HAPLESS HARVEST
NEGOTIATION

Teaching Note

Hapless Harvest – Negotiation 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 then 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 of Hapless Harvest.

Hapless Harvest – Negotiation is newly created to round out the Hapless Harvest suite. It is intended to be a realistic but relatively simple 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 lawyers are realistic and if clients listen to their lawyers.

This case simulation is designed for participants in lawyer and client roles. We all know that "in real life", much of this discussion of the case and potential settlement would take place over the course of the lawyer-client relationship. They would have or should have spoken about the client's interests, priorities, comfort with risk, and familiarity with the legal process. That's true on the plaintiff client side, certainly, and I'd say on the insurer client side as well (even if most insurer representatives might have some basic familiarity). It's important for the lawyer to know something about the defense client context – both the Harvest Plenty decision-maker and the insurer representative. Are there corporate constraints? Policies? Linked cases? Has the insurer already put a reserve on the case? How strict a line is that? How much authority and influence does the insurance company have?

Eventually, lawyers would seek to get formal settlement authority from their clients before entering a negotiation with the lawyer on the others side. Here are some options for setting it up within a class or workshop context:

1) Have half the class take on lawyer and half the class take on client roles. The first stage of the exercise would involve lawyers and clients discussing the litigation risks, the client's goals, and settlement authority. You would the move to a lawyer-to-lawyer negotiation phase. While not essential, it's always interesting for the clients to be "flies on the wall" for the lawyer-to-lawyer negotiations.
2) Or, if you want everyone to have the negotiation experience, you can still set it up with a brief meeting between lawyer and client. Have half the class play the lawyer and half the class pay clients. Pair them up to discuss the case and for lawyers to obtain settlement authority. When those in the lawyer role are negotiating, as lawyers, they can't exceed that client's authority. Then have the student switch roles and partners. Now, the other half of the class will be in the lawyer's role and will have to get settlement authority for their negotiation round. After that prep, all students can negotiate lawyer to lawyer. Instruct the

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students that, when negotiating with opposing, they must take their clients' interests, priorities, and any authority limits into the negotiation. Time permitting, you might even add a final phase for all students to present settlement terms to their original student clients.

3) A more time efficient way for all students to negotiate is to give everyone both the lawyer and client role information for either the defense or the plaintiff's side. Have the students consider what level of settlement authority they believe their fictional clients would provide, and remind them that, post negotiation, in real life, they would have to obtain their clients' approval for any tentative settlement reached.

Negotiation structure

- Hapless Harvest is a distributive negotiation. Precise reservation values and ZOPA are not specified; participants are responsible for setting these. However, case analysis suggests a ZOPA (unless bargaining tactics, emotions, and clients make agreement impossible).

- Creative solutions are not the main goal. However, attentiveness to clients' interests and emotions may lead to (or require) terms addressing these.

- Facts include numbers and liability estimates that could be used to support case assessment/risk analysis discussion or exercise.

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.

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Dollars, Risks, and costs

The Hapless Harvest-Negotiation 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), an economically rational plaintiff would settle for anything over $10,000ish and Total Insurance would settle for up to $40,000ish. (Of course, plaintiffs are not Data from Star Trek. 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.)

This can 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 tree 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. Even $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 – beyond nuisance value – makes sense for Harvest Plenty.

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