



What Homer Simpson and Spock can teach us about litigation risk

By: Commentary: Jeff Trueman ○ October 9, 2018



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The central question on the minds of counsel, their clients and insurance professionals in civil litigation is, of course, "What's the case worth?" In the midst of this analysis, the human brain plays tricks on us. For example, litigators sometimes assume their trial experience can determine how jurors will negotiate with one another and resolve factual discrepancies after closing arguments. This assumption is a "heuristic" – a cognitive shortcut called attributional error or illusion of control.

Although more than 100 heuristics exist, approximately 15-20 occur commonly in the context of settlement negotiations. It is easy for potential clients to employ a heuristic similar to the illusion of control by imagining a connection between something they desire, such as a favorable case outcome, and the past successes of their prospective lawyer. Representative and confirmation biases influence how we connect "model" to "outcome." When differences over case value intensify, litigators return to threats of relinquishing control: "Maybe we have to try this case"; or "We feel good about our chances in front of a jury." Underneath the games of litigation "chicken" that are the hallmark of settlement negotiation, heuristics lead to erroneous valuations and assessments of risk.

Borrowing from Daniel Kahneman's book, "Thinking Fast and Slow," cognitive shortcuts live in our "System One" brain where we react to circumstances intuitively without giving much thought about the way in which we perceive problems or how to calculate probabilities and manage risk. "System Two" thinking is slower, more deliberate, logical, and usually more accurate. Think of the difference between Homer Simpson and Spock from "Star Trek" and you get the picture.

Although we like to think that we are System Two negotiators who act analytically and rationally, we usually operate within System One. We negotiate emotionally. We prefer to avoid loss rather than experience an equivalent gain – it feels better not to lose \$5 rather than find \$5. Whether we consider something a loss or a gain depends on a reference point (our expectations, for example) which is usually based on perceived surroundings, desires or what we think happened to others. Loss and fear of loss carry significant psychological power when we think about the future.

Many lawyers default to their role as advocates for legal rights without considering the quality of counsel they give to clients regarding risk management. This plays right into the endowment bias that potential clients carry, valuing property or experiences merely because they have them. When thinking about future risk, many lawyers exhibit an overconfidence and self-serving bias in favor of past success. Unfortunately, competitive bargainers are disinclined to compromise even when it would benefit their bottom lines. Of course, it goes without saying that clients are often better served by lawyers who have some experience in a courtroom. But prior success does not guarantee future results.

Granted, it's hard to know whether a particular settlement number is "good," since it's impossible to compare trial verdicts to settlement results in the same case. Although most lawsuits settle on terms that are good enough, practically speaking, lawyers will emphasize trial advocacy and "justice" over risk management. Few potential clients want to hear about "cognitive heuristics" and risk management when they want a fighter for a "just" cause. Even so, litigants who are aware of the well-worn chutes and ladders of emotion that commandeer their thinking can tune out Homer Simpson in favor of Spock to make better decisions about valuation and risk.

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