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

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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.

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Introduction

> *When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why is it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then is prediction of the incidence of the public force through the instrumentality of the courts.* Oliver Wendell Holmes[1]

Over 100 years ago, when Oliver Wendell Holmes wrote this seminal article, "The Path of Law", in the Harvard Law Review, is it unlikely that he had ever heard the term "risk assessment," particularly as applied to the function of the lawyer. But interestingly, when he wrote these words, he was identifying the function of a lawyer as that of a "predictor." A view of rights and duties identified in law as prophesies about what a judge or court will decide in a particular context.[2]

In fact, the descriptions we give to the role or function of a lawyer have not changed significantly from the traditional conceptions of lawyer as advocate, solicitor, litigator or counselor.[3] Today, when we hear the terms "risk identification, analysis and assessment" we may more readily think of project managers and engineers, business people or human resource professionals, or even financial specialists – from traders, to auditors. We may think lawyers do something else.

This article endeavours to change that perception. Lawyers *do* perform risk assessment functions. They have, since the inception of the law and of lawyers as a profession. Lawyers study the law to both know "what the law is" (and what it should be) and also to better predict outcomes for clients. While lawyers have not used the terminology of "risk assessment," lawyers have adopted their own language, methodologies and techniques to perform risk identification and risk assessment functions on behalf of their clients. These methods or techniques are often thought of as lawyering skills, experience and, even, intuition. So while there has been a perception that lawyers "do nothing" when it comes to risk

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[1] "The Path of the Law" (1897) 10:8 Harv L Rev 457 at 457.

[2] *Ibid* ("[t]he prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" at 461).

[3] Arthur T. Vanderbilt, Chief Justice of New Jersey, in a speech to the American Law Student Association, described the five essential functions of a lawyer as that of wise counselor, skilled advocate, unselfish improver of his profession, leader in shaping public opinion and unselfish holder of public office ("The Five Functions of the Lawyer: Service to Clients and the Public" (1954) 40:1 ABA J 31 at 31-32.

assessment, this perception is – at best – inaccurate and – at worst – undermines the critical role lawyers play and should play in resolving problems for clients.

A perception inside the legal profession that lawyers are not undertaking risk assessments for their clients may impede lawyers from adopting new techniques and acquiring new skills that will help them improve their roles as accurate predictors of risk. If lawyers believe they are not doing risk analysis, but are simply providing legal advice on the strengths and weaknesses of the case, or advising on the processes to be followed and the cost and time to completion, then they may be losing opportunities to draw on literature and teachings in other disciplines that could strengthen and enhance what they already do. The rich and emerging field of law and behavioral economics is one such important source, as is the study of negotiation practice and informed-client decision-making as an emerging focus for realizing access to justice.

In the context of litigation, making accurate predictions about what a court is likely to decide is fundamental to the lawyer's role as an information and advice provider. The purpose of these predictions is clearly to enable a client to make better decisions about how to avoid or manage a problem. Advice on whether to proceed to court, whether to settle and at what appropriate settlement value, is ultimately about whether it makes economic sense to continue to litigate a dispute, settle or discontinue. Accuracy in predictions about what a court will do informs the advice provided by lawyers and the ultimate decisions that clients must make. As a result, enhancing lawyers' predictive ability, in conjunction with really understanding clients' interests and goals, will result in better results and satisfaction for both lawyers and clients.

In the corporate world, regulatory compliance and the management of litigation costs take up a significant amount of professional time for lawyers. Litigation also poses financial, reputational and business risks for the firm. As a result, there is significant pressure on legal counsel to keep costs down and to reduce the possibility of legal actions being instituted, or successfully litigated or prosecuted, against the corporation. A lawyer's role as a risk manager may take the form of adopting strategies to avoid or eliminate risk (drafting policies and processes to minimize events or behaviours that may expose the firm to unwanted consequences or stop certain forms of business activity), to externalize risk (contract drafting, third party insurance) or to reduce magnitude of a loss once a risk becomes a reality. As a result, risk management activities are usually forward-looking – avoiding problems that may arise in the future. However, strategies to avoid risk, or avert risk may not eliminate all risks of liability. In some cases, the elimination of risk is impossible, either because of regulatory imposition of legal responsibility, or because there is no way to eliminate all probability of risk, short of stopping all business activity. As a result, legal counsel will be faced with trying to mitigate the risks that arise from litigation.

In the litigator's role, prediction of litigation outcomes is difficult. First, it is often hard to predict the outcome of one singular event with any accuracy. Litigation requires an assessment of the likelihood of a series of events occurring. This added complexity and compounded probability makes these assessments even more difficult. Second, risk analysis requires the assessor to have some comfort with math. That is a difficult problem as many lawyers would readily admit that they went to law school,

rather than studying engineering, because they did not enjoy math.[4] Unfortunately, any rigorous assessment of risk requires some basic understanding and application of mathematics. Third, there is comfort in avoiding the fine-tuned risk assessment, when it comes to relations with the client. If a lawyer relies on vague or slightly ambiguous language to describe chances of winning or defeating a claim (such as "more likely than not" or "most likely" or "unlikely") rather than providing percentages or scales of predictions, there may be less ability for the client to complain if the result turns out badly. Lastly, the litigator's commitment to advocacy may feel inconsistent with risk predictions that open the topic of settlement. If the litigator is hired to win, the litigator may become so entrenched in his client's position that is it difficult for her to consider the risk of loss. While the movement towards settlement and negotiation has influenced most litigators, there may still be perceptions that a lawyer recommending settlement is just not a strong enough litigator to win the trial.

So how can we improve a lawyer's ability to predict the outcome of litigation and more accurately recommend settlement or pursue continued litigation when appropriate? This paper confronts this question from several angles. Part I of this paper situates risk analysis by lawyers in the law and behavioral economics literature. It considers the empirical research on the contrast between settlement offers and trial outcomes, and then explores the heuristics and biases that impact decision-making behavior of lawyers and their clients. By understanding the hard-wiring that affects our judgement, legal counsel can be aware of their influences and take steps to either counteract or improve upon them. Part II will then consider the growing reasons for lawyers to embrace their risk assessment and management roles with consideration of professional code responsibilities, effective negotiation practices and the larger socio-legal climate. Part II also introduces our study, and introduces the premise that most lawyers are uncomfortable with risk assessment tasks. Part III explores what methodologies, tools or techniques are currently available to lawyers engaged in dispute resolution processes to resolve a case or manage the risks associated with litigation. Part IV draws on our work with lawyers and law students, reporting on the ways that methodical risk assessment both challenges and benefits lawyers. We view this as a presentation of "key turning points" that are integral to a modern way of thinking about litigation risk analysis. Part V draws conclusions, and presents a simple framework for risk assessment. We offer a simple framework with the goal of not replacing, but balancing out, the more sophisticated tools available. In this final part, we will also explore what happens when law students are trained to use a simple risk assessment methodology – by observing the impact on settlement negotiations, and the impact of "good" and "bad" risk assessment practices. Finally, our conclusion identifies priorities and areas for further study.

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[4] This observation came up often in our interviews of lawyers, a study which will be described later in this paper.

Part I: Predictive Ability of Lawyers: What does Behavioral Economics have to contribute?

In the past twenty years, the field of law and economics has undergone a revolution with the introduction of the behavioral sciences, which examine how people think and make decisions. If the "rational" person was the norm in the 1940s and 50s, it is the "actual" person that has been the preoccupation more recently. As noted by Cass Sunstein, "the future of economic analysis of law lies in new and better understanding of decision and choice."[5] For the purposes of our paper, we have considered two important contributions that have been made to better understanding lawyer's predictive judgment. The first contribution is in the empirical research undertaken to examine the accuracy of lawyer's predictive judgement, particularly as it relates to decisions on whether to proceed to trial or to settle a suit. The second relates to better understanding how individual decision-making is impacted by both intuitive and cognitive processes. If informed decision-making is about enhancing the ability to better predict the likelihood of an event occurring (such as winning or losing at trial), then lawyers should be particularly concerned about understanding how their predictive judgement is impacted by the brain's hard-wiring and how it can be manipulated (consciously or subconsciously) to enhance the accuracy of its decision-making capacity.

Empirical Research: How Well Do Lawyers Predict Trial Outcomes?

There is relatively little empirical data available that tests the predictive ability of lawyers. However, since 1984, five important studies have attempted to better understand negotiation and settlement behavior through examining actual cases. These empirical studies, in part, sought to test the hypothesis proposed in a 1984 article published by George Priest and Benjamin Klein. In this paper, the authors proposed a theoretical model of litigation, assuming that Plaintiffs and Defendants should be equally good at predicting the outcome of trials, and that since only "close" cases should ever go to trial (with the non-close, or more obvious cases settling) that in 50% of the cases the Plaintiff should win and in 50% of cases the Defendant should prevail.[6] This "fifty percent implication" would be arrived at through a random distribution of settlement decision errors and win rates. Other factors, such as the characteristics of the actors (whether they are Plaintiff or Defendants, or the experience of the legal counsel), or context factors (such as the type of case, or type of adjudicator) should not have an impact on the average outcome rate. The most important assumption of this model, as articulated by Priest and Klein is that "potential litigants form rational estimates of the likely decision, whether it is based on applicable legal precedent or judicial or jury bias."[7] What this suggests is that litigants are rational decision-makers, that they will consider both legal precedent and processes, including human biases, in reaching a decision, that the application of the law will be predictable, that both parties can evaluate the outcome with equivalent precision and that the gains or losses from the litigation would be equal.[8] The fifty percent implication was then refuted in four subsequent empirical studies that analyzed actual

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[5] Cass R Sunstein, "Behavioral Analysis of Law" (1997) 64:4 U Chicago L Rev 1175 at 1175.
[6] George L Priest & Benjamin Klein, "The Selection of Disputes for Litigation" (1984) 13:1 J Leg Stud 1.
[7] *Ibid* at 4.
[8] *Ibid* at 5, 12, 14, 19, 20, 24.

settlement behavior in civil cases by comparing actual rejected pre-trial final settlement offers and the ultimate outcome at trial.

In the first study, Samuel Gross and Kent Syverud reviewed 529 cases between June 1985 and June 1986 to identify determinants of success in pretrial negotiations and at trial.[9] They opined that trial and pre-trial bargaining by clients and lawyers was not akin to "a competitive market: numerous individuals intelligently pursing independent self-interests" but provided "a competing image that is less susceptible to statistical prediction: stragglers picking their way in the dark, trying to avoid an occasional land mine."[10] In this study, the authors found that Plaintiffs were more likely to make predictive mistakes in 61% of the cases, with 15% of the Plaintiffs being awarded less than the Defendant's pretrial settlement offer. Defendants in turn, were wrong in their prediction in 24% of the cases. They also observed that as a class, Plaintiffs were more risk adverse than their Defendant counterparts.

In their second study, Gross and Syverud analyzed an additional 359 cases decided between 1990 and 1991 and found Plaintiffs making pretrial prediction errors in 65% of the cases and Defendants in 26% of the cases.[11] In a third study, undertaken by Jeffery Rachlinski, 656 cases were reviewed with comparisons made between rejected pre-trial settlements offers and jury awards after trial. Rachlinski found that Plaintiffs got it wrong in 56.1% of the cases, and Defendants in 23% of the cases, with the average cost to the Plaintiff's error of $27,687 and to the Defendants of $354,900.[12] Rachlinski, similar to Gross and Svyerud, observed that the litigants' decisions were not always "rational"[13] and that the different risk preferences observed between litigants could be explained by behavioral economics theories of "framing" the offers as gains or losses and whether the litigant was a Plaintiff or a Defendant.[14]

A study published in 2008 by Randall Kiser, Martin Asher and Blakeley McShane[15] compared 4532 cases where final settlement offers had been rejected and the suits proceeding to trial. The authors' data revealed that 61% of Plaintiffs and 24% of Defendants that rejected settlement offers did the same or worse at trial and that the average cost of the Plaintiffs' decision error was $43,100 while the average costs of Defendants' decision error was $1,140,900, for cases decided between 2002 and 2004. The authors also concluded that context factors, such as the type of case, were more predictive of trial outcome than personal factors, such as the experience of the lawyer or whether the lawyer attended law school. The findings in these studies are remarkably consistent, with Plaintiffs experiencing higher decision-rate errors, but Defendants experiencing significantly higher costs for their decision errors.

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[9] Samuel R Gross & Kent D Syverud, "Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial" (1991) 90:2 Mich L Rev 319.

[10] *Ibid* at 385.

[11] Samuel R Gross & Kent D Syverud, "Don't Try: Civil Jury Verdicts in a System Geared to Settlement" (1996) 44:1 UCLA L Rev 1.

[12] Jeffrey J Rachlinski, "Gains and Losses and the Psychology of Litigation" (1996) 70:1 S Cal L Rev 113.

[13] *Ibid* at 118.

[14] *Ibid* at 119.

[15] Randall L Kiser, Martin A Asher & Blakeley B McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" (2008) 5:3 J Empirical Leg Stud 551.

Kiser's subsequent study of 5653 civil litigation disputes in California and New York also revealed similar findings.[16] In the California case data, the Plaintiffs experienced decision error rates of 60%, compared to Defendant decision error rates of 25%, with the average cost of decision error being $73,400 for the Plaintiffs and $1,403,654 for the Defendants. The New York data revealed slightly lower error rates of 56% for Plaintiffs and slightly higher rates of 29% for Defendants, with the average decision error of $52,183 for the plaintiffs and $920,874 for the Defendant. Consistent with his previous study, Kiser identified five (5) context factors as having a strong effect on decision-errors and win rates, as opposed to "actor-dependant factors." These context factors include the type of case, service of statutory settlement demands and offers which raise the monetary risks of not settling before trial, the type of forum (judge, jury or arbitrator), the type of damages claimed by the Plaintiff and the degree of disparity between the Plaintiff's demand and the Defendant's offer.[17] Kiser found that high Plaintiff decision error rates were associated with cases in which contingency fee arrangements were most common (e.g. medical malpractice (80%) and products liability (70%)), but low for cases in which contingency fee rates were less common (e.g. contracts (31%) and eminent domain (33%)).[18] Defense error rates were higher where insurance was generally unavailable (e.g. contract cases (60%) and fraud (44%)) and lower in cases where insurers were likely to represent Defendants (e.g. medical malpractice (17%) and premises liability (19%)).[19]

The results of this empirical work are highly consistent. The Priest-Klein "50 percent implication" does not arise in practice. Both Plaintiffs and Defendants exhibit decision error with Plaintiffs experiencing decision error at a higher frequency than Defendants, but with the magnitude of the decision error significantly higher for Defendants than for Plaintiffs.

Intuitive versus Cognitive Decision-making

The Priest-Klein hypothesis assumed that litigants would be rational decision-makers, basing decisions on information such as existing precedent and process and understanding human biases that may arise with a judge or jury. Experimental psychology, and its impact on behavioral law and economics, has uncovered a much richer way to understand human judgment and decision-making.

As previously mentioned, a litigation lawyer's role is that of a predictor of a future event. He or she must forecast the probable outcome of a matter should it proceed to trial. Unfortunately, that prediction is plagued by two elements: complexity and uncertainty. The complexity of a lawsuit is a result of the many factors that must be considered. Litigation is not a single event, but a series of events or results. For example, in a personal injury case, the Plaintiff must prove liability on the part of the Defendant as well as damages. The ability to prove liability will depend on the causes of action available, the elements of each cause of action, whether each element can be proven with credible, available evidence (on a

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[16] *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* (Berlin: Springer, 2010) at 32, 42, 45.

[17] *Ibid* at 54

[18] *Ibid* at 55, 56. Kiser posits that these higher error rates in contingency fee cases may reflect optimistic overconfidence (*ibid* at 56, citing J Goodman-Delahunty, PA Granhag & EF Lofus, "How Well Can Lawyers Predict Their Chances of Success?" (1998) [unpublished, archived at University of Washington]).

[19] Kiser, *ibid at* 56

balance of probabilities), that the cause of action, if proven, caused the injuries sustained by the Plaintiff and that they were not the result of other causal events, or intervening causes, or if proven, that the Plaintiff was not sufficiently contributorily negligent, and that the Defendant does not have any legal bars to the suit or defenses to the action. Even in this brief example, the complexity is overwhelming.

How people will evaluate the likelihood of a certain single event occurring will also depend on the mechanism they are using to evaluate the probability. Probability theory is generally used to analyze repetitive chance processes (e.g. rolling a dice, flipping a coin). But it has also been applied to events "for which probability is not reducible to the relative frequency of 'favourable outcomes.'"[20] Amos Tversky and Daniel Kahneman describe the extension rule as the most fundamental qualitative law of probability.[21] As explained "a probability measure is defined as a family of events, and each event is construed as a set of possibilities, such as the three ways of getting a 10 on a throw of a pair of dice. The probability of an event equals the sum of the probabilities of its disjoint outcomes."[22] What this means is that that probability of the family of events cannot be more than the sum total of the probability of each possible event in the family. And the probability of a possible event in the family cannot be more probable than the entire family of events.[23] However, people's intuitive judgments or beliefs of probability do not apply this extensionalist thinking: "People do not normally analyze daily events into exhaustive lists of possibilities or evaluate compound probabilities by aggregating elementary ones."[24] Rather, we rely on mental short-cuts, or *heuristics*.

