc., as detailed below.

The "rational" discounted value analysis easily be shown on a decision tree, but it's not necessary. It's easy to see that the plaintiff has only a 30% chance of getting past summary judgment and a 50% chance of winning at trial, that an overall 85% chance of getting NOTHING, with damages ranging from a high of $250,000 to a low of $15,000, even before considering reductions for contributory negligence. While the plaintiff's attorney is on a 33% contingency fee, the client already owes the $3000 in expert fees/costs advanced and will likely owe an additional $7,000 - $10,000 in expert fees etc., to be incurred after summary judgment and through trial. (One of the attached plaintiff's side decision trees does NOT include these costs. The other tree deducts at total of $10,000 from net payoffs in

the event of a plaintiff's win but assumes the attorney will waive their bill for costs if the plaintiff loses at trial. That makes it consistent with the decision tree problem set included in my Client Science course.)

Leaving decision trees aside and just looking at out-of-pockets: the plaintiff has lost (or will soon): $20,000 in lost wages, plus cleaning service and estimated physical therapy – totaling $23,000. IF the plaintiff could get, for example, $45,000 (more or less) in settlement, after a 1/3 attorney's fee and paying $3000 the lawyer has already advanced for an expert, the plaintiff would clear $27,000. As stated above, the $40,000 would cover the plaintiff's out-of-pockets.

Thus, while a plaintiff's side strict litigation risk analysis would likely put the discounted value of this case at less than $10,000 (depending on assessments of injury uncertainties and possible contributory negligence calculations), that may or may not inspire the plaintiff to settle in this range. However, settling at $40,000 (or close) would allow the plaintiff to cover losses and might make sense for Total Insurance.

As you'll see in the simulation, the defense attorney is a little bit less confident of knocking the case out on summary judgment – 60%. (Perhaps plaintiff's counsel's fear drives their 70% estimate.) From a defense perspective, the problem is that briefing and arguing a summary judgment motion, plus a small amount of additional discovery is likely to cost $8,000. If the defense loses on summary judgment, attorneys fees and costs after that, through trial preparation and the trial itself are estimated at $25,000, plus expert fees of $10,000. Counsel's case assessment must also factor in the range of potential damages: between approximately $15,000 and $50,000 if the jury finds a knee injury only and between $100,000 and $250,000 if they find the fall caused both injuries. Yes, these could be reduced if contributory negligence is found. But even with, say 33% contributory negligence attributed to Jan, Harvest Plenty's exposure would be between $10,000 and approximately $166,000.

Once again, this could be used as a decision tree analysis exercise, mapping out the case for both sides. A defense perspective decision tree is attached. Still, lest I be accused of fixation on decision trees, it should be easy to see without a tree, that a sizable settlement – well beyond nuisance value – makes sense for Harvest Plenty.

Highlights and particulars at each stage

1) Lawyer-client discussion about possible negotiated settlement

On the plaintiff's side, Jan Hapless did previously retain the attorney, but has decided to listen to the attorney's advice only if they seem to understand and appreciate Jan's concerns. (That is explicitly stated in the plaintiff's instructions, to set up failure if the student or workshop participant fails to successfully demonstrate understanding and appreciation.) Jan was recently divorced and worries about being able to have a future relationship given the back injury. Jan is upset at the way Harvest Plenty treated them – a

loyal customer – and was embarrassed at being in dire financial circumstances after losing so many months of work.

Jan was happy that the lawyer put the $1 million demand into the complaint and that the lawyer said they might win as much as $250,000 at trial. (Of course, the lawyer said "only if everything goes our way, etc.) Jan isn't sure about the idea of settlement and has an interest in making sure other people don't suffer this type of fall, etc.

Prior to the discussion, Jan is unaware of the "Open and Obvious" doctrine or the risk of summary judgment. The lawyer has to skillfully explain this aspect of the litigation process. It's tricky to explain the risk of losing at summary judgement or at trial, without making the client question their "zealous advocacy." The lawyer will be wise to frame settlement as a win, an opportunity to obtain a certain, risk-free sum. And of course, the lawyer should empathize and listen to the client's emotional interests.

