

The Path of Lawyers: Enhancing Predictive Ability through Risk Assessment Methods

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Authors:

Heather Heavin, Associate Dean Research and Graduate Studies, College of Law
University of Saskatchewan

Michaela Keet, Associate Professor, College of Law, University of Saskatchewan

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Note to the Reader:

This paper presents a comprehensive picture of the work we have done, so far, on the topic of risk analysis. Not every section will be of interest to every reader, and so we offer this advice to those who would have preferred the concise version. Lawyers who are new to the idea of a systematic risk assessment, and would like something practical to take away, may wish to focus on Part V, where we present a simple framework, as well as Part III, where we list some tools available. Lawyers who have wrestled with risk assessment tools already may be interested in our discussion of the tensions and turning points in Part IV as well. Judges and mediators may find Part I and its review of decision-making biases of particular interest, as well as some of the references about multi-faceted process 'costs' (Part V) and how costs factor into a risk assessment. Finally, we expect that academics and teachers may respond to the underlying questions about the relationship between law and negotiation. We hope, in the end, that the work contributes to the dialogue about how to merge advocacy and problem-solving orientations, both theoretically and practically.

Heather Heavin
Michaela Keet

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A Simple, Practical Framework for Risk Assessment

Develop a projection for outcome

Step 1: Understand and Calculate Risks on Liability

- **Analyze causes of action.** This stage of the analysis is needed to identify areas of uncertainty or risk in the applicable law, the evidence or a combination of these elements.

Break down the legal action into its component parts. What are the elements of each cause of action available to the client? Is the applicable law settled or uncertain, and if the latter, are there risks around the legal test to be applied?

Then, look at the strengths and weaknesses from an evidentiary perspective. What evidence is available (or anticipated) to prove each element of the cause of action?

Limit the risks: Keep the risk factors clear and concise, without letting *de minimis* concerns creep in – keeping in mind the tensions we have described above.

Assign a probability of success to each uncertainty. Aggregate independent variables by multiplying the probabilities. This will produce an overall assessment of the probable finding of liability.

- **Analyze defenses.** The questions that must be answered at this stage of the analysis similarly focus on risks or uncertainties, and include: Are there any dispositive defenses available? (ex: limitation periods, applications to strike) What are the elements of each defense available to the Defendant? Is the applicable law settled or uncertain? What evidence is available (or that you anticipate) to prove each element of the defense? What is the probability of the elements of the defense being proven?

Analyzing the case from both the Plaintiff's and Defendant's perspective will give insight both into the strengths and weaknesses of each of the cases, but also will help legal counsel and the client to better understand or anticipate the theory of the case that will likely be put forward by the opposing side. It also opens the door for later assessments of both client and opposing party goals or interests that will impact the anticipated financial value of the case.

Step 2: Project Damages

- **Analyze remedies.** What remedies are available to the client given the causes of action or defenses available? What are the estimated damages, determined by reference to each itemized head of damages and the probability of proving each head of damage?

Use different graphical models and tools to work through these steps, if appropriate, such as a weighted average across a range of low, medium and high assessments or binary decision trees.

Step 3: Assess – Multiply Steps 1 and 2

- **Aggregate projections for liability and damages.** Risks attached to proving liability and risks attached to proving damages often exist independent of the other. The overall probability under liability and the overall projection of damages should now be multiplied, for an overall reference point on expected legal outcome.

Assess Process Costs

Assess the various costs of attaining the expected legal outcome.

- **Focus on Client Interests and calculate indirect costs.** What client interests are met through the initiation of the legal dispute, or continued litigation and trial? What interests can be met through terms of settlement? How can the gains or losses, in terms of client interests, be quantified? This requires an assessment of the *impact* of litigation in monetary and non-monetary terms:
 - a. *Internal impacts:* human energy costs (time, emotional energy), internal environment of the family, impact on relationships and children, impact on goals, interests and identity
 - b. *External impacts:* network of relationships surrounding the family; business/commercial networks, opportunities and concerns

Identifying client interests, and assigning value to those interests, is a step that is missing from many of the risk assessment tools currently available – and yet we see this as a vital step in the process. How one might approach that is discussed further below.

- **Calculate direct legal fees and costs.** These costs will include both the costs incurred to date, and the costs anticipated into the future in order to get the matter resolved at trial (or appeal). Many lawyers may have a standard checklist for cost estimates, which consider pre-filing investigation/interviews, early legal research, early case evaluation, drafting & filing claims/defense, drafting & filing pre-trial motions, mediation preparation, mediation, client document discovery (organization & drafting), oral questioning preparation, oral questioning, witness preparation, updating legal research, pre-trial preparation, drafting & filing pre-trial brief, pre-trial, trial preparation, and trial. Identifiable costs may be quantified through flat fee rates, or by an estimate of the time needed to complete each task multiplied by the hourly rate of the lawyer/student/paralegal to be undertaking the work. In addition, any fixed administrative fees associated with the various activities should be included.

Finally, Calculate Expected Value of the Action. The final step is a simple subtraction of overall projected process costs from expected outcome. It will produce a value which might be considered the financial or expected value of the case: not a full and accurate prediction of what *will* occur through a trial, but a much more realistic reference point for evaluating how to proceed.

A Simple Framework for Risk Assessment

Develop projection for outcome

Step 1: Understand and Calculate Risks on Liability

1. Break each cause of action into its elements.
2. Consider law and evidence (proof) - identify risk factors.
3. Limit risk factors and assign probabilities.
4. Assess overall probability of success: COMPOUND
5. Go through the same process with respect to DEFENSES.

Step 2: Project Damages

1. Break it down into heads/types of damage.
2. Assign the anticipated quantum to each head/type of damage', considering any legal or evidentiary risks including mitigation.
3. Add up #2 for each head of damage.

Step 3: Assess – multiply steps 1 and 2

Liability projection x Damage projection = Projected outcome

Step 4: Assess Process Costs

1. Consider the client interests and impact of the litigation.
Consider the significance and value of each:
 - Internal (and less visible) business costs
 - Reputation, identity interests
 - Family, business, community relationships
 - Impact on third parties
 - Psychological strain of uncertainty and conflict
 - Loss of time and energy to advance other “life goals”
2. Project full and direct financial cost of the litigation.

Projected outcome – Process costs = Expected value of case

Diagram of a Full Risk Analysis Inside Negotiation