Daniel Kahneman's popular book, *Thinking, Fast and Slow,*[25] describes how judgment and decision-making is effected by two modes of thinking, System 1 being the automatic or intuitive (quick) system and System 2, the cognitive or concentration-based (slow) system.[26] It is the reliance on these systems and their interplay that explains, among other things, our decision-making behavior. It is often our "quick" intuitive thinking with its reliance on mental short-cuts and biases that is triggered in the face of both simple and complex decisions. While the "slow" cognitive system is better at analyzing complex problems, the slow cognitive system is also "lazy" and tires when faced with cognitive overload or ego/emotional depletion. These higher costs of slow thinking and the relative ease and comfort we

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[20] Amos Tversky & Daniel Kahneman, "Extensional versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgement" in Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge, UK: Cambridge University Press, 2002) 19 at 19.

[21] *Ibid* at 20.

[22] *Ibid* at 19.

[23] Tversky and Kahneman refer to this as the conjunction fallacy in probability judgment. This fallacy was illustrated in their study involving students given a questionnaire and asked to estimate the number of words out of 2000 in four pages of a novel that were seven letters long and ended in 'ing.' In a second version of the questionnaire, students were asked to estimate the number of seven letter words ending in '_n_.' While seven letter words ending with 'ing' should be reflected in the frequency of words ending in '_n_,' the opposite was found. The participants rated the frequency of words ending in 'ing' much higher than its conjunction, "_n_" (*ibid* at 21-22).

[24] *Ibid* at 20.

[25] (Doubleday Canada, 2011).

[26] Daniel Kahneman in *Thinking, Fast and Slow* describes these as System 1 and System 2: "System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration" (*ibid* at 20-21).

experience with quick, intuitive thinking can result in significant decision-making error. Understanding when quick, intuitive thinking may be influencing behavior and resulting in inaccurate predictions is important for lawyers and their clients as techniques and tools can be developed to counteract these intuitive responses. Accordingly, if a lawyer's advice to a client is based on intuitive thinking, rather than a cognitively-based risk assessment, the ability of the client to make a truly informed decision is compromised. Similarly, if a client's decisions are impacted by intuitive thinking, methods and techniques that can be used to explain the litigation and its potential outcomes will be more effective in facilitating lawyer-client communication.

Various heuristic devices (or rules of thumb), biases and aversions can impact our judgement and decision-making. As noted by Jolls, Sunstein and Thaler, "[a]ctual judgments show systemic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory."[27] These heuristics include availability and representativeness, anchoring, and case-based decisions. Biases and aversions include unrealistic optimism, overconfidence bias, status quo bias, hind-sight bias, extremeness aversion, and loss aversion. A brief explanation of each helps one to better understand how our brains rely on both quick and slow thinking, with the quick, intuitive system often operating even in the face of complexity and uncertainty.

Heuristics and Biases Impacting Predictive Judgment

If the extension rule is a fundamental law of probability, and our minds do not aggregate and sum all disjoint outcomes to accurately predict outcomes, what does our mind actually do to predict the probability of uncertain events?

Availability – When an event is readily recallable or easily comes to mind, people will often over-estimate the risk of it occurring, merely because it is readily available to be brought to mind.[28] Alternatively, events that are not as "available" in one's recollection may have their risk underappreciated and underestimated. This can lead to overconfidence bias, in rejecting or ignoring events that appear to have a low risk of materializing.

Representativeness and Stereotypes – How closely an instance corresponds to an entire category (or a sample corresponds to a whole population) tells us something about how representative that instance is of the category as a whole.[29] Professions and personality stereotypes fall into this example.[30] Various studies have revealed that the conjunction rule of probability is violated frequently, particularly when social stereotypes are involved. This is because the more detail or richness that is added to the description, the higher people will perceive its probability. This is because the mind confuses probability

[27] Christine Jolls, Cass R Sunstein & Richard H Thaler, "A Behavioral Approach to Law and Economics" in Cass Sunstein, ed, *Behavioral Law and Economics* (Cambridge, UK: Cambridge University Press, 2000) 13 at 15.
[28] Kahneman, *supra* note 25, ch 12, 13; Nobert Schwarz & Leigh Ann Vaughn, "The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information" in Gilovich, Griffin & Kahneman, *supra* note 20, 103 at 103.
[29] Kahneman, *ibid*, ch 15.
[30] For example, when someone describes a Star Trek-loving, socially awkward yet brilliant person, does computer scientist, or banker come to mind?

with *plausibility*, searching for a coherent story or description. As noted by Kahneman, "[t]he most coherent stories are not necessarily the most probable, but they are plausible and notions of coherence, plausibility, and probability are easily confused by the unwary."[31] This has interesting implications for legal analysis and legal argument. If litigation is not just about conjunctive probabilistic reasoning, the more descriptive and plausible the story put forward by the Plaintiff or the Defendant, its plausibility will increase even if its actual probability will not.

Anchoring - When people are called to make a decision in the face of uncertainty, they will frequently fixate or anchor on a known reference point when making a quantity estimate.[32] For example, real estate pricing can serve as an anchor from which people will negotiate. Anchoring can be a useful tool if the anchor is providing accurate information about the target value, but the anchoring effect occurs even if the anchor is completely unrelated to the target.[33] Given this impact, the advantage of making a first offer is obvious in a negotiation setting. However, many negotiators aware of this effect can attempt to reduce this anchoring effect by triggering their "cognitive" side and deliberately challenging and refuting the analytical basis upon which the first offer has been made.[34]

Extremeness Aversion – People have an aversion to extremes and tend, between two given extreme alternatives, to seek a compromise.[35] What is perceived as an extreme can be manipulated through the addition of alternatives into the possible choices. Unfortunately, even if an "irrelevant" alternative is introduced, it may alter the choices of the parties, resulting in a switching from one extreme alternative to another.[36]

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[31] Kahneman, *supra* note 25 at 159. The studies conducted by Kahneman and Tversky required participants to guess the occupations of 'Bill' and 'Linda' where the age and personal attributes of each individual were included. The results demonstrated participants guessed the profession by the degree to which they perceived Bill or Linda resembled the description provided. In the case of Bill, it was that he was 'an accountant who plays jazz for a hobby' and for Linda as a feminist bank teller. However, the vast majority of participants ranked these conjunctions as having a higher probability than their less representative constituents, namely they ranked much less probable that Bill was an accountant and that Linda was a bank teller, although these large more inclusive groupings (accountant and bank teller) should have a higher frequency than the most specific (jazz playing accountant or feminist bank teller) (Tversky & Kahneman, *supra* note 20 at 23-29). While much has been written about Kahneman and Tversky's studies of representatives, Kahneman and Shane Frederick have proposed a more unified theory of judgment heuristics, namely that they are not "a collection of disparate cognitive procedures bound together by their common function in a particular domain," but are all premised on "attribute substitution and are not limited to questions about uncertain events" ("Representativeness Revisited: Attribute Substitution in Intuitive Judgment" in Gilovich, Griffin & Kahneman, *supra* note 20, 49 at 81).

[32] Gretchen B Chapman & Eric J Johnson, "Incorporating the Irrelevant: Anchors in Judgements of Beliefs and Value" in Gilovich, Griffin & Kahneman, *supra* note 20, 120 at 120-121.

[33] See Amos Tversky & Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases" (1974) 185:4157 Science 1124 at 1124-1131.

[34] The empirical studies testing the impact "awareness" by participants of the anchor and anchoring effect revealed conflicting results, with either large or small anchoring effects displayed by the participants after being informed that an anchor was not informative. See Chapman & Johnson, *supra* note 32 at 125.

[35] Sunstein, *supra* note 5 at 1181

[36] Sunstein, *ibid* at 1182.

Loss Aversion and Mental Framing – People are significantly more averse to losses than they are pleased to receive what is perceived as an equivalent gain.[37] As a result, "[c]ontrary to economic theory, people do not treat out-of-pocket costs and opportunity costs as if they were equivalent."[38] The impact of loss aversion can be significant in the legal context for two reasons. First, people that are vested with a legal entitlement or right will be especially averse to losing that entitlement or right and accordingly, value it more than someone that does not have that entitlement or right.[39] As a result, the legal system is very important in establishing and allocating entitlements and rights at the outset. Second, whether something "codes" as a gain or a loss is contextual: whether a person perceives the event as a gain or a loss will depend on how it is framed.[40] For example "[w]hether people choose the risk of trial over the certainty of settlement may depend on whether they perceive their choice as involving a loss or gain."[41] As a person's perception of an event as a gain or loss is easily manipulated through framing an event as a gain or a loss, the implications for legal argument (and negotiation practice) are significant.[42]

Self-serving Bias and Overconfidence Bias – People are more confident about their judgments when they have little or no information to support them.[43] They are also overly optimistic about the strength of their own judgments and believe they are more deserving than other people.[44] This can result in systemic overconfidence in assessments of risk that are at uniformed and missing critical information. It also helps explain failure in negotiations of legal disputes.[45]

With these (and many other) biases and heuristics impacting our predictive judgement and decision-making ability, it is not surprising that errors occur. These impacts are experienced both by clients and lawyers. At a practical level, lawyers must be aware of the heuristics and biases operating upon their conscious and subconscious minds, and take steps to recognize when these mental short-cuts are

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[37] Daniel Kahneman, Jack L Knetsch & Richard H Thaler, "Experimental Tests of the Endowment Effect and the Coase Theorem" (1990) 98:6 J Political Economy 1325 at 1326-1327.

[38] Sunstein, *supra* note 5 at 1179. Loss aversion discredits the Coase Theorem, as the initial allocation of rights and entitlement between parties will have a significant impact on the outcome of subsequent negotiations as the allocation impacts how much people value the entitlement and are averse to losing it (see Sunstein, *ibid* at 1179).

[39] In many ways, the entire civil law system of litigation is premised on loss aversion, enabling the enforcement of one's rights against another, with damages payable compensating for losses through compensatory or expectation damage awards.

[40] See Daniel Kahenman & Amos Tversky, "Prospect Theory: An Analysis of Decision under Risk" (1979) 47:2 Econometrica 263; Sunstein, *supra* note 5 at 1180; Kahneman, *supra* note 25 at 270-271.

[41] William F Coyne, "The Case for Settlement Counsel" (1999) 14:2 Ohio St J Disp Resol 367 at 386.

[42] Louis Kaplow & Steven Shavell, "Property Rules Versus Liability Rules: An Economic Analysis" (1996) 109:4 Harv L Rev 713; Edward J McCaffery, Daniel J Kahneman & Matthew L Spitzer, "Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards" (1995) 81:5 Va L Rev 1341.

[43] Kahneman refers to this as the WYSIATI rule (what you see is all there is). "You cannot help dealing with the limited information you have as if it were all there is to know. You build the best possible story from the information available to you, and if it is a good story, you believe it. Paradoxically, it is easier to construct a coherent story when you know little, when there are fewer pieces to fit into the puzzle. Our comforting conviction that the world makes sense rests on a secure foundation: our almost unlimited ability to ignore our ignorance" (*supra* note 25 at 201).

[44] Sunstein, *supra* note 5 at 1183.

[45] Linda Babcock & George Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases" (1997), 11:1 J Economic Perspectives 109 at 119-121.

operating, or identify the situations where they are likely to arise and take active steps to avoid or eliminate their impact. The "slow-thinking processes" embedded in risk analysis are key to this exercise.

Part II: Perspectives on the Responsibility of Lawyers to Predict Risk

Litigation clients and their lawyers are – as a matter of fact – under the influence of cognitive barriers which interfere with "good" decision-making. This is important for lawyers to know, from three different vantage points, each of which may be seen as having an "economy of value" to today's legal professional. First, the lawyer is a member of a profession bound by standards and ethical obligations. We will review those standards and the extent to which those presume transparent and full information owed and given to clients. Second, regardless of the lawyer's philosophy on negotiation, today's litigation lawyer must think strategically about how clear information about risks is essential to an ethical and effective settlement process. We will draw briefly on the negotiation literature to explain how this is so. Third, the lawyer is almost necessarily now drawn into larger public dialogue about the accessibility of justice. Rising public policy concerns on this front reinforce the obligation to give open, transparent, and precise advice to clients about the legal processes in which they may find themselves.

Professional and Ethical Standards

Providing the client with accurate and understandable advice is a core ethical and professional requirement of lawyers. Facilitating informed decision-making, then, is central to the efficacy of the lawyer-client relationship.[46] When clients seek the services of a litigation lawyer it is generally because the client has exhausted her own ability to adequately resolve the problem. The lawyer then is retained because of the legal and procedural knowledge that he or she possesses. Clients are usually concerned about the strength of their position, either in pursuing a claim or defending against a claim. They generally lack information about the process that will be followed in order to pursue or defend a claim, the role they will play in making decisions, and participating in and directing the litigation, and they will be unaware of the monetary, time and emotional costs of litigation and of what form the resolution of the dispute may take, either in terms of remedies or compensation available or payable.

Most commonly, the provision of information to the client would be in the form of a "legal opinion," setting out the strengths and weaknesses of the client's case. This will often be accompanied by information about the type of process or processes that could or should be utilized to pursue the resolution of the matter, an estimate of the legal costs involved, and the possible timeframe for completion. Opinions will invariably set out the assumptions that the lawyer is relying upon when rendering his opinion, as well as any further qualifications. The opinion may be further qualified by other uncertainties. These may be uncertainties as they relate to unclear legal rules, uncertain application of the law to the assumed facts, uncertainty as to the current facts or ability to prove those facts through available and credible evidence or witnesses. While rarely referred to as such, these opinions are risk assessments. The lawyer is faced with trying to forecast what a probable future result will be, based on

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[46] Julie MacFarlane's book, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) characterizes the relationship between lawyer and client as a partnership rather than that of an expert

information currently available. The lawyer's assessment is plagued with uncertainty of past and future events, as well as complexity. In making these assessments, lawyers are bound by ethical and professional standards, but are rarely provided with a prescriptive formula to follow when undertaking these assessments. Not surprisingly, lawyers may exhibit strengths and weaknesses in performing some of these assessments.

Lawyers are bound by ethical and professional obligations, including the obligation to "advise and encourage compromise or settlement of a dispute whenever it is possible to do so on a reasonable basis and [to] discourage the client from commencing or continuing useless legal proceedings."[47] While the Federation of Law Societies Model Code of Professional Conduct does not provide additional commentary on what form this advice should take, or the methodology to be employed in assessing whether legal proceedings should be commenced or continued, the competency, quality and candour standards set out elsewhere would demand that a lawyer assess a settlement offer or proposed compromise to a claim only after being aware of the relevant legal issues, evidence applicable to these issues, relevant substantive law and procedure, as well as the interests and objectives of the client. The Model Code however, does not provide any precise methodology, timeframes or tools to be utilized in undertaking these assessments.

The Model Code defines a lawyer's professional responsibilities as meeting a standard of competency,[48] providing a quality of service that is timely, conscientious, diligent, efficient and civil,[49] and being honest and candid in providing information and advice to the client.[50] Alice Wooley, reflecting on the duty of honesty and candour in the context of providing legal advice, suggests that lawyers must "engage in a reasoned explanation of their position, noting its weaknesses and any countervailing arguments."[51] The advice, she argues, "ought to facilitate the client's goals and – especially – the client's ability to make decision about how to proceed."[52]

The definition of "competency" in the Model Code also imports both a requirement for substantive knowledge, timely communication but also judgement and deliberation in all of the lawyers' functions:

    (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practices;
    (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

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[47] *Federation* of Law Societies of Canada, *Federation Model Code of Professional Conduct*, Federation of Law Societies of Canada, 2016, r 3.2-4 [*Model Code*]. The Australian Legal Convention obligates lawyers, when preparing for mediation, to undertake a risk analysis that links risks to the client's interests (Law Council of Australia, "Guidelines for Lawyers in Mediations" (August 2011) at 5, online: <http://www.lawcouncil.asn.au/FEDLIT/images/Guidelines_for_laywers_in_mediations.pdf>). See also Mary Walker, "Guidelines for Lawyers in Mediations" (2007) 9:8 ADR Bull Article 3, online: <http://epublications.bond.edu.au/adr/vol9/iss8/3>.
[48] *Model Code*, *ibid*, r 3.1-2, commentary 1-15.
[49] *Ibid*, r 3.2-1, commentary 1-6.
[50] *Ibid*, r 3.2-2, commentary 1-3.
[51] Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47:2 UBC L Rev 743 at 773.
[52] *Ibid*.

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including: (i) legal research; (ii) analysis; (iii) application of the law to the relevant facts; (iv) writing and drafting; (v) negotiation; (vi) alternative dispute resolution; (vii) advocacy; and (viii) problem solving.

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) …

(f) applying intellectual capacity, judgment and deliberation to all functions;[53]

The Explanatory Commentary accompanying the competency standard provides further guidance on how a lawyer should undertake the formation and communication of legal opinions and other non-legal advice to clients:

> A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.[54]

The competency standard does not expressly indicate a methodology to be used in meeting this standard. In order for a client to make an informed decision about their dispute, the lawyer must be knowledgeable about the applicable substantive law and procedures and communicate this knowledge to the client. Written opinions can be a useful tool to facilitate this communication with the client. Qualifications in a legal opinion can relate both to a competency standard as well as ensure more effective communication with the client. If the lawyer identifies facts, circumstance and assumptions upon which the opinion is based, it brings a degree of transparency to the lawyer's opinion making processes and can, in turn lead to the client providing further information to the lawyer so that the opinion can be less qualified. It also identifies the limits of the opinion and can help the lawyer to identify what further additional information and knowledge are needed to bring less uncertainty to the opinion. Risk assessment methods are one possible format to help focus this kind of advice.