At this point, what the lawyer really needs is the client's authorization to undertake settlement negotiations with opposing counsel. If possible, it would be helpful to get some dollar authority from Jan. That's not essential because the lawyer doesn't yet know if Jan will authorize any settlement negotiations at all.

On the defense side, the lawyer is faced with a jaded insurance representative, suspicious of all plaintiff's including this one. It would appear that the insurance company has put an insufficient dollar reserve on the case. As was true for the plaintiff's side, the defense attorney needs authorization to commence negotiations and, if possible, a dollar value settlement authority.
Depending on the defense client and how skillfully the attorney communicates, reasonable settlement authority may be obtained. Still, as the author, I confess that the insurance representative's instructions make them unlikely to come up with a helpful figure.

(2) Optional: a lawyer-to-lawyer discussion about settlement, ending in no progress other than a joint decision to mediate

Time permitting, after the lawyer-client discussions, the instructor could have the two lawyers meet to discuss a possible negotiated settlement. Why not? The debriefing could elicit what was effective, what was difficult, etc. I suggest asking them not to report on any numbers exchanged or negotiated settlements reached.

Whether or not the lawyers attempt negotiations, the simulation determines that their attempt fails. Both sides' documents titled "In Preparation for Preliminary Conference with Mediator" explain their perspectives on the way the other was entirely unreasonable and obnoxious. These documents also explain that the lawyers agreed only on the wisdom of trying mediation and then to retain a particular mediator. It sets them up for the next step: to prepare for a preliminary joint conference between the mediator and both counsel.

Whether or not the students attempted direct negotiation, it would be worth taking some time to discuss everything that was wrong about the negotiation interactions described in their documents.

(3) Optional: A preliminary conference between the mediator and both counsel

Again, time permitting, if your goal is for students to learn how to represent clients in mediation, or how to mediate, I do propose that the mediators conduct a preliminary conference with both counsel. Instructors could then debrief what occurred in that conference – whether it was helpful or unhelpful from the mediator's and the lawyers' perspectives.

Unsurprising to all instructors, the next documents in the set, titled "Mediation Post Preliminary Conference," include separate confidential information for the mediator and each attorney and describe what happened in that Preliminary Conference.

Whether or not preliminary conferences were conducted with the mediators, it's worth a discussion as to what was "done well" or "should have been done differently" in the preliminary conference as described in the documents.

When the mediations eventually begin, everyone should assume the preliminary conferences were as described in the documents.

(4) A pre-mediation preparation meeting between lawyers and clients on both sides.
To my mind, this stage is not optional: lawyers should sit down with their clients (or connect via video conference) to discuss the mediation process, allocate roles in the mediation, what to expect from the other side, and what the legal risks, costs, and benefits might be, and what settlement terms will meet their interests. This preparation meeting could be an out-of-class assignment.

In class, without asking anyone to reveal numbers or strategies, the instructor could lead a general discussion about what lawyers did or said that was effective or off-putting. Or the instructor might delay this discussion until after post-mediation debriefing.

(5) Mediation

Finally! While I confess that I haven't yet used this full sequence in a mediation course, the basic Hapless Harvest mediation simulation has been well received in mediation trainings. The lawyers have had some unpleasant interactions, the insurance representative has an insurer's jaded attitude, and the plaintiff is angry at slights in the litigation process and at Harvest Plenty's treatment, etc. The defense wants to pay as little as possible and doesn't like to count future attorney's fees to benefit the greedy plaintiff. Jan Hapless doesn't want to think a judge or jury might find the spill to have been "open and obvious." Jan wants as much money as possible to cover costs, feel vindicated, punish Harvest Plenty, and protect

future customers. The attorneys see risks and costs, though perhaps not as fully as they might. All entirely realistic: the mediator has a job to do.

Need I mention that this simulation can also be used to demonstrate how a decision tree analysis can be used in client counseling and within the mediation process? Candidate decision trees are included in the simulation packet. Instructors are invited to riskandrigor.com, or to consult Risk and Rigor: A Lawyer's Guide to Decision Tree Analysis for Assessing Cases and Advising Clients (DRI Press 2019). I hereby admit that it's my book. While the hard copy is available on Amazon, the good news is that you can download it chapter by chapter, free of charge, at https://open.mitchellhamline.edu/dri_press/9/