Predictions of Litigation Risk as Instrumental to Effective Settlement Negotiation

Subsumed in Code responsibilities is the lawyer's obligation to understand and advise on the process options available to the client, and to explore the option of settlement. This arguably requires more than general advice about the slate of litigation and alternative dispute resolution options. Presumably, it requires that the lawyer undertake an appropriate factual inquiry or investigation, understand non-legal factors, and be able to define appropriate strategies to resolve the problem.

Against a backdrop which includes Model Code obligations to "encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis,"[55] informed assessments of litigation risk are fundamental in a very specific way. While litigation is at play, the best option short of a

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[53] *Supra* note 47, r 3.1-1.

[54] *Ibid*, r 3.1-2, commentary 8.

[55] *Ibid*, r 3.2-4.

settlement agreement is usually to continue on with that process. A detailed understanding of the "litigation alternative" becomes the point of comparison. It is how the negotiator knows when to stay or leave the negotiation table.[56] This is the case regardless of which model or philosophy of negotiation the lawyer pursues, along the spectrum from competitive to collaborative approaches.[57]

How a lawyer views her client's "best alternative to a negotiated agreement" (or BATNA) will be how she defines the walkaway point in any negotiation. General assessments of BATNA may be empowering ("if we don't get the deal we want, then we will litigate"), but can still leave the negotiator rudderless inside the negotiation, and therefore open to being buffeted towards misguided decisions. The most security comes when the negotiator has a very specific understanding of her BATNA, and how it translates into potential terms or values gained in a negotiated agreement.

In his recent book on negotiation theory, Robert Mnookin encourages negotiators to translate a BATNA into a "reservation value," ensuring that the walkaway strategy is assigned a financial value.[58] The reservation value is the minimum set of terms (or "price") that the negotiator would accept rather than take the next course of action (usually, litigation). Recognizing that the reservation value can include relationship or psychological ("human") factors – something we discuss in Part V – it should still be understood as a specific value, a number that captures as many considerations as possible. Each side's reservation value, although usually unknown to the other, will set a "Zone of Possible Agreement."[59] The difference between the two values creates a surplus available to be divided or allocated in different ways in a negotiated agreement – all presumably acceptable to both parties. Therefore, in a simple transaction, Mnookin points out, "we might expect the parties to settle somewhere in this range."[60]

Many things, of course, impede such an easy result, guaranteeing a negotiation dynamic which is frequently chaotic. Except in the most open and collaborative negotiations, each side will not likely be aware of the other party's reservation value. The pressure to gain as much value as possible on one's side may lead to bluffing behavior, or at the very least to cautious and protective approaches to information-sharing, and in particular about one's walkaway point. These are the strategic pressures and opportunities which will exist in every negotiation.

We suggest later in this paper that strong risk assessments can equip negotiators to be more transparent and persuasive inside negotiation (see Part V), and we have also offered examples of varying approaches along these lines. For now, though, our point is that an undefined BATNA, or a knee-

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[56] Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (New York: Penguin Books, 2011).

[57] Fisher, Ury & Patton identify some basic distinctions.

[58] Robert H Mnookin, Scott R Peppet & Andrew S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, MA: Belknap Press of Harvard University Press, 2000) at 20. It is important to acknowledge, as Mnookin does (*ibid* at 34), that a negotiator can still leave room for integrative value to be identified during the negotiation itself (compatible and mutual interests can be uncovered, taking a possible agreement in different directions). In this way, one can identify a reservation value, but leave it open to influence as the engagement unfolds.

[59] Mnookin, Peppet & Tulumello, *ibid* at 20.

[60] *Ibid*.

jerk reservation value (not carefully constructed), will create significant disadvantage for a client inside the negotiation process. Clients and their lawyers will be more susceptible to the cognitive biases described above, encouraging false bargaining zones and the potential to walk away from offers which – on a thorough evaluation – ought to be considered.

The Current Socio-Legal Climate and Access to Justice Concerns

So far, we have described how lawyers are professionally obligated to deliver legal advice to clients in a way which allows them to make informed decisions. We have also reviewed the crucial role that this information has in a grounded negotiation strategy. We also want to draw the reader's attention to the broader socio-legal climate, which increasingly turns justice policy-makers' attention to people's needs for self-determination and education around their "legal" problems. The topic of access to justice now comes up at every legal conference, and in all institutional research agendas. It has growing repercussions for how lawyers structure their work.

The challenge of improving access to justice has been the primary concern of reformers within the Canadian legal profession especially since the release of the Action Committee's *Access to Civil & Family Justice: A Roadmap for Change*,[61] chaired by Mr. Justice Thomas Cromwell. As Chief Justice McLachlin wrote in the foreword, however, "the problem of access to justice is not a new one. As long as justice has existed there have been those who have struggled to access it."[62] Awareness of this problem is not novel either, as indicated by Clause 40 of Magna Carta: "To no one will we sell, to no one will we refuse or delay, right or justice."[63] The problem of access to justice was traditionally framed as a concern with effective administration of justice, viewed "from within" court-centered or adjudicative processes. The current dialogue, guided by the concept of "access" (and likely influenced by a couple decades of experience with alternative processes through ADR and mediation movements) invokes instead a client-centred approach to the problem.

Shortly after the release of the Cromwell Report, the Canadian Bar Association published their *Reaching Equal Justice Report*, which insists that "[o]ur change strategies and priorities must be grounded in people's experiences of the justice system today."[64] The Report goes on to recommend a "people-centred" system that is "participatory" and provides "meaningful access to justice."[65] The CBA Report contends that public accountability depends upon informed clients,[66] helping to ensure "equal

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[61] Action Committee on Access to Justice in Civil & Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice, 2013) at 1 [Cromwell Report], online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

[62] *Ibid* at i.

[63] "English translation of Magna Carta", online: British Library <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation >.

[64] CBA's *Reaching Equal Justice Report* is a good introductory reference to this question. Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: CBA, 2013) at 14.

[65] *Ibid* at 60, 61.

[66] *Ibid* at 61.

participation in the justice system."[67] The informed client, perhaps not surprisingly, is viewed not only as a logical development but indeed as "a blessing."[68]

The stage is set: the current mandate of improving people's interaction with the justice system, with growing accountabilities in terms of the multi-leveled cost of those interactions, is permeating dialogue among civil reformers, judges and lawyers. Lawyers are being increasingly considered important agents in this. Older practice models which treat the client as the passive recipient of a professional service[69] – rather than a partner in planning and decision-making – no longer fit as comfortably. The larger public policy climate will continue to create some pressure on lawyers to provide candid and specific advice not only about the various paths to resolution, but also their risks.

What's Missing: How Lawyers are Leaving Large Gaps in the Way They Assess and Communicate Risk (an Introduction to our Research Study)

Against this backdrop of multi-faceted responsibilities, how are lawyers faring? The empirical reports we reviewed in Part I highlight, at least in the American context, the significant rate of decision-making error over whether to accept settlement offers or proceed to trial. Those studies do not examine the source of the decision (to what degree it lies with the client or the lawyer), but one can expect that lawyer behavior is contributing. John Wade – a commercial mediator and law school educator who spent most of his career in Australia – observes, from the view of the mediator's chair:

> One of the benefits of being a mediator is that a mediator voyeuristically observes negotiation behavior – of both disputants and sometimes their legal representatives. In this role as observer, a mediator sees outstanding, average and incompetent negotiators. A survey of forty of the most employed commercial mediators in Australia recorded the following four most commonly observed unhelpful negotiation behaviors by lawyers….
> - A lawyer who has given wildly optimistic advice;
> - Concentration on legal questions and missing commercial interests;
> - Lawyers who themselves have become antagonistic/emotionally involved;
> - 'Entrapment' – disputants have invested too much in the conflict.[70]

Our study

Our curiosity about the approach that lawyers commonly take to risk analysis – and how this can be improved – led us to reach out to lawyers and law students, using educational events as opportunities for mutual learning. As a first step, we interviewed 17 professionals who have experience and expertise in the topic of risk analysis, many with national reputations in the U.S. and Canada. Eight were private practitioners, all of whom had displayed leadership in the use of settlement roles and processes in

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[67] *Ibid* at 65.

[68] *Ibid* at 67.

[69] Macfarlane, *supra* note 46. See especially *ibid*, ch 6, "The Lawyer-Client Relationship".

[70] John Wade, "Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients to Make Better Decisions" (2002) 13:2 Bond L Rev Article 12 at 1-2, online: <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1216&context=blr>.

commercial litigation in Canada.[71] Three had longtime careers primarily as senior in-house counsel for large corporations. Four additional interviewees had considerable experience in risk assessment in the legal arena – having developed risk assessment models, written about risk assessment and/or acted as consultants on the topic. Finally, we also interviewed one actuary, and one high-profile mediator known to use risk assessment in his mediation practice. Our methodology was qualitative, exploring the subjective experience and reflections of these 17 professionals.[72] The picture presented is primarily a Canadian one: twelve interviewees were Canadian, four were American and one was European.

The second step of our study was to observe and collect information and responses from two training sessions on risk assessment for commercial litigators. The two training workshops were intensive – including both theory and tools, each two days in length. A total of 14 lawyers participated, experienced commercial litigators from Toronto, Ottawa, Calgary, Edmonton, Vancouver and Chicago.[73] The workshop training was a stimulus for discussion and reflections on "what works" and "what is challenging" when it comes to risk assessment. Those points of learning – the lawyers' reflections and our observations about their engagement with the tools – are woven into the discussion which follows.

Finally, as a third step in our outreach, we have used built-in opportunities to work with law students in their Negotiation classes, encouraging them to use risk assessment methods in their practice of negotiation skills. Using a simulated personal injury litigation file to set the stage, law students were taught a simple framework for doing risk assessment, video-taped while they negotiated, and then asked to evaluate what happened. Working with students in this way has been a window into the impact of different negotiation strategies. Two of these simulations are described in more detail, as a way to illuminate the strengths, challenges and impact of risk assessment tools, when used to support negotiation.

Lawyers tend not to use systematic, mathematical approaches

By now, it may be too obvious to note the starting point of the information we collected: lawyers tend not to use systematic, mathematical approaches to risk assessment. One of our interviewees pointed out that it was like "pulling teeth," historically, to get lawyers to assign numerical probabilities to trial success.[74] Author Jeffrey Senger explains: "Attorneys have not traditionally focused on decision analysis in litigation and negotiation. While business clients are accustomed to looking rigorously at risk and are trained to do so in M.B.A. programs, lawyers often have little experience with this mode of analysis and

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[71] For ease of reference, participants in these interview groups are identified as "Lawyers 1 to 8," "Corporate Counsel 1 – 3," "Risk Assessment Consultant 1 – 4," "Actuary," and "Mediator."

[72] Our interview template identified general and open-ended questions, and allowed the participants to identify issues of relevance as well. Most interviews were one to two hours in length, via telephone. Four lawyers were interviewed in person. Study participants were identified as key informants, and results were analyzed using a grounded theory method. Longer interviews were tape-recorded and transcribed.

[73] 10 of these lawyers had 20 or more years' (up to 38 years at the top end) experience in commercial litigation.

[74] Interview with Risk Assessment Consultant #2: He described getting a lawyer to "give a number" in the past as "like pulling teeth." At the time, some law firms went as far as taking a vote of the firm's management committee, taking the position that a client should not be given a numerical probability.

receive no training in the field in law school."[75] Indeed, across our interviews and engagements with lawyers, many described their and their colleagues' approach to risk analysis as "informal." Our interviews confirmed that two things are generally missing from the way that lawyers conduct risk assessments: first, the use of a formal, systematic approach; and second, the full consideration and valuation of client interests.

Informal approaches are often characterized by imprecise or qualitative language, when advising clients on the chances of success. "The language I use is a 'good' or 'arguable' case, or a 'challenging' case."[76] John Wade agrees, when he observes that lawyers often only list "the trilogy of legal risks (delay, cost, uncertainty of judicial decision)," "omit personal and business consequences," use vague terms such as "'no guarantees', 'who knows what a judge will do,'" and "rarely set out risks in precise, one page written form," relying instead on long opinions which are difficult to understand, or anecdotal predictions in passing conversation with the client.[77]

Vague language and qualitative terms are inherently likely to add to confusion. For example, in one training session with senior litigators, one of the authors asked the group of participants what "a good chance" of winning at trial meant, to them, as a percentage. The answers included a range from 51% to 80%. On a $1 million file, that represents a projection difference of almost one-third of that value. Even among lawyers, then, qualitative terms carry drastically different meaning. Among clients, the impact of vague predictions of litigation outcome can be even more pronounced. Julie Macfarlane points out in *The New Lawyer* that research shows that one-shot litigants tend to overestimate their chances of success at litigation.[78] Without specific and pointed advice, they will be uninformed and especially subject to the biases described above. Especially when risks are described orally to them, clients may have – as Wade describes it – "selective deafness":

> Anecdotally, many (legal) representatives tell mediators that they have 'advised the client about the risks'. However, when mediators ask clients in private about the risks of not settling, the client has heard selectively or not at all, or the client speaks in vague generalities about the high costs of litigation, or unpredictable nature of the behavior of judges or other decision-makers.[79]

Admittedly, the exercise of making predictions does not "feel easy" to lawyers. Many view litigation predictions as inherently "subjective," making the exercise a "very amorphous evaluative thing."[80] "Most lawyers … don't actually believe that there's any scientific principle that will help. They actually believe that their case is unique … which then justifies a gut response to their case."[81] Adding to this is the worry

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[75] Jeffrey M Senger, "Analyzing Risk" in Andrea Kupfer Schneider & Christopher Honeyman, eds, *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (Washington, DC: American Bar Association, Section of Dispute Resolution, 2006) 445 at 452.

[76] Interview with Lawyer #3. Lawyer #1 made a similar statement in his interview.

[77] Wade, *supra* note 70 at 2.

[78] Macfarlane explores the expectations and realities of clients, and the implications of those for lawyers, in *The New Lawyer* (*supra* note 46).

[79] Wade, *supra* note 70 at 14.

[80] Interview with Lawyer #1.

[81] Interview with Corporate Counsel #1.

that formal and precise assessments of litigation risk will "scare the client away."[82] One lawyer we interviewed prefers to keep the discussion of risk general, to go no further than posing a question like "What is the worst that can come of this?"[83] The absence of mathematical approaches to risk assessment is reinforced by lawyers' general aversion to computer tools that would assist in this realm (see discussion in Part IV). For a number of reasons, informal and vague discussions of litigation risk are prevalent, leaving troubling gaps in what clients hear and understand.

Lawyers tend not to quantify client interests and full procedural costs

On the other end of this, lawyers may not be attaching value to client interests when assessing risk, especially those interests which may be affected by the experience of the legal process. "We're assessing liability and damages, but we're missing the broader interests of the client."[84] Many lawyers do attempt to cover this off, asking clients to take psychological, relationship and other less tangible costs into account.[85] However, outside of in-house counsel, lawyers – even in the commercial arena - are less familiar with how to systematically quantify these interests. One of the corporate counsel we interviewed explained the litigator's common blindness to these factors:

> The roadmap most lawyers use is the rules of court. They will leap in, and their first thought is to issue pleadings. In issuing pleadings, they will think "I'm going to make this as forceful and powerful a case as I can, then I'm going to push through to exams and document discovery, then I'm going to plan for trial." But there are costs to the client of internal time – something that most lawyers don't focus on. These costs can be significant, because they involve the time of valuable people. There are also costs in terms of business relationships and reputation.[86]

Referring back to his time handling litigation in-house with a large resource company, another corporate counsel agreed:

> I was taking the time of a senior executive, helping to prepare him for discovery and getting him to go through documents, getting his assistance to assign employees to help me, who didn't regard this as profitable work. They were being taken away from what they were actually doing. In a large organization …, you're dealing with things that happened years before, and the people involved have now advanced to different levels of the organization. You're taking them back to a time in their lives that they're not involved in anymore. Those costs are enormously important. If those costs are not included in a risk analysis, then it isn't a realistic assessment of what being involved in a major piece of litigation means. With all of the challenges of electronic data and discovery, that's a whole other nightmare situation, which is demanding in terms of time.[87]

Corporate clients may view such concerns as extremely important, and worth factoring in, even if not easy. In addition to overlooking internal costs to the organization, lawyers (especially outside counsel) can be equally vague about actual litigation costs. As noted by all corporate counsel we interviewed,

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[82] A worry expressed in the interview with Lawyer #6.
[83] *Ibid*.
[84] Interview with Lawyer #5.
[85] For examples, see section on Client Interests below.
[86] Interview with Corporate Counsel #2.
[87] Interview with Corporate Counsel #3.

outside lawyers are not generally viewed by those within organizations as being good at projecting costs:

> I also expect an assessment of cost, and many lawyers are poor at doing this. Many are reluctant to provide a cost estimate. I think it's because they don't do it enough on their own, to properly forecast costs. But there's no reason why a large firm couldn't assess how much it costs to run a big trial, based on the average of what it cost to run their last ten trials (accounting for certain factors). But they resist doing this.[88]

In sum, our interviews confirmed what the empirical studies suggest: that lawyers may be assessing and communicating litigation risk, but often – and often enough to be of concern – use informal approaches and vague language, and fail to factor a full range of risks into the analysis. Without systematic methodologies which cover all relevant factors and put the results in concrete terms, clients are arguably left to make decisions without the best available information. Viewed against the various sources of responsibility which we identified earlier in this chapter, this is a problem.

Part III: Available Tools and Methodologies for Risk Assessment

We have already noted that the way we structure our regulatory and commercial world prioritizes risk and risk management. Risk allocation as a defining characteristic of social relationships has been the subject of sociological literature, from Beck's thesis in the mid-80s [89] to Arnoldi's more recent exploration of the topic.[90] It goes without saying that there are wide-ranging areas in contemporary society where risk is discussed. Its role in the physical and health sciences is obvious; its role in the justice system, perhaps a little less so. Risk assessment tools have, however, had a place in the criminal setting for some time. Sentencing of offenders is completed often only after risk assessments have been calculated, using tools that evaluate the chance that an offender will reoffend, and under what circumstances.[91] Police service are also increasingly gathering data and analyzing it to better predict outcomes and improve policing techniques.[92] We might view the civil justice context as less advanced when it comes to the use of risk assessment methodologies. However, various tools are currently available, and marketed to lawyers. Some of those tools, and how they might contribute to risk assessment approaches, are described below. It should be noted that no catalogue of these options

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[88] Interview with Corporate Counsel #2.

[89] See Ulrich Beck, *Risk Society: Towards a New Modernity*, translated by Mark Ritter (London: Sage, 1992).

[90] Jakob Arnoldi, in his book *Risk: An Introduction* (Cambridge, UK: Polity, 2009) explores key concepts in risk, starting from the premise that risk is also a social phenomenon that has changed quite dramatically over time.

[91] A common tool used in Provincial Court in Saskatchewan is the LSI (Level of Service Inventory). For discussion of the range of tools used for these purposes, see "Risk Assessment: Approaches and Applications" (April 2006), *InsidePrison*, online: <http://www.insideprison.com/risk-assessment.asp>.

[92] In January 2016, the University of Saskatchewan, the Government of Saskatchewan and the Saskatoon Police Service launched its own Predictive Analytics Lab (PAL). The date gathered will be used for research purposes to help the police service to better predict criminal behavior and trends. See University of Saskatchewan, "Predictive Analytics" (15 January 2016), online: <https://words.usask.ca/news/2016/01/15/predictive-analytics/>.

exists, and it took a surprising amount of research to uncover even these. In this sense, the accessibility of the tools – as well as the development of better ones – remains an issue.

We have organized the following discussion into categories of tools which can support risk analysis in various ways, including checklists, decision analysis tools, and tools which focus on data-mining, or incorporate data-mining into probability analysis. The proprietary nature of some of these services make it difficult to do more than describe some of the approaches.

Checklists as Tools for Practice

A common tool promoted by law societies, dispute resolution offices and many administrative tribunals is the use of a "checklist." The Law Society of British Columbia's "Litigation Checklist" is a good example of a thorough and comprehensive checklist covering processes recommended to be followed by legal counsel from when initially contacted by a potential client, to the completion of an action after a trial.[93] This checklist includes the ability to specify who is undertaking the steps (the lawyer or legal assistant), the date the task is assigned and the date it is due. Importantly, the checklist reminds counsel to obtain important information, undertake assessments and provide advice at various stages in the litigation process. In addition to providing substantive information about various types of actions, limitations periods or process considerations, the checklist recommends the timing for: (a) obtaining information and evidence from the client, third parties and other witnesses;[94] (b) the provision of advice on the client's legal position;[95] (c) providing information on costs of the proceeding and its time frame;[96] (d) obtaining and providing information on the availability of bars to the action[97] or defenses available;[98] (e) advising on risks;[99] and (f) considering settlement and alternative dispute resolution resolutions.[100] It should be noted that *all* of these considerations and assessments are required at early stages in the lawyer-client relationship, commencing with the initial contact, first meeting/interview and prior to the commencement of any proceedings. This is a critical point as too often lawyers may believe that they cannot undertake an analysis of risk until after they obtain all the information possible, such as after discoveries.

After commencement of proceedings the assessments are continued to be updated regularly as new information is disclosed and obtained. There are also specific recommendations in the checklist pertaining to negotiation and settlement.[101] The lawyer is to: (a) "Consider all relevant factors on liability

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[93] Law Society of British Columbia, "Practice Checklists Manual: General Litigation Procedure" (1 July 2015), online: <http://www.lawsociety.bc.ca/docs/practice/checklists/E-2.pdf>.

[94] *Ibid*, ss 1.4, 1.5, 2.2, 2.10, 2.13, 2.18, 2.19, 2.21, 6.1, 6.4, 6.5, 6.9, 6.10, 6.11, 6.12 (initial contact, initial interview and case preparation).

[95] *Ibid*, ss 2.14, 3.3, 4.1, 4.2, 6.1, 6.3 (initial interview, follow-up from initial interview, commencement of proceedings – plaintiff and case preparation).

[96] *Ibid*, ss 2.3, 2.5 (initial interview).

[97] *Ibid*, ss 1.9, 2.13, 2.15, 2.16, 3.1, 3.2, 5.9, 5.10, 5.11 (initial contact, initial interview, follow-up from initial interview, and commencement of proceedings – defendant).

[98] *Ibid*, ss 2.14, 4.1, 4.2 (commencement of proceedings and initial interview).

[99] *Ibid*, s 2.3 (initial interview).

[100] *Ibid*, ss 2.3, 2.9 (initial interview).

[101] *Ibid*, s 8.

and quantum";[102] (b) "Address costs and scale of costs, if appropriate";[103] (c) "Evaluate the case (law, facts, evidence, parties, witnesses, contributory negligence, injuries, etc.)";[104] (d) "Form an opinion on liability and contributory negligence and arrive at the minimum settlement you consider acceptable."[105]

Checklists generally have several objectives in mind: they are very helpful in assisting lawyers on how to run a file, with reference to the various professional responsibilities that the lawyer must adhere too. The more comprehensive the checklist, the greater the ability to identify factors and elements that might be missed, thus both ensuring that certain complexities of the action are not forgotten and breaking down this complexity into smaller events or factors which should then enable predictive judgment to operate more effectively. However, checklists lack the methodologies or processes that could be applied by the lawyer to estimate the probability of the case being successful. That said, if this checklist were followed, legal counsel would have gathered information early and often, which information could be fed into a risk assessment methodology to provide early and on-going risk evaluations as the case proceeds through various stages of the litigation process.

Decision Analysis Methodology and The Use of Decision Trees

Decision analysis is one methodology used to break down the complexity of the legal analysis into its various factors and then allow for the application of predictive judgment to the individual elements or factors, ultimately leading to the aggregation of their probability. Howard Raiffa explains:

> The spirit of decision analysis is divide and conquer: Decompose a complex problem into simpler problems, get one's thinking straight in these simpler problems, paste these analyses together with a logical glue, and come out with a program for action for the complex problem.[106]

Since as early as the 1980s, decision analysis was identified by various legal academics and practitioners as providing a more thoughtful and deliberate risk analysis methodology to identify and quantify litigation risk.[107] Given the application of decision analysis methodology in the fields of engineering and managerial economics, it is not surprising to find its cross-over into the realm of analyzing the

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[102] *Ibid*, s 8.2

[103] *Ibid*.

[104] *Ibid*, s 8.3

[105] *Ibid*, s 8.4

[106] *Decision Analysis: Introductory Lectures on Choices under Uncertainty* (Reading, MA: Addison-Wesley, 1968) at 271.

[107] See e.g. Eric D Green, "Corporate Alternative Dispute Resolution" (1986) 1:2 Ohio St J Disp Resol 203 at 229-33; Marc B Victor, "The Proper Use of Decision Analysis to Assist Litigation Strategy" (1985) 40:2 Bus Lawyer 617 [Victor, "The Proper Use of Decision Analysis"]; Samuel E Bodily, "When Should You Go to Court?" (1981) 59:3 Harvard Business Rev 103; Ronald David Greenberg, "The Lawyer's Use of Quantitative Analysis in Settlement Negotiations" (1983) 38:4 Bus Lawyer 1557; Stuart S Nagel, "Applying Decision Science to the Practice of Law" (1984) 30:3 Practical Lawyer 13. It should be noted that decision analysis has been used extensively by business and engineering professionals. Also, an early user and developer of risk assessment tools in the United States describes how early decision analysis tools in the legal setting were developed through discussions with engineers and physicists.

uncertainty in legal disputes.[108] Decision analysis is commonly visualized in the form of "decision trees." Uncertainties are entered as nodes, with each branch of the tree laying out the way the uncertainty may be resolved.[109] The elements of uncertainty in the tree include typical litigation question: Is there a jurisdictional bar to the action that will be dispositive of the entire action? How credible is the evidence relied upon by the Plaintiff to prove that a particular event has occurred? Is the defence witness credible?

Decision analysis methodology forces counsel to break down complex litigation into smaller and smaller questions or factors, forcing the lawyer to consider each aspect of the case. Marc Victor advocates, for example, the use of a three-stage risk analysis process to be applied in the litigation context:[110] (1) identify all the uncertainties in a legal case that may impact either the finding of liability or on an award of damages;[111] (2) determine all the reasons for a favourable and unfavourable finding for each;[112] and (3) make a prediction for each identified uncertainty.[113] Victor argues that "this technique imposes a discipline on counsel, forcing them to think as carefully and systematically as possible about the evidence and legal issues that are important to their case. It also provides counsel with the means to integrate their assessments of the numerous uncertainties in a logical, unambiguous fashion. Thus, counsel can be more confident of their litigation strategy or settlement decisions."[114]

The third step – assigning numeric probabilities to outcomes – is essential to the decision analysis's final output (predicted results).[115] The nodes on the tree will each be assigned a numeric probability. Having estimates of their probability applied, the decision tree enables the calculation of the cumulative

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[108] Howard Raiffa, "Decision Analysis: A Personal Account of How It Got Started and Evolved" (2002) 50:1 Operations Research 179 at 181.

[109] Marc B Victor, "Interpreting a Decision Tree Analysis of a Lawsuit" (1988, revised 2001), online: <http://www.litigationrisk.com/Reading%20a%20Tree.pdf>.

[110] Marc B Victor, "Litigation Risk Analysis^TM and ADR" in John H Wilkinson, ed, *Donovan Leisure Newton & Irvine ADR Practice Book* (Wiley Law, 1990) at 3 [Victor, "Litigation Risk Analysis"], online: <http://www.litigationrisk.com/Litigation%20Risk%20Analysis(tm)%20and%20ADR.pdf>.

[111] *Ibid.* In some of his later work, Victor refined the uncertainty identification stages through using "dependency diagrams" that both identify uncertainty and map the impact such an uncertainty may have on either a finding of liability or on damages (see Craig Glidden, Laura M Robertson & Marc B Victor, "Evaluating Legal Risks and Costs with Decision Tree Analysis" in Robert L Haig, ed, *Successful Partnering Between Inside and Outside Counsel* (West Group & ACCA, 2000) at 12-3, online: <http://www.litigationrisk.com/ACC%20Chapter%2012%20(2016%20version).pdf">.

[112] Victor, "Litigation Risk Analysis", *ibid.*

[113] In later writing, Victor has identified his three stages as (1) creation of dependency diagrams to identify uncertainties and the factors that influence the uncertainties, (2) the creation of decision trees to map each uncertainty, and (3) then the application of quantification (see generally Glidden, Robertson & Victor, *supra* note 112.

[114] Victor, "The Proper Use of Decision Analysis", *supra* note 108 at 617.

[115] Resources are also available that focus on a broader step-by-step analysis of the factors influencing a case (even without the focus on mathematical predictions) (see e.g. International Institute for Conflict Prevention & Resolution, "Corporate Early Case Assessment Toolkit", reprinted in John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (Chicago: ABA, 2011) 165. In deal-making transactions, as opposed to disputes inside existing legal relationships, risk analysis is different. There, "the alternatives to a settlement are as broad as the parties' varied interests and outlooks on the future" (The Honourable George W Adams, *Mediating Justice: Legal Dispute Negotiation* (Toronto CCH Canadian, 2003) at 119).

probability for each possible outcome. This is important, as it ensures that each important aspect of the case has been considered, with a probability assessment made for each individually, rather than possibly being overlooked or ignored due to biases operating in our thinking.

At this juncture, three observations will be made that caution against the application of a numeric probability estimate. First, Victor warns against over-reliance on the computational side of this methodology:

> In a *good* decision analysis of a lawsuit, only a small fraction of the effort (perhaps ten percent) is spent in performing the necessary calculations, and only a part of the benefit of conducting the analysis is derived from the quantitative results. Most lawyers who are familiar with how to perform a good decision analysis will attest to the fact that a significant benefit of this methodology is in forcing-and assisting-an attorney to understand his or her case better, at a level of detail sufficient to produce valuable insights for planning pretrial discovery and selecting trial strategy.[116]

Hoffer concurs with Victor, positing that the benefits of the decision analysis methodology include facilitating the ability of lawyers to structure the issues in the case, determine settlement value, and allocate resources before trial.[117] Several authors describe this methodology as an effective means to communicate the dispute to the client as well as between co-counsel.[118] Similarly, in mediation practice, the utility of decision analysis has been noted to help the parties to work through a negotiation impasse by enabling both parties to participate in the *building* of an analysis. It enables the creation of a shared structure for analyzing the dispute which is neutral and logical.[119] If the decision analysis is computer-generated, it also provides a take-away that enables counsel and their clients to reflect on the case outside of the negotiation session.

Several risk analysis consulting services and software businesses rely on decision analysis methodology as their primary platform.

Since the power of decisions trees is often said to be visual, we have included a diagram that illustrates its basic structure. It was constructed with diagrammatic software, not with the analytical software which will be described below. Decision trees can focus on liability issues, or damage assessments. The following illustrates what a decision tree focusing on damages might look like.

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[116] Victor, "The Proper Use of Decision Analysis," *supra* note 108 at 618. Raiffa himself acknowledged that "I completely missed the boat when I published *Decision Analysis* (Raiffa 1968). I was so enamored of the power and elegance of the more mathematical aspects of this emerging field that I ignored the nonmathematical underpinnings: how to identify a problem or opportunity to be analyzed, how to specify the objectives of concern, how to generate the alternatives to be analyzed. All this was given short shrift. All that nonmathematical starting stuff was ignored". (*supra* note 109 at 184).

[117] David P Hoffer, "Decision Analysis as a Mediator's Tool" (1996) 1 Harv Negot L Rev 113 at 114.

[118] Hoffer, *ibid* at 123-28; Marjorie Corman Aaron, "The Value of Decision Analysis in Mediation Practice" (1995) 11:2 Negotiation J 123 at 126-27; Wade, *supra* note 70 at 2.

[119] Aaron, *ibid* at 124, 127-8.

Decision Tree on Damages

a) TreeAge Pro[TM120]

TreeAge Pro[TM] is an example of decision-analysis software that is commercially available to legal counsel.[121] The product is self-help software, offering the ability for individuals to model a case, analyze the model and calculate the expected value of the case through identifying all the possible outcomes. The software enables the building of a visual model or "tree" to help map or visualize the nodes of uncertainty, and all predicted outcomes arising from each node of uncertainty. The software has built-in algorithms that allow the calculation of the expected outcomes when any prediction is changed, allowing for an appreciation of the effect each factor may have on the overall outcome of the dispute. TreeAge Pro[TM] is described as computing "expected values of Markov models, and deterministic sensitivity, threshold and probabilistic sensitivity analysis via second order Monte Carlo simulation."[122] As mentioned, this is software that can be utilized by the individual user and is not marketed strictly to legal professionals but other services sectors such as healthcare, strategic and oil and gas industries. [123]

b) Litigation Risk Analysis[TM], Inc.[124] (U.S.)

Marc Victor offers consulting services to legal professionals and clients using decision tree analysis. As an early contributor to the application of decision-analysis to legal problems, he one of the first in the United States to offer presentations, scholarly publication, training and consulting services on the use of decision analysis.

c) Win Before Trial[125] (U.S.)

Michael Palmer, a mediator and lawyer, has also developed a case valuation methodology including proprietary Excel-based software, the Case Value Analyzer[TM] to calculate the net present expected value of a case.[126] Palmer uses decision analysis as the basis for his proprietary software, but also encourages counsel to consider and value risks such as reputational risk, or value costs such as emotional strain or psychological time in having to pursue litigation. Palmer's methodology breaks down the analysis to four elements: (1) liability; (2) dispositive contingencies;[127] (3) damages; (4) costs (itemized expenses and

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[120] TreeAge Software, Inc., Waltham, MA, USA

[121] <www.treeage.com>.

[122] Benjamin P Geisler, "Automating First- and Second-order Monte Carlo Simulations for Markov Models in TreeAge Pro" in Shaul Mordechai, ed, *Application of Monte Carlo Method in Science and Engineering* (Intech, 2009) 917 at 919, online: <http://www.intechopen.com/books/applications-of-monte-carlo-method-in-science-and-engineering>.

[123] "Products", online: TreeAge Software, Inc. <https://www.treeage.com/products/>; "Industries", online: TreeAge Software, Inc. <https://www.treeage.com/industries/>.

[124] "The Developer of Litigation Risk Analysis[TM]", online: <http://www.litigationrisk.com/m-ov-mbv%20bio.htm>.

[125] <http://www.winbeforetrial.com/>.

[126] Michael Palmer, "Using the Case Value Analyzer[TM] to Estimate the Financial Value of a Lawsuit" (2013) 6:1 New York Dispute Resolution Lawyer 38, online: <http://www.winbeforetrial.com/uploads/9/6/7/6/9676143/using_the_case_value_analyzer_to_analyze_the_financial_value_of_a_lawsuit_video_link.pdf>. Also see www.winbeforetrial.com and updated descriptions of the Case Assessment System.

[127] In the author's opinion, the frequency of dispositive contingencies in Canadian litigation is significantly lower than in the United States. As a result, if applied in Canada, while important, it may be treated as a liability question

professional fees).[128] Unlike traditional decision analysis, Palmer introduces a range of probability calculations into his liability assessment as well as a weighted average into his damages assessments.[129]

In his approach to liability assessment, Palmer breaks down each cause of action into its elements and then proposes that legal counsel provide a low, medium and high estimate of the probability of proving that element.[130] He then averages those estimates to arrive at a single probability assessment for each element. The probability of proving each cause of action then, is the product of proving each individual element, calculated by multiplying the estimate of each element together to arrive at an overall probability estimate for proving the cause of action.[131]

In his damages estimate, Palmer employs a weighted average estimate, itemizes each head of damage, applying low, medium and high probability predictions to determine a possible range of damages and then calculating a weighted average estimate of damages based on these individual assessments.[132] This damages estimate allows for a greater range by which to consider a damages prediction beyond a single decision tree analysis. Palmer's Case Value Analyzer™ also employs cost shifting between the Plaintiffs and Defendants, which may or may not be appropriate in the Canadian context.[133]

Data-Mining With or Without Probability Analysis

Other software and consulting services for risk assessment do not appear to utilize decision analysis methodologies and rely on applying empirical data from legal databases to provide statistical

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rather than as its own step of analysis. However, as noted, this is perception of frequency only and may merit further empirical study to confirm. One lawyer we interviewed identified this as a difference between the Canadian and U.S. legal systems, where it was surmised that a higher reliance on juries in civil matters may result in more judge-only pre-trial motions to dismiss, a practice not as heavily utilized in Canadian civil cases; Workshop Participant, Lawyer #10

[128] As a result of Michael Palmer sharing proprietary methodologies with the authors, and spending numerous in-person and online meetings with us, we have been able to better understand his approach and methodology than some other proprietary services that are offered.

[129] Palmer breaks down each cause of action into its elements and then proposes legal counsel to provide estimates low, medium and high estimates of probability of proving each. This introduces a somewhat different treatment of liability than that envisioned in the typical decision tree.

[130] For example, in estimating the probability of proving the Defendant owed a duty of care to the Plaintiff, Palmer would have three estimate of proving duty of care, (low 90%, medium 92%, high 97%) and take the average (93%) to arrive at his estimate. You will note that the range of probabilities applied appears to be ascertaining how certain legal counsel is in her prediction.

[131] The product rule of compounding probability estimates is explained later in this paper at footnote 177.

[132] For example, to calculate an estimated probability of proving pain and suffering, Palmer's methodology would require applying a low estimate of value and probability of proof ($50,000 @ 25%), a medium estimate ($80,000 @ 40%) and a high probability ($100,0000 @35%). The weighted average estimate of pain and suffering would then be calculated at $79,500. In this example, it is critical that the sum of the probability estimates is 100%.

[133] Cost-shifting may be more automatic in some U.S. jurisdictions than in Canada, as the rules that apply to both the value of costs to be awarded and cost-shifting will vary. See Manitoba Law Reform Commission, *Costs Awards in Civil Litigation,* Report No 111 (Winnipeg: Queen's Printer, 2005), online: <http://www.manitobalawreform.ca/pubs/pdf/archives/111-full_report.pdf.>.

information to legal professionals about past court decisions and settlement offers. Sometimes those tools include probability assessments, drawing on the data, and sometimes they do not.

a) Case Evaluator on Westlaw (U.S.)

Case Evaluator is a litigation management tool created by Thomson Reuters Westlaw for use in the United States.[134] The tool makes use of legal databases in the United States to generate reports which can be used to evaluate potential cases, analyze verdict trends, develop negotiation and settlement strategies and obtain information about medical and expert testimony in similar cases. Inputs available to the Case Evaluator report builder include case type, date range, jurisdiction, injury type, industry and company involved, and a range of damages. Upon entering these inputs, the tool generates a report summarizing similar cases under three major headings: verdict and settlement trends, summaries and court documents, and medical and expert materials. The verdict and settlement trends section lists jury verdict data in the chosen date range sorted by county or federal district. This data includes trends in Plaintiff verdicts, Defendant verdicts and settlements as well as median, average, and maximum settlement amounts. Also included is a list of the cases resulting in the top twenty largest awards within the chosen parameters. The summaries and court documents section gives excerpts of relevant documents from WestlawNext collections including jury verdict and settlement summaries, trial court memoranda, appellate court documents, and appellate decisions. The medical and expert materials section provides tables of relevant medical reference material including sections from the Attorneys Medical Advisor database, medical illustrations, names and type of experts who have testified on the matter in the past, and excerpts of expert testimony.[135] This service, however, is only available for U.S. cases. It also has the benefit of having publically available settlement data information from which to draw settlement and verdict ranges, data that is not available in Canada. As a model, if replicated in Canada, it may be useful, in reducing the transactions costs in trying to obtain data on case-type, damages and settlement ranges or frequency of certain applications being granted.

b) Loom Analytics (Canada)

Loom Analytics is also a commercially available service that offers to provide analysis based on Canadian case-law data.[136] Relying on the information publically available through the Canadian Legal Information Institution (CanLII),[137] it offers to provide information on court processes, narrowing the results for jurisdiction, level of court and judge. This service, however, is in the very early stages of development, with data currently available only for 2015 and 2016 Alberta Queen's Bench, British Columbia Supreme Court and Ontario Supreme Court and Court of Appeal decisions. [138] There is also no data publically available in Canada on either successful or rejected settlement offers, which, in light of dwindling civil trials in Canada, could be a significant impediment to the usefulness of the data as it relates to damages

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[134] "Case Evaluator on Westlaw", online: Thomson Reuters Westlaw
<http://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/litigator/case-evaluator>.
[135] "Sample Report", online: Thomson Reuters Westlaw
<http://static.legalsolutions.thomsonreuters.com/static/pdf/CaseEvaluatorSampleReport.pdf>.
[136] <http://www.loomanalytics.com/>.
[137] <http://www.canlii.org/>.
[138] See "Our Data", online: Loom Analytics <http://www.loomanalytics.com/our-data/>.

claims.[139] However, as a first entry into this type of service provision in Canada, it appears to be attempting to fill a much needed gap in data availability and analysis.

c) DecisionSet®(United States)

DecisionSet® is a decision services company that provides services aimed at improving decision making and problem-solving skills in legal practice.[140] DecisionSet's principal analyst is Randall Kiser, one of the few researchers in the United States that has undertaken empirical research into decision-making error by Plaintiffs and Defendants (and referred to in Part II) . The services he offers rely on the use of the empirical data that was generated in his two studies and the variables he identified in those studies that result in decision making error. DecisionSet® offers four services to legal counsel to help in their risk assessment: the first is a decision-making styles survey and report that identifies decision-making propensities correlated with poor outcomes; the second is a general decision-making training course that inform legal professionals of decision-making heuristics, biases and illusions and methods to reduce their impact; the third is structured interviews of decision-makers to understand how they make decisions and provide corrective measures; and the third is an analysis of datasets to identify predictor variables and build predictive models of adverse outcomes.[141] The datasets include those relied upon by Kiser in the empirical studies he has previously conducted.

d) SettlementAnalytics™ (United States)

SettlementAnalytics™ is another service business providing research and advice focusing on litigation valuation, settlement optimization and legal claims risk management.[142] The principal of the business, Robert Parnell, offers consulting, training services, file management software as well as use of its proprietary "OptiSettle," a software platform that incorporates information economics, Monte Carlo[143] simulation, financial analysis and quantitative data into one package. The application of game theory[144] and Monte Carlo simulation is used to model a range of possible outcomes in legal disputes involving

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[139] See generally Trevor CW Farrow, "Civil Justice, Privatization, and Democracy" (Toronto: University of Toronto Press, 2014). See especially Farrow, *ibid*, ch 4.

[140] Randall L Kiser (see Kiser, Asher & McShane, *supra* note 15) is the president of the company.

[141] Personal communication from Randall L Kiser to the authors (13 September 2016).

[142] "Intro: The Game Theory of Litigation", online: <https://settlementanalytics.com/about/introduction>.

[143] Monte Carlo methods rely on repeated random sampling to generate a probability distribution of potential outcomes.

[144] Game theory is a method used in business and mathematical economics to predict and model how competing players will interact with one another. The assumption of game theory is that the players will act rationally to maximize their own utility, with the results of the game represent the utility of the group. While game theory has been used to describe and model past behavior, it has also been applied as prescriptive for predicting future outcomes. See Roger B Myerson, *Game Theory: Analysis of Conflict* (Cambridge, MA: Harvard University Press, 1991) at 1; Roger A McCain, *Game Theory: A Nontechnical Introduction to the Analysis of Strategy*, 3rd ed (Hackensack, NJ: World Scientific, 2014); Simon Parsons, Piotr Gmytrasiewicz & Michael Wooldridge, eds, *Game Theory and Decision Theory in Agent-based Systems* (Boston: Kluwer Academic, 2002).

multi-variable uncertainty.[145] By including a range of uncertainties, SettlementAnalytics**™** proposes that its proprietary OptiSettle is able to model the likely best and worst case scenario outcomes in a negotiation or settlement offer, as well as compare these options to the likely trial outcome amounts. [146]

As Robert Parnell explains, SettlementAnalytics's proprietary model "calculates the expected value of (or "wealth" derived from) a legal claim as the probability-weighted combination of net present value cash flows from both trial and settlement."[147] Parnell distinguished his approach from what he calls "conventional claim valuation methods" which he says "equate claim value with trial value."[148] Rather, his approach considers "the impact of different degrees of trial uncertainty on the expected wealth (expected value of the legal claim) versus settlement offer relationship across the range of potential rational settlement offers."[149] He is critical of decision tree analysis applied to complex litigation problems as, in his assessment, it can fail to capture the cost associated with uncertainty in the damages award by providing only a single assessment based on average expectations (average expected liability and average expected damages award). Rather he proposes that his model, using a game theory approach, will better capture the nuances of trial risk on its expected value.[150]

e) Internal Models using Organizational Data

An intriguing development, although relatively undocumented, is the experience of some large organizations in designing their own internal risk assessment models. Organizations which may benefit and have the resources to do this are the "repeat litigation players," such as insurance companies. The impetus for the development of an internal data base may come not from the legal department, but from the business area responsible for overall costs and outcomes. The pressure towards business accountability would create a logical incentive for the adoption of an internal information management tool, although it is often resisted even by internal lawyers.[151] Indeed, those same pressures are the ones that are vital to the identification of litigation reserves. Those same organizations will be aware of the empirical studies noted earlier in Part II, documenting rates and values of decision-making errors in the settlement and litigation of files, and will be interested in strategies to reduce such "errors."

Where the organization faces a certain type of repeat litigation (for example, personal injury claims), their internal risk assessment models might focus on typical vulnerabilities and common legal and evidentiary issues. In the example provided to us, the model identified five or six factors, sensitivities which – over a large block of cases – could statistically be shown to determine the outcome of this

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[145] Myerson, *ibid*.
[146] "OptiSettle Functionality", online: <https://settlementanalytics.com/resources/opti-settle-applications/>.
[147] Robert Parnell, "Pricing Trial Risk: The Tangible Cost of Uncertainty in Commercial Litigation" (25 March 2015), online: <https://settlementanalytics.com/resources/dynamic-illustrator/price-trial-risk/>.
[148] *Ibid*.
[149] *Ibid*.
[150] *Ibid*. It is difficult to properly consider this criticism without a better understanding of the nature of the proprietary model being used in his 'OptiSettle' platform.
[151] Interview with Risk Analysis Consultant #4.

particular kind of case.[152] In this way, the internally-developed model can be custom-made, avoiding the exhaustive cataloguing that might be required using generic tools.

Conclusion

In reviewing the methodologies, software and services currently available to legal professionals to conduct risk assessments, some observations can be made. First, at least in Canada, there is a lack of data available on settlement offers and agreed settlements. In light of the diminishing civil trials, this raises serious concerns about what information or experience lawyers will be basing their risk assessment predictions on. Second, while both proprietary and open access legal databases exist in Canada, the transaction costs of mining that data for individual clients are significant. Services such as those provided by Loom Analytics may be moving in that direction, but it is too soon to know how, or if, that gap will be filled. Third, there appears to be some debate on whether decision analysis or a methodology applying a form of game theory (combined with a Monte Carlo simulation) adds anything to the prediction of litigation risk. Given that many of the analytical services are proprietary, it causes some difficulties in truly assessing the merits of one proprietary service over another. With the exception of the statistical information provided by data mining previous decisions, all methodologies require the legal professional to engage with mathematical calculations or models that are often beyond their comfort zone and are not systematically taught in law school curriculums.[153] This will most likely change as client demands and marketing by service providers will continue to target legal professionals.

Part IV: Our Work with Lawyers and Law Students – How Risk Analysis Methods Benefit and Challenge Them

As we have engaged with lawyers on this project, what we have overwhelmingly heard is a clear interest in the language and tools of risk assessment. This we view as both exciting and hopeful:

> More clients are driving detailed reporting than they used to. They want a quarterly report and fee estimates and projected costs, that's driven by the financial side of things. They want analysis of your view on this issue and that issue. They want that information from lawyers, more. At least 20-30% of my clients are now requesting it.[154]

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[152] *Ibid*.

[153] It appears that legal analytics courses are starting to surface (see e.g. "Legal Analytics Course", online: <http://www.legalanalyticscourse.com/>).

[154] Interview with Lawyer #1. The same message came consistently across many of the interviews. One Risk Assessment Consultant we interviewed observed that in-house lawyers have been more actively supportive of the use of risk assessment tools than private lawyers. Given the challenges of group decision-making, he viewed this as logical. In a firm, there may be 200 different practitioners to "sell" on an idea; but in the corporate environment, if the General Counsel likes the idea and sets the directive, then everyone must get on board.

Several lawyers mentioned their clients' interest in methodological tools. "In the past, my clients didn't ask for 'analytics,' but now they are."[155]

Students, lawyers, judges and other audiences are intrigued by two significant features of the risk assessment approach:

1. Increased accuracy of projections: by breaking the analysis into separate risk factors, with separate attention to liability issues and damage calculations;[156] by assigning percentages to predictions of success for each factor;[157] and by compounding probability where factors represent independent risks.

2. Expanded consideration of factors that "have value" in the analysis: By assessing hidden and internal client costs rather than just the classic litigation costs – and by assigning financial value even to qualitative interests.

These features hold lawyers to a higher standard when it comes to forecasting litigation risk. Many lawyers we interviewed described these as "adding rigour." "Disaggregating the analysis into summary parts" allows you to move beyond the realm of "hunch"[158] – or what might simply seem to be a "hunch" – about the probability of success. The tool might also draw attention to aspects that might easily be overlooked: "It's a useful tool because it causes you to focus on your decisions, and think hard about certain areas of your case which you might not otherwise."[159]

However, for every revelation that a deeper risk assessment offers, it invokes equivalent challenges. Below are a few themes and insights that we have gathered through our work with lawyers and law students, and our early presentations to other audiences such as judges and mediators. These are likely the normal byproduct of merging legal analysis, negotiation conventions and a conceptual framework built on mathematics and economics. For both the promise and the challenge these revelations contain, they represent significant shifts in thinking. It may therefore help to think of them as "key turning points" in the application of risk assessment methods. An academic reading of this analysis may leave the reader wondering why each point is important; we predict, however, that anyone who has wrestled with a full litigation risk assessment will relate.

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[155] Workshop Participant, Lawyer #15.
[156] Interview with Corporate Counsel #2: "It's important that the risk analysis be done both on liability and on damages. Often the focus on damages doesn't come until later. But, ideally, you need to understand the ranges on both – early on."
[157] Interview with Corporate Counsel #1: "This is where the lawyers tend to fall down." Either they don't do it (Interview with Lawyer #2) or they don't do it well: "garbage in, garbage out," "if the information you input isn't good, then the tools don't help" (Corporate Counsel #1).
[158] Interview with Lawyer #8.
[159] Interview with Lawyer #1.

Key Turning Points and Tensions in a Thorough Risk Assessment

1. **Identifying risk factors is more than a "boilerplate" exercise – it requires a deeper understanding of the liability and evidence issues in any given case, and the relationship of these issues to each other.**

<u>The sometimes intricate construction of legal liability</u>

It may be possible to group areas of risk into themes or types of risk, but the precise factors will need to be generated case-by-case. This reality is holding up the development of universally useful models – or at least technical and computer-assisted models. A decision tree, and to some degree, Palmer's case valuation methodology, are currently relying on the user to develop her own list of factors. There are advantages to leaving it to the lawyer to develop the "theory of the case," although it requires more time. Some effort will likely be made in the coming years to develop transferable lists of factors, and increase the utility of computer tools, but this tension will always remain.

The first step in any litigation risk assessment includes a listing of the elements of the claim, and a review of evidence available to prove each element, including defenses. This is not always as easy as it sounds. It requires a solid understanding of the construction of that particular litigation file. Even a relatively straightforward file – for example, a personal injury claim grounded in negligence – may require several assessments, branching off from one another. In that negligence action, there may be several breaches of responsibility. For every alleged negligent decision, action or failure of the Defendant, a different assessment will have to be constructed. Each one may have its own breach issues (its own considerations around Standard of Care), flowing through all the remaining elements of the claim, and damages connected to the particular breach. A "defective product" case will require a risk assessment for different actions or omissions – for example, negligent design and manufacture, and failure to warn. Standard of care may be a risk area in one, and causation in the other – and each may allow a claim for different types of damage with different risks around proof.

A risk assessment begins with an in-depth theory of the case, detailing different causes of action and specific breaches of responsibility under each. Like the fabled law school exam, this requires a solid understanding of how a case is constructed and what evidence is needed – and available – to prove each element. Generic checklists and lists of questions are possible (consider, for example, the table of contents in a law school textbook), but every risk assessment at some point requires a custom-made list of issues.

<u>How legal issues impact trial outcomes</u>

Another advanced question at an early stage in risk assessment is the question of the relationship of the risk elements to each other: their "variable weight." Each factor may have a different potential for impacting the outcome, an impact that is not necessarily captured in the assignment of probability of success on that one issue. So, for example, a tort lawyer may identify two areas of litigation risk but may have the sense that one risk area will have greater impact on the file. Within a formal theoretical view of the file ("on the law school exam"), each element of liability is equally important to the proof of the claim. However, when she considers human judgement and patterns of judicial decision-making, she

may believe that one element of the claim (breach of the standard of care, for example) is more likely to determine the result than another (factual causation).

From an actuarial point of view, a sophisticated risk analysis would take the variable weight of different factors, as well as their individual probabilities, into account.[160] Generally, the computer-assisted tools do not provide for this.[161] Variable weighting, although commonly done in the criminal justice arena,[162] would not be easy to assess in civil justice claims. However, the sense that some factors may be more determinative than others may influence risk assessments in less formal ways. For example, a conclusion about variable weight could influence the percentage probability for that factor (although the argument against that would be that it mixes two different assessments into one projection). Another approach would be to include it as a late-stage "discretionary consideration" when finalizing the risk assessment projections.

2. Assigning numerical probabilities is essential, but inherently unstable in a litigation setting.

For each relevant factor, the lawyer will be required to make a prediction of success, and this prediction will have varying levels of certainty. From an actuarial point of view, the more data (information) which is attached to a prediction on a factor, the stronger the prediction will be – the stronger the analysis. There are two ways that poor access to information can destabilize or weaken a prediction.

<u>Timing in litigation process, and access to evidence</u>

The earlier in litigation, the less access a lawyer may have to the evidence required to establish the claim or defence. If approached as an organic, evolutionary process, a risk analysis can be done at any point in the development of the file, on the understanding that its results may shift as more information becomes available. One of our interviewees, for example, expressed his preference is to do his risk assessments right after discoveries, but explained that he sometimes will do a formal one at the pre-discovery stage as well.[163]

Our interviews with corporate counsel confirmed the value that corporate clients place on early assessments:

> At the beginning of a claim, we did two things: We selected an internal person who would have the primary responsibility to get the thing fixed. Then we would select an outside counsel who would manage the claim. There was a requirement that external counsel prepare a realistic evaluation of the strengths of the claim – both liability and damages – early on. Then there was

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[160] Interview with Actuary.
[161] Although we view the Case Value Analyzer™ as having the most flexibility to take such considerations into account.
[162] The problem of "variable weighting" comes in in risk assessment for criminal behavior. Inventories of factors list areas of risk, but leave room to recognize that "all risk factors should in many cases not be treated equally for all individuals" ("Risk Assessment: Approaches and Applications", *supra* note 91).
[163] Interview with Lawyer #7.

a requirement that both counsel and the client representative got together and develop a strategy on the best way to get the problem fixed. There was also a required monthly report from external counsel on the success/progress in putting that particular strategy in place.[164]

From inside the corporation, the litigator's typical reaction that risk assessment cannot be done until after formal discoveries is not convincing:

> Lots of lawyers say "I can't do that until the document production is done." I say this is absolute nonsense. The more documents you have, the more time and money you will have spent on the process. Sure, you will be in a stronger position to do the analysis, but that may mean 3-4 years and 3-4 million dollars, to discover that you don't actually have a good case. That does happen. That's not unusual, for clients to get a big surprise on the eve of trial. At the start of the case, counsel will usually have available most of the key documents. There could be a smoking gun – but those cases are extremely rare. Usually, the really important documents are the ones that – working with a cooperative client – you can get early in the piece. If you have a leader (at the executive level) within the client organization, who is making the right people available to counsel early on and instructing those people to be frank and honest with counsel, then you can get a pretty good sense of what the facts are at an early stage. At that point, external counsel needs to do a proper analysis, to understand all the key issues and where the strengths and weaknesses lie. This will also help tremendously in drafting pleadings, and honing in on documents.[165]

This suggests the principle of "proportionality."[166] In the face of incomplete information to make a secure or solid prediction on the probability of success, a litigator should consider the transaction costs of obtaining further information. The transaction costs of refined searches for legal information may be considerable, in an environment which has not historically documented and organized "data." Some advancements in the development of data bases of the outcomes of interim applications and trials – such as the Loom Analytics web-based program – have been noted above. However, large gaps and inefficiencies still exist. As well, refinement of information where the gaps are evidentiary can mean combing through large volumes of documents.

Every prediction will be based on some degree of incomplete information, and on most points, more information could be sought, in the form of evidence or legal research. Every risk analysis will require judgment about whether to go further before making an assessment on each point. In this way, an early risk assessment can strengthen the lawyer's litigation management strategy, a point we explore further in Part IV, (7).

> <u>Predicting human behavior (witness credibility, and judicial decision-making) and the trend of decreasing trial experience for civil litigators</u>

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[164] Interview with Corporate Counsel #2.

[165] *Ibid*.

[166] Indeed, this is one of the key messages of the strategic litigation management and settlement negotiation training that Michael Palmer has developed (*supra* note 126)

The quest for more information may not resolve other layers of uncertainty. Uncertainty generated by the behavior of other people is apt to remain: witness credibility, the influence of judicial thinking, and the other counsel's approach. Some uncertainty may result from human factors that even appear to be within the lawyer's own control: the level of relevant experience with litigation that he brings to bear on his analysis of the case and his predictions about how things are likely to unfold in a courtroom – his own internal data base.

There are ways, of course, to register concern about human behavior in a normal risk analysis process. Instincts about the credibility of a witness can be taken into account in the percentage probability assigned to that element of the case. Even thoughts about the leanings of a particular judge may be integrated into predictions of success, in this way. One might also factor in predictions about the professional competency of the other lawyer. Some may find it unpalatable, or perhaps even irresponsible, to use this factor to reduce or increase predictions about success. One experienced litigator explained his concern this way: If he felt disadvantaged by the advocacy skills of the other lawyer, then his responsibility is to "short that up" by getting some help on his side of the case.[167] If he felt their advocacy skills and resources were stronger than the other side, then he would still not factor that in, as a way of being conservative about it. Somehow, this approach seems more in line with professional obligations of competency, outlined above.

The humble or realistic lawyer may also have concerns about competency – or, at least, level of experience – on his own side of the case. As noted above, making predictions reliable is going to be increasingly difficult for litigators in the era of the receding trial. Lawyers can continue to draw on their substantive training, their work with other lawyers and the collective knowledge of the "litigation team," but less experience in the courtroom inevitably means a smaller individual data base of experiences.[168]

Lawyers and other professionals we interviewed offered some strategies to combat this problem. One step is to collect perspectives from others while brainstorming around the risks to a client on either side of the file, for example, from someone who knows the business well, or knows the other side's business.[169] Another is to collect more information about what might influence a neutral arbiter. One example provided in an interview involved a client who hired two retired judges to provide advice on the likelihood of success on certain issues.[170] Working through an arbitration service, the client ensured that neither adviser knew which party in the case had retained them. Each adviser conducted his assessment separately, and then was asked to work through it together. This work product helped shore up the risk assessment, and was also used as a tool in the negotiation itself.

Other lawyers reflected on the importance of mentoring junior lawyers, as a systemic response to the problem described above. It was pointed out that the real knowledge base at issue is the judgment that lawyers gain through their experience in adjudicative settings – judgment that can be nurtured in many ways outside of a trial courtroom.[171] Small claims, administrative and disciplinary hearings, arbitrations,

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[167] Workshop Participant, Lawyer #11.
[168] George Adams acknowledges this dilemma (*supra* note 116 at 121, n 100).
[169] Interview with mediator
[170] Interview with Risk Assessment Consultant #2.
[171] Interview with Lawyer #2.

and other forums can all provide equally valuable opportunities for learning about the way that witnesses and evidence influence decision-making, and other more nuanced assessments.

Lawyers in the risk assessment training workshops also acknowledged that a transparent and careful use of such tools could help educate junior lawyers on a file, and clarify communication between junior and senior litigators. Junior litigators asked to work on a risk assessment could demonstrate that (or whether) they really understand the construction of the case; also, it might help them to better understand why they are investing time researching a point of law or combing through discovery documents. Increased strategic training of junior lawyers would help combat the problem of the 'fading courtroom education' point raised above.

<div align="center">The mechanics of assigning probability when uncertain</div>

Uncertainties may exist for a number of reasons, only some of which will be resolved as the case moves along. However, our work with lawyers and students confirms that those conducting risk analysis must push through these limitations to assign probabilities, on the best information available. Law students conducting a risk assessment for the first time, even on a hypothetical case, lean toward assigning a range of probabilities, rather than making a firm prediction. This dilutes the risk assessment, and the message sent to clients.

Corporate counsel may expect a "tough approach." Again, from the corporate client perspective:

> I expect external counsel to use all the skills they have, to do the best probability analysis they can. If there are areas where they are truly challenged and can't assign a probability, then they onus is on them to explain why not. Is it the nature of the facts, or issues? Or is it a lack of experience on the part of counsel – where you may need to bring in someone else on that.[172]

One twenty-year litigator with a specialty in commercial disputes acknowledged that a lawyer can get mired in long debates about what probability to assign to an event. "As you do this more," he affirms, "you get comfortable with it."[173]

Our experience tells us that a range of probabilities is only a useful response when the point of indecision turns on an external factor (for example, an interpretation of law, or the impact of a piece of evidence), and truly captures a range of outcomes, rather than the analyst's own internal discomfort. Different scenarios can indeed be built into a risk assessment in a way that strengthens the assessment. For example, if dual possibilities exist – on a point of law or evidentiary outcome – then a lawyer can insert a decision tree step, with two branches of the analysis: "If A," and "If B."

Nuanced outcomes can also be taken into account using a Low/Medium/High range, with weighted averaging.[174] In this way, it may be possible to incorporate a range of outcomes into a single prediction that does not dilute the overall analysis. Some issues may legitimately warrant a range of predicted outcomes. In particular, this might work best for liability issues that translate into different numerical

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[172] Interview with Corporate Counsel #2.
[173] Interview with Lawyer #3.
[174] This step is built into the Case Valuator.

values (for example, apportionment of liability) or on damage assessments that fall along a range. Consider a personal injury case with an issue of the Plaintiff's contributory negligence toward the accident. A feasible range of outcomes on that point could be 0 to 40% of responsibility falling to the Plaintiff. A median average on that point would be 20%, but that might not accurately represent the lawyer's sense of the weight, or likelihood, of different possibilities. She might believe that an assessment of 40% is more likely than an assessment of 0, but that they are both still possibilities. A weighted average approach would consolidate different outcomes into a reasonable number, and then would assign a probability of each outcome along the range. The more points added to the weighted average range, the more accurate the prediction, but the number of points chosen should represent an educated decision, based on observations about outcomes in other cases or based on the evidence here. A three-point average (high-medium-low) adds more specificity than a two-point average (high-low), but a two-point range might make the most sense in a particular equation. Getting back to the example, the lawyer might assess the chance of a 40% reduction for contributory negligence at 30%, the chance of a 25% reduction at 60% and the chance of a 0% reduction at 10%. The weighted average value on this calculation would be 27%,[175] instead of the median average of 20% – which, on a $500,000 claim would represent a difference in the projection of $35,000. The weighted average across a range can offer, in the end, more accuracy than the median value, but only if the more complex valuation is justified in the analysis.

Overall, the lawyer must not use ranges as a way of avoiding the projection altogether, or it will make the overall risk assessment meaningless, and (worse), misleading – in the same way that using soft language ("there is a good chance we will succeed on this") hides the lawyer's own discomfort with firm projections. Any nuances built in should not originate from the lawyer's own discomfort or lack of security about the case analysis, and should flow instead from an actual uncertainty about external factors which – ideally, at some point – will become ascertainable.

3. Compounding probabilities ("The Product Rule") feels antithetical

In addition to assigning probabilities, there is the issue of aggregating those probabilities to get an overall assessment of the probability of being successful. This aggregation is referred to as the "product rule,"[176] as each factor of uncertainty must be multiplied together to get an overall assessment of probabilities for a single cause of action. In the case of decision trees, each node of uncertainty is identified and an assessment made of the probability of being able to successfully prove that element is identified. If there is more than one uncertainty in the liability case, the probability of each uncertain element is multiplied together in order to assess the overall probability of the cause of action being proven. This is referred to as the product rule: "to figure out the chance of several probabilities all going a particular way, you multiply them by one another and fine your answer in the product."[177] In the case

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[175] (30% x 40%) + (60% x 25%) + (0% x 0%) = 27%
[176] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (Chicago: University of Chicago Press, 2007) at 273.
[177] *Ibid*. For example, the chances of getting heads when flipping a coin is 50%. The chances of getting heads from two coin flips is the product of the probability of getting heads on the first and second coin flip, or 50% x 50% or 25%.

of a cause of action where there are four elements, two of which are assessed at a 100% probability of being proven beyond a reasonable doubt, and two that each have a 60% probability of being proven, the overall probability will be 36%.[178]

Two very senior lawyers we interviewed expressed their discomfort with how compounding fits into an assessment of liability risks, in particular.[179] By necessity, the greater the number of elements of uncertainty identified, the lower the overall probability estimate will be. Causes of action which require more elements to be proven (for example, three versus six) will result in a lower overall assessment of probability, if uncertainty creeps into several of them.[180] For some, this is difficult to trust: "Intuitively, my sense of that is that you could dictate the outcome by the number of issues that you wanted to treat as being of significance."[181] Even elements assessed with a high probability of success (90%), when compounded, can take the overall prediction of success to less than half – meaning that anything but the simplest of claims may be seen as likely to fail at trial.[182]

Lawyers who have worked with risk assessment tools suggest that the compounding effect should be seen as a reason to limit the assignment of liability risks, in particular.[183] Before assigning a high probability of success which is still less than 100% (for example, 90%), the lawyer should be able to articulate a precise reason for the discount. In the absence of a precise and compelling reason, a high prediction should be rounded up to 100% to avoid the cumulative and disproportionate impact of *de minimis* uncertainties. Allowing *de minimis* concerns to tip towards 100% predictions allows the lawyer to focus the risk assessment on true areas of uncertainty in the case.

The product rule contains an embedded assumption that each of the elements that must be proven is *independent* of the other,[184] and this may also underlie discomfort expressed by some lawyers. Probability analysis works perfectly to assess the frequency of two uncertain and unrelated events. For example, to calculate the probability in two flips of a coin of getting heads on each flip, each coin flip is independent of the other. However, if each element of uncertainty is not an independent variable, compounding the probability of each uncertainty will lead to an over-estimation of the risk. Determining whether elements are related, as a matter of law, should not be a hard thing. But determining whether risks are related, in the way that a judge's mind works, is not as easy.[185] For example, with the intentional tort of assault and battery, if the lawyer can prove that the Defendant had physical contact with the Plaintiff then perhaps there is (as a matter of psychological decision-making) a greater

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[178] 100% x 100% x 60% x 60% = 36%.

[179] Interviews with Corporate Counsel #3; Workshop Participant, Lawyer #12.

[180] For example, if we added to two more elements, where the probability of proof has been assessed at 90% each, the overall probability is 100% x 100% x 60% x 60% x 90% x 90% = 29.16%.

[181] Interview with Corporate Counsel #3.

[182] See Farnsworth, *supra* note 177 at 273. Richard Posner suggests that, in the case of a jury assessment, they may actually be rethinking their initial assessment or probability of individual elements because the story told by the Plaintiff is more plausible than the alternative story told by the Defendant ("An Economic Approach to the Law of Evidence", (1999) 51:6 Stan L Rev 1477 at 1513).

[183] Interview with Corporate Counsel #3.

[184] See Farnsworth, *supra* note 177 at 278.

[185] Interview with Risk Assessment Consultant #3.

likelihood that the judge will find it was not consensual.[186] The way that humans view an event may create a co-dependency among elements which are not interdependent from a purely legal (and therefore mathematical) point of view.

This tension may not be fully resolvable.[187] However, it does suggest a separate question that should be posed in some cases. Do the liability issues present truly independent and separable uncertainties? Or, are the risks closely tied to each other? Asking this question may also assist in the development of the litigation strategy – something we discuss later in this section.

In the end, the product rule may feel antithetical because it is unfamiliar. As previously noted by Kahneman, people do not think in probabilities, they think in terms of plausibility.[188] This is why the conjunction fallacy occurs where a smaller subset is perceived as being more probable than its larger constituent group.[189] In litigation, both the Plaintiff and Defendant have a different "theory" of the case and, at trial (or at the settlement table), they are generally trying to persuade that their theory of the case is the correct one. A Plaintiff does this by presenting evidence that tells a more compelling story than the Defendant and the Defendant attempts to tell a more compelling story than the Plaintiff. However, when people equate plausibility with probability, they can overlook elements of the case that do not "fit" with their story and run the possibility of overconfidence and ignoring risk factors. In some ways, this is a different way of explaining the "variable weight" question identified in #1 above.

While some lawyers in the training workshops were troubled by the cumulative reduction through compounding, others emphasized that compounding is a vital counterweight to what might be biased judgement on the part of the legal advocate. One lawyer summarized it nicely, "I know I need to stop drinking my own bathwater." "This will eliminate some of the bias."[190]

4. **"The Forest or the Trees": A logical risk assessment methodology sometimes challenges intuitive assessments, and these two approaches must be balanced.**

In the end, a risk assessment can take the focus away from the forest and into the trees. Some can get so caught up in the detail of the analysis, that they do not notice when it produces a prediction which seems "out of whack." There needs to be a mechanism whereby users always pull back at the end to ensure that the analysis merely clarifies their thinking about litigation risks and outcomes, and does not cause them to override an instinct about the strength or weakness of the case. Our work with law students, described in Part V, shows multiple examples of students falling into this trap, perhaps because they were less likely to identify or trust their "gut feeling" as a check-and-balance on the risk assessment.

In the first "turning point" above, we postulated that every risk assessment must begin with the theory of the case. We come back to this point as a protection against "losing the forest for the trees." It may

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[186] *Ibid*.

[187] *Ibid*.

[188] See Kahneman, *supra* note 25.

[189] That Linda is a feminist bank teller having a higher probability assessment than that Linda is a bank teller, even though feminist bank tellers are a smaller subset of bank tellers.

[190] Workshop Participant, Lawyer #20.

be more important for a practitioner to develop a "plausible theory" or story of the case and focus on the ability to prove the elements of the plausible theory, rather than identify and map each individual uncertainty.

Our conversations with lawyers drew out many perspectives on why a "checks-and-balances" step – an approach that leaves room for intuition – is important. "I would use the tool as a check on my experience, rather than my experience as a check on this tool."[191] Senger also suggests that sequence, recommending that a lawyer first do a "gut risk assessment" and then work through a more sophisticated model, to compare results.[192] If the results do not match, then assumptions need to be examined more vigorously – a process of both file- and self-examination.

As we continue to recommend, and many lawyers observed, the safest approach is to keep the focus on risk factors clear and concise. Some of their advice:

> From a senior commercial litigator with experience using decision trees: "If there are too many variables, it gets bogged down." The more variables there are, the more the uncertainty will accumulate, and the less accurate the overall prediction may be. His conclusion is that it must be carefully applied for more complex files. He sees this as not so much a problem with software, but simply as caused by the limits of human ability to assess risk. He recommends, therefore, that you really focus on "key principles" and "key issues" in the file, as a way of combatting this.[193]

One corporate counsel offered a similar caution: "I do worry about getting too detailed on a risk assessment, when it comes to breaking down legal and evidentiary issues. No matter how detailed your analysis, you're in front of a judge who may or may not be listening, may have a predisposition about the parties, or the lawyers, or may have had a certain kind of day."[194]

Decision-making personality types also affect the process. Individuals who are inherently more cautious or conservative may import too much uncertainty – a tendency which we noted in the work we have done with law students.[195] Especially for risk-averse people, the complexity of a risk assessment can become a psychological weight to carry. It can impede decisive action, if allowed to generate anxiety rather than clarify. One senior lawyer offered this caution:

> I'm thinking of lawyers I know who are very precise but don't litigate well because they can't see the forest for the trees. They get so hung up on all the little issues that they can't visualize the big picture. I think it's a big picture process. If you have a lawsuit with 30 or 40 issues, you can get so hung up on those. You need to develop the confidence to push the case forward without

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[191] Workshop Participant, Lawyer #10.
[192] Senger, *supra* note 75 at 453.
[193] Interview with Lawyer #7.
[194] Interview with Corporate Counsel #2.
[195] Randall Kiser's DecisionSet services appear to be offering an analysis of legal professionals' style of decision-making, akin to a 'personality-type' analysis.

getting tied up in all the tiny little bits. There are some very intelligent lawyers out there who could never litigate because they get so hung up on the risks.[196]

If you start looking at all the issues that way, sometimes that lawyer will just get scared away. It's overwhelming. You can't see the forest through the trees, and you physically get lost… spinning into the ground.[197]

Our interviewees suggested practical steps to take to avoid such paralysis setting in:

I do a fairly simple thing, sometimes. I'll use a flipchart and a marker, and I'll write down the three most critical ideas. Five, six or seven words, three times.[198]

The people that I find really intelligent, as colleagues and mentors, are the people who – when I'm stuck in the trees – offer a perspective and a big-picture view. The best advocates can explain complex concepts in simple language.[199]

A number of strategies are available to prevent getting "lost in the trees": giving an intuitive prediction first, before using a systematic risk assessment tool; focusing on the "plausible theory of the case"; brainstorming to focus on critical ideas; using third-party input. As with many of the points of tension identified in this section, awareness is key.

5. There are practical considerations with the use of sophisticated risk assessment methods to files: transaction cost and discoverability.

Lawyers who have experience working with decision tree software point out that "most files can't bear the cost of a full TreeAge assessment."[200] Lawyers and their firms may have to weigh the benefits and costs of the educational investment: training in computer programs such as TreeAge, and the tutelage needed to guide their early use. Some files may justify the hiring of an outside risk assessment consultant, who may not have the content knowledge on the file, but do bring "a special set of questioning skills to the evaluation."[201] Concerns around cost and the initial investment of time have increased demand for simpler tools and methodologies.

In addition to the cost, practical questions should be noted about the discoverability of any risk assessment documents. A risk assessment in Canada is likely to be protected under rules of privilege, but not necessarily protected in the United States.[202] In the Canadian setting, if a risk assessment is part of communication between the lawyer and client, an argument may be made that it is protected as

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[196] Interview with Lawyer #1.

[197] *Ibid*.

[198] *Ibid*.

[199] Interview with Lawyer #2.

[200] Interview with Lawyers #1 and 7.

[201] Interview with Risk Assessment Consultant #2.

[202] Workshop Participant, Lawyer #12. Some vulnerabilities around the discoverability of risk assessment tools in the U.S. context are explored in Robert B Calihan, John R Dent & Marc B Victor, "The Role of Risk Analysis in Dispute and Litigation Management" (Paper delivered at the ABA 27th Annual Forum on Franchising 6-8 October 2004) [unpublished] at 42, 47-48.

"legal advice communications." However, risk assessments are completed, and used, in many different ways, and a more reliable source of protection may come from "litigation privilege" instead.[203] Not restricted to communication between lawyer and client, it might include the product of more varied interactions, if the litigation was ongoing or reasonably contemplated at the time, and the dominant purpose of the communication was in respect of the litigation.[204] In the scope of the risk assessment examples provided in this paper, the document would arguably fit those criteria.[205]

What if a full risk assessment is prepared, but only conveyed in summary format to the client? It appears the document should be protected regardless of if and how it is communicated:

> …while the focus of solicitor-client privilege is to protect communications (specifically, the provision of legal advice), litigation privilege protects documents (defined broadly). There need be no communication at all for litigation privilege to attach to a document. The prototypical example–a lawyer's brief–may never be seen by the client or anyone else but the lawyer who prepared it. It is nonetheless covered. The privilege also extends to documents prepared or communicated between the lawyer and third-parties. One consequence of this is that confidentiality is not a requirement for litigation privilege.[206]

Even in the Canadian context, however, there may be unanswered questions about the future security of such documents. The limitation of litigation privilege as a ground of protection is that it ends with the litigation. Inside "unrelated" proceedings, a risk assessment document could theoretically be discovered (subject, arguably, to its relevance).[207]

6. Technology holds promise for risk assessment methods, but is daunting and – so far – unmanageable for most lawyers.

We have encountered very few Canadian lawyers who feel comfortable with software tools for risk assessment. Only one lawyer we interviewed uses TreeAge regularly. His starting assumption creates incentive for him: "I believe that you're going to be clouded by cognitive biases. The input frailties based on the 'back of the napkin' or 'back of your head' assessment means that you're *going to* miss things which are potentially significant."[208] Because of that, "I use TreeAge on pretty much everything, whether it's for my own benefit, or at the specific request of the client. I do it on any significant case, particularly

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[203] Justice Fish distinguished litigation privilege from attorney-client privilege in *Blank v. Canada (Minister of Justice)* (2006 SCC 39 at paras 27-28, [2006] 2 SCR 319 [*Blank*]). The Canadian Bar Association provides a simple explanation of the difference between the two types of privilege ("FAQ – Privilege and Confidentiality for Lawyers in Private Practice", *Practice Tools – Ethics and Professional Responsibility*, online: <http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Solicitor-Client-Privilege/FAQs>).

[204] *Blank, ibid* at para 60.

[205] Gloria Geddes cautions that more than a "vague or general apprehension of litigation" would be required ("The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege" (1999) 47:4 Canadian Tax Journal 799 at 822).

[206] Mark Prescott & Peter Waldkirch, "Litigation Privilege: Scope, Rationale and Critique" at 6, online: Canadian Bar Association <http://www.cba.org/cba/cle/PDF/Mark_Prescott_paper.pdf>.

[207] *Blank, supra* note 204 at para 36. See also Prescott & Waldkirch, *ibid* at 6-9.

[208] Interview with Lawyer #4.

where it's a little more complicated."[209] Beyond this, lawyers that we interviewed described TreeAge as "daunting."[210] "Very few lawyers use it…I think their eyes glaze over when you talk about it."[211] Many concluded there was a need for a simpler tool.

That is not to say that lawyers are unfamiliar with decision trees. While decision tree software was seen as unwieldly, some are using the "old-school" method.[212] That might mean sketching out a decision tree, "like a flowchart."[213]

> In a normal case which is complicated, and where the client can bear the cost, I'm going to have that flowchart written down on a piece of paper for myself. I'll do a chronology of the documents, where things were found, what happened, all of that. Most important, I make what I call a "factor's list." Once you have a decision tree based on the angle you're going to take, the factors list helps me decide what I need to prove and how I'm going to prove it. If it's a breach of contract claim, I write down all of the elements that have to be proven. How do I prove it, what documents help me prove it, what witnesses might help me prove it. I will assign probabilities, and then I will go through the same process but flip it on its head, pretending that I'm the other side, figuring out how to attack the case. If you take a look at both sides, then you can produce a decision tree and some guiding principles.[214]

Some lawyers resist the idea that software can help: "To me, there's no magic as to whether it's software, or whether I'm doing it manually. The important thing is that I'm doing it, and that's it in a format where it provides the information that I can use for the client."[215] Assigning the risk assessment exercise to someone else, inviting a junior to input into the process, may be uncomfortable to the "lone wolf" litigator. "I'm a dictator. I never assign a chronology, or a factors list, to a junior in whom I don't have complete trust. If I don't have complete trust in someone, or the case otherwise requires it, I will always do it myself."[216] His concern about computer software is that "I wouldn't be the one doing the input." This lawyer explains that the pain of doing the risk assessment is how he learns the case, a value which pays off at every stage in the litigation.[217]

The Case Value Analyzer™ approach was indeed developed in the search for a simpler model, supported with a more accessible software program (Excel). Lawyers are keenly interested in access to a simpler set of tools:

> If there is a tool out there which is simpler to use …that would facilitate broader adoption of it amongst lawyers. In general, that's a goal, even if you can't come up with a simplified approach that is going to be usable for very complex cases.[218]

[209] *Ibid*.
[210] Interview with Lawyer #7.
[211] Interview with Corporate Counsel #3. Interviews with Lawyers #1, 2 and 7 confirmed the same thing.
[212] Interview with Lawyer #2.
[213] *Ibid*.
[214] Interview with Lawyer #2.
[215] *Ibid.*
[216] *Ibid*.
[217] *Ibid*.
[218] Interview with Lawyer #4.

Excel was identified as a software base with potential.[219] Although even the "new generation" of lawyers does not necessarily have an intimate understanding of the program,[220] there is a possibility of importing information more simply into such a spreadsheet. "Everybody has it, and it's easy to build on top of it."[221] There may be an advantage, however, to combining a visual mapping exercise with an Excel-based process of consolidation. Visual diagrams – even a "simple kind of illustration"[222] – are powerful,[223] and may lend more capacity "to see the interconnectedness and relationships among various issues."[224]

> When I look at a decision tree, or build in TreeAge, as complicated as that process can be, it's all there in one picture. I can look at it, and when someone talks about this part of the tree, I can intuitively see and appreciate where that fits into the overall picture and analysis.[225]

Whether using TreeAge Pro™ or an alternative, at this point, the lawyer still has to "build" the list of issues, getting back to the tensions we have identified in Part III (1). It may be possible to develop "pre-formulated worksheets that could be specific to certain kinds of issues and circumstances that would simplify the process,"[226] but at the moment these do not exist.

It's also an important reminder that "the amount of background work that's necessary to produce the numbers that go into damage assessments is very extensive, and very case specific,"[227] and that is perhaps unavoidable.

7. **Risk Assessments can be used for different purposes (predicting litigation risks, enhancing client communication and improving litigation management), and the tensions described above may affect each of these uses differently.**

Platform for enhanced client communication

Our search for risk assessment tools brought us to the work of Tobias Mahler, who in 2010 published his Ph.D. dissertation in Norway, entitled *Legal Risk Management.*[228] Although the method he explored was focused on contract drafting and contract evaluation – and thus different from the litigation context – many of his observations are enlightening. In particular, he concludes that a value (and, potentially even the chief value) of graphical risk assessment models is as a "communication tool."[229] Even where lawyers

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[219] Interview with Actuary; Lawyer #4.
[220] "Can they manipulate a workbook and write programs and formulas and do integration, and produce pivot tables? I do stuff in Excel, and junior lawyers come to me and say, 'I don't understand what you've done'" (Lawyer #4).
[221] Ibid.
[222] Interview with Corporate Counsel #3.
[223] Interview with Risk Assessment Consultant #1.
[224] Interview with Lawyer #4.
[225] Ibid.
[226] Ibid.
[227] Interview with Corporate Counsel #3.
[228] Tobias Mahler, *Legal Risk Management: Developing and Evaluating Elements of a Method for Proactive Legal Analyses, with a Particular Focus on Contracts* (PhD Thesis, University of Oslo Faculty of Law, 2010) [unpublished].
[229] *Ibid* at 2

are concerned about the accuracy of an analysis in projecting an outcome, it may still be fully useful as a platform for discussion with their clients about the directions a trial can take, where there are weaknesses, and their impact.[230] With business clients who are used to following methodical decision-making processes in their broader work setting, a risk assessment "has more authority. It's more compelling. The client understands much better where the lawyer is coming from."[231] "When you put the decision tree up on the white board (which is usually what I do), it has an impact. I love working through it with the client. It allows me to correct improperly apprehended facts."[232] It might help "manage the client's expectations," "allowing the client to reassess their own perspective."[233]

From the corporate client's point of view:

> How the client uses risk assessment will depend on the approach the General Counsel uses. If the General Counsel doesn't have an analytical approach, then the client may not understand that the law can be approached that way. They may view the law as a bit of a mysterious thing. But, having taken the analytical approach with executive clients myself, I find that they really like it. It makes sense: That's how they run the rest of their business. If you're running a construction company, and you're assessing what to put in for a bid, you're doing a risk assessment on all aspects of that project. What's the soil likely to be like? Weather? Labour costs? You're doing a risk assessment all the time. So, this fits with their model of thinking about business issues.[234]

One interviewee drew on his long-time experience as corporate counsel, and his intensive experience using risk assessment while working with an external firm, as well, to explain further:

> When I worked as in-house counsel in the corporate setting, I was a "conduit," bringing an opinion and talking to accountants and engineers and technical people, and it was an enormous challenge communicating to them how the lawyer got to where he got. There's a huge communication gap. This challenge was compounded by the reality that they saw the escalation of fee charges – the litigation we were talking about included millions of dollars of costs, not just millions of dollars of claim. Even for large organizations that's not lost in "petty cash": it needs to be justified. I remember going to meetings, with senior managers and executives in the company expressing angst that we couldn't be more precise about quantifying risks or costs. Against that kind of background, any tool which enables lawyers to communicate quantitatively as opposed to qualitatively, has to have a use. It may not be the best tool that is available, but it is a tool. A risk analysis demonstrates how you got there. It lets you say, "tell me where I'm wrong in the assumptions I've made." It gives you an opportunity of engaging at a level which is more than just broad-based numbers.[235]

In many ways, enhanced client communication benefits the lawyer: "The other very significant importance it had was that we could use it as a means to get instructions from our client as to the settlement. It enabled them to go to their management and the Board and get approval on a range

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[230] Lawyer #7 finds it useful to draw decision tree diagrams, even for this purpose alone.
[231] Interview with Lawyer #3.
[232] *Ibid*.
[233] *Ibid*.
[234] Interview with Corporate Counsel #2.
[235] Interview with Corporate Counsel #3.

produced by the risk analysis."[236] Clear communication may still not produce a settlement, but ensures that client and lawyer strategies are aligned. For example, another lawyer had assessed his client's exposure (through a risk assessment) at $100,000, and recommended a settlement below that range. The client was able to articulate their reasons for proceeding, and ended up content with a win and legal fees at $200,000.[237]

The conversation may be a reality-check that is not easy to deliver to a client, and this introduces a tension to the litigator who wants to be seen as the client's advocate. Because there is not the same client loyalty to lawyers as in the past, lawyers may perceive their clients to be saying "If you can't be positive, then I'll go to the next lawyer," which "creates pressure on lawyers not to deliver bad news."[238] However, the corporate client may be more resilient than the lawyer may assume:

> I can tell you what the worst risk analysis is, which is probably the most common. The client is interested in a certain counsel, and they approach the lawyer and have a meeting. The client explains the problem. The lawyer then falls all over themselves to come up with good arguments as to why the client should win. Clients like to hear that. That may persuade them to select that lawyer. But, my fear is that this carries on, in which case the client may believe what they're getting from external counsel is an objective analysis, when they're getting a biased statement of the arguments the client can make – without giving full effect to all the contrary arguments. There is nothing wrong with offering a few days of "consolation" to the client. "Yes, you were wronged here." This helps, psychologically. But, early in the process, counsel have to come in and do a truly objective analysis.[239]

<u>Adding clarity and strategy to litigation management</u>

Most litigation files are dynamic, moving back and forth between settlement and litigation oriented decisions. Risk assessment may help guide the allocation and management of resources on both sides of the equation:

> What the decision tree helps me with is my strategy. We all know those litigators who, if there are ten issues, will throw all ten equal time and effort. At the end of my decision tree, I can see that I'm going to win on 1, 2 or 3 issues, then I'm going to focus 95% of my efforts on the issues where I think I can succeed.[240]

Twenty years ago in Saskatchewan, one of the reasons lawyers resisted mediation at the close of pleadings was the reluctance to settle until all or the majority of information has been gathered through discoveries.[241] It can be argued, however, that a good litigation strategy demonstrates not an absolutist approach to information-gathering (one gathers and confirms evidence through litigation simply because one *can*), but an economical approach to decision-making. In fact, one can argue that this is

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[236] Interview with Corporate Counsel #3.

[237] Interview with Lawyer #8.

[238] Interview with Corporate Counsel #1.

[239] Interview with Corporate Counsel #2.

[240] Interview with Lawyer #2.

[241] Michaela Keet, "The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation" (2005) 68:2 Sask L Rev 313.

essential to increased efficiency in the justice system. Rather than automatically "go to the next step" in litigation (push that document discovery, or move to witness examination, or take that interim application forward), lawyers should be taught to evaluate whether "the marginal benefit of the information acquired (by taking that step) exceeds the marginal cost of acquiring it."[242]

Thinking through each stage of the risk assessment may help solidify strategies in how the case ought to be presented, if it does go to trial. One example was offered by a senior litigator.[243] Earlier in this section, we discussed the issue of possible interdependence among liability issues. While, from a formal legal point of view, the elements of most claims are independent, ties or relationships may exist at the evidentiary level. For example, the evidence around one element may prejudicially affect the assessment of another element – where the lawyer prefers the case to turn on the second. Having thought through the relationship between the evidence on these two elements, the lawyer might want to stipulate certain facts, or deal with it in a fashion ahead of trial.

American lawyer and writer Duffy Graham describes the symbiotic nature of information-gathering and analysis, suggesting that none of this is antithetical inside the lawyer's role:

> In each case, facts and legal arguments are mutually dependent: development of one affects development of the other. The litigator seeks to develop facts that support application of a certain rule and to develop arguments that favor certain facts. Sometimes the facts turn out to be other than what the litigator thought they were or what the client said they were, so the litigator must adjust the legal argument accordingly or develop a different one. Sometimes the law turns out to be other than what the litigator thought it was, and so the litigator seeks to develop different facts or impart to the facts a different meaning. Usually a measure of both processes is under way at all times.[244]

Part V: A Simple, Practical Framework for Risk Assessment

This article has as its premise the idea that lawyers have professional and ethical obligations to aid clients in making informed decisions about their legal dispute. Learning from the "Litigation checklists" approach, decision analysis models and non-interest-based models available, we believe that there are critical assessments that all lawyers need to address when conducting an analysis of risk. These assessments aim at breaking down the complexity of a legal dispute, counteracting our quick, intuitive judgement and allowing our slower, cognitive processes to work on better understanding and predicting risk. We propose that a well prepared risk assessment should include the following considerations:

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[242] This advice we attribute to our colleague, Professor John Kleefeld.
[243] Workshop Participant, Lawyer #12.
[244] Duffy Graham, *The Consciousness of the Litigator* (Ann Arbor: University of Michigan, 2005) at 5-6.

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
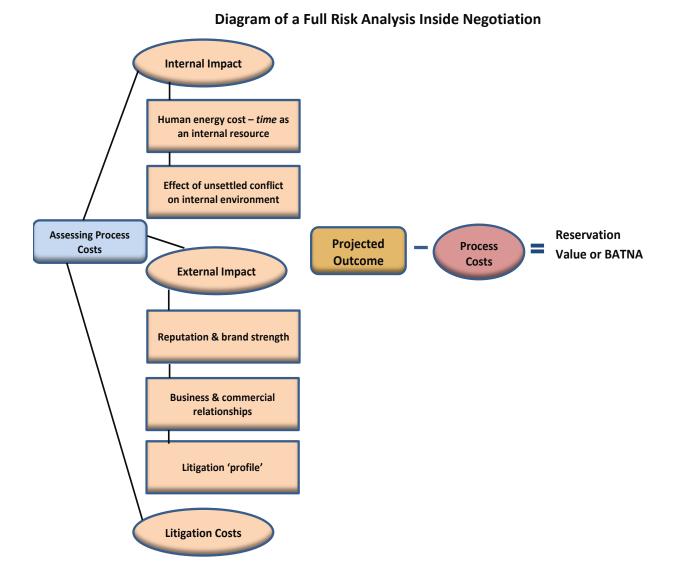

Step 4: Assess Process Costs

1. Consider the client <u>interests</u> and <u>impact</u> 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 = <u>Expected value of case</u>

Diagram of a Full Risk Analysis Inside Negotiation

Further Thoughts on How to Assess Impact: Identifying and Valuing Client Interests and Goals

There is nothing new about the assertion that lawyers must discuss "the impact of litigation" when seeking instructions about how to proceed. Experienced lawyers explore interests – especially those which may have implications for process choices – intuitively, and they are certainly obligated to do so under rules of professional conduct. In keeping with this paper's thesis, however, we argue that some *systematic exploration of interests* is crucial, as part of – or prior to – the risk assessment dialogue. Although we did not explore this topic in our interviews or engagements with lawyers, we have come across some examples of how lawyers do this now. For example, experienced litigator Jay Watson boils it down to key questions of each client, going into a mediation or a settlement conference:

1. What's the longest period of time you have gone… since this all started… without thinking about this litigation?
2. How would you feel tomorrow if you woke up and found that this matter had been resolved? How valuable would that be, to you? To "X" (your mom, your daughter, your brother, etc.)?
3. When comparing settlement options with litigation options, what route would you go if your goal was to minimize regret?[245]

Empirical studies and statistics ought to be sources of information about how a litigation process might impact a client, but to date, surprisingly little information is formally available.[246] Some studies confirm what most lawyers would intuit: that, while litigation remains pending – while a legal problem remains unresolved – clients are affected emotionally[247] and perhaps even physically.[248] In 2013, useful information was gathered and presented in the context of self-represented litigants, who experience the "cost" of unresolved conflict in the most extreme ways.[249] More recently, huge contributions have occurred through the work of the Canadian Forum on Civil Justice's Cost of Justice research project, whose major subproject, *Everyday Legal Problems and the Cost of Justice in Canada* is described as "the first national legal problems survey in Canada or elsewhere to specifically ask participants about the costs of these problems for their economic and social wellbeing."[250] While the study explores larger social and institutional costs of unresolved legal problems, it is the individual or direct litigant costs which would be of relevance to our work. This has been noted to include:

> …money spent by people attempting to resolve their problems as well as intangible costs to individuals that are a direct consequence of experiencing a legal problem. These intangible costs can include, for example, decreasing physical health, high levels of stress and emotional

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[245] Jay Watson, panel presentation on the lawyer's role in mediation, in Mediation Course, class presentation (March, 2016, U of S College of Law).

[246] The cost of litigation, in effect, is overcoming each barrier to access to justice. In its section on "Access to Justice Metrics," the CBA Report laments the lack of data on "costing aspects of the justice system," (*supra* note 64 at 142-144). The Report states, "[w]e have only fragmentary data and no capacity to pull it together to get a complete picture of access to justice in Canada. The absence of an evidentiary base for action, and shared views on what to measure and how to measure it are serious obstacles to achieving equal justice" (*ibid* at 142).

[247] "Nearly 18% of people who reported having a legal problem experienced stress or emotional difficulty as a direct consequence of having that problem" (Omar Ha-Redeye, "Impact of Litigation on Your Client's Health" (15 March 2015), *Slaw*, online: <http://www.slaw.ca/2015/03/15/impact-of-litigation-on-your-clients-health/>). The author reproduces an older version of a fact sheet published by the Canadian Forum on Civil Justice. The updated version now reports that number as 51% (CFCJ-FCJC, *Everyday Legal Problems and the Cost of Justice in Canada: Fact Sheet* (Toronto: Canadian Forum on Civil Justice, 2016), online: <http://www.cfcj-fcjc.org/sites/default/files//Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20Fact%20Sheet%20-%20Updated%20May%202016.pdf>).

[248] The fact sheet cited by Ha-Redeye (*ibid*) found that "[t]he percentage of respondents reporting they experienced a physical health problem as a result of the legal problem increased from 39.1% for people 18-35 years of age to 61.5% for individuals aged 55-64," and, interestingly, "women were more likely than men to identify a physical health problem as a direct result of a legal problem; 67.1% of women compared with 53.2% of men."

[249] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Toronto: Law Society of Upper Canada, 2013).

[250] The subproject is introduced online at <http://www.cfcj-fcjc.org/cost-of-justice>. This link provides access to various publications of the project, some of which are referred to elsewhere in this section.

problems, and strains on relationships among family members. Everyday legal problems can result in costs to the basic security of the person in terms of loss of employment or housing.[251]

Even on the early empirical work that has been done on this topic, we suggest that it is possible to begin building an "inventory of considerations" for lawyers to explore with a client. Martin Gramatikov has begun this venture, by gathering international research on "costs" including monetary, time spent, stress and emotions, social costs and damage to relationships, opportunity costs including personal time, and other dimensions of cost.[252] His handbook, published in 2010, may also be a useful starting point.[253]

Civil mediators have built-in mechanisms to explore these types of concerns, and are employing those informally – if not systematically – in almost all mediations. Tools such as the International Institute for Conflict Prevention and Resolution's "ADR Suitability Guide" demonstrate the value of a framework of broad questions which may guide lawyers through the "interests conversation."[254] The Guide takes the form of a questionnaire identifying issues that should be explored: relationships, resources, and capacities. For example, a first set of questions asks about "the parties' goals for managing the dispute," divided into "overarching goals," "legal goals" and "pragmatic goals (costs & risks)." The questions which follow are perhaps not as broad and searching as they should be, but the idea of a questionnaire framework is enticing.[255]

In the commercial context, of course, "impact" should be translated into organizational and commercial terms. Indeed, Senger suggests that a valid decision analysis should – if appropriate – consider personal risks, business risks and even perhaps community risks.[256] Here again, some literature on corporate impact may be useful, but we have so far not come across a full inventory.[257]

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[251] Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) at 12. See also *ibid* at 14. The CFCJ's Cost of Justice Project is a "Community-University Research Alliance" (CURA). Background for the project was provided in 2012 with a helpful list of references (see CFCJ-FCJC, *The Cost of Justice: Weighing the Costs of Fair & Effective Resolution to Legal Problems* (Toronto: Canadian Forum on Civil Justice, 2012)).

[252] Martin Gramatikov, "A Framework for Measuring the Costs of Paths to Justice" (2009) 2:1 J Jurisprudence 111, online: <http://www.jurisprudence.com.au/juris2/gramatikov.pdf>.

[253] Martin Gramatikov et al, *A Handbook for Measuring the Costs and Quality of Access to Justice* (Portland: Maklu, 2010).

[254] International Institute for Conflict Prevention & Resolution, *ADR Suitability Guide: Featuring Mediation Analysis Screen* (New York: International Institute for Conflict Prevention & Resolution, 2001). This institute also produced a guide to case assessment (*supra* note 116). Some assistance on exploring client goals may also be found in the mediation literature. For example, the Insight Model of mediation focuses on client "cares" as a way to identify values, and "perceived threats" (Cheryl Picard, Peter Bishop, Rene Ramkay, Neil Sargent, *The Art and Science of Mediation* (Toronto: Emond Montgomery, 2004)).

[255] The literature on client-centred lawyering approaches may also be a good resource here, suggesting a model for questioning and discussing values and goals with the client. See e.g David A Binder et al, *Lawyers as Counselors: A Client-Centred Approach*, 3rd ed (St. Paul: West Academic, 2011).

[256] Senger, *supra* note 75 at 445.

[257] Two Australian authors took on the subject via a University of Melbourne research grant (Asjeet Lamba & Ian Ramsay, "The Costs of Corporate Litigation in Australia: A Research Note," online: <http://law.unimelb.edu.au/__data/assets/pdf_file/0004/1709770/55-

Lawyers in our interviews offered examples. As explained by one corporate counsel:

> Many factors come into play. The timing of getting the matter resolved might be important. The client may be prepared to sacrifice more money to get a quick fix because, for example, they may be planning to go public in six months. There are also relationships which are almost always present in commercial claims. Maintaining that relationship may be quite important.[258]

It may even lead to surprising strategies, when considering the objectives of the business from a bird's eye view. For example, in the construction business, this meant understanding "key relationships, key drivers, the importance of subcontractors and the implications of conflict."[259] "You might have one subcontractor on many different contracts, and a conflict on one project might put all the other projects at risk. So instead of suing that one party, you might even develop a strategy to give financial support to that party."[260]

Internal staffing costs are another consideration:

> … when it comes to internal costs, it's harder. You can do an hourly cost for internal people, and we did this at our company. We would assign a dollar number for positions, and estimate the hours that might be spent in the litigation process. Or, you can try to evaluate the opportunity costs of getting employees and executives to spend time on litigation rather than doing the "real work" they're supposed to be doing for the organization.[261]

A full risk assessment must be framed in an understanding of client interests, in order for it to be "fully informed," either to the client or the lawyer. We suggest that a diligent lawyer will need to explore client goals before being able to assess the "process impact" (including tangible and intangible costs) which ought to be factored into a risk assessment in the end. We also believe that more work can be done to develop a checklist of potential concerns for individual and organizational clients.

Framing a discussion of impact by first identifying positive goals:

The question of "how one enters the discussion about process impact" also deserves consideration. We have noted above that the way something is framed – as a loss or as a gain – will feed into whether a client is attracted or repelled by the scenario. Because of this, when John Wade mediates a dispute, he

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Cost_of_Corporate_Litigation_in_Australia_-_final__26_06_09_1.pdf>). In the civil litigation area more generally, there has been some recognition of the reality that costs deter litigants from pursuing strong claims. See Erik Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 Queen's LJ 113. See also Daniel Schwartz, "Estimating the Cost of Litigation: Parallel Stories Illustrate Difficulty of Predicting Costs and Outcome of Litigation" (13 August 2008), *Connecticut Employment Law Blog*, online: <http://www.ctemploymentlawblog.com/2008/08/articles/estimating-the-costs-of-litigation-parallel-stories-illustrate-difficulty-of-predicting-costs-and-outcome-of-litigation/>.

[258] Interview with Corporate Counsel #2.
[259] *Ibid*.
[260] *Ibid*.
[261] *Ibid*.

uses a positive frame – which he calls "life goals" – to explore process considerations.[262] By inviting the client to reflect on wide-ranging and future-focused interests, and then to consider the impact of various processes and outcomes on those goals, he tries to use positive motivations rather than fear to focus decision-making.[263] It is possible, of course, for a positive goal to be better served through the process of litigation itself, rather than the termination of a dispute through its resolution.

The last step – cataloguing legal costs:

All of this can be a way of identifying the "indirect" or "intangible" costs of engaging in a litigation process, beyond the "direct" costs (legal fees and expenses) which tend more easily to be the focus of the conversation between the lawyer and client. In most cases, those legal fees will only be part of a much more complex picture – in part, why we have left the question of legal costs to the final stage of this discussion.

After noting the tendency of many lawyers to resist giving detailed projections of litigation costs, Calihan, Dent and Victor argue for the importance of including such "forecasts" in a risk assessment. They suggest using Excel spreadsheets that could:

1. Express the budget in hours needed for particular tasks, rather than dollars.
2. Include all costs and disbursements, in addition to fees.
3. Let the spreadsheet handle the arithmetic.[264]

They suggest that the spreadsheet(s) might include issues such as staffing (which lawyers are needed to work on which aspects of the file), and timeline, as well as other considerations. Useful precedents are located within their article.[265] Other tools which might assist lawyers at this stage include:

- The Law Society of Upper Canada, "Litigation Cost Estimate"[266]
- American sources but still interesting: Paula Hannaford-Agor & Nicole L. Waters, "Estimating the Costs of Litigation",[267] and Just Resolve's Total Cost of Litigation Calculator.[268]

Other considerations when assessing legal costs include court costs.[269] Another point worth noting is that costs already incurred to date are not to be included in a risk assessment calculation (which focuses on projections, and a comparative analysis of different courses of action).

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[262] Wade, *supra* note 70.

[263] Wade includes several useful charts or tables in his article (*ibid*). Positive goal-setting is one of the principles at the root of the "motivational interviewing" technique used frequently to shift offender behaviour in the criminal justice setting (online: <www.motivationalinterviewing.org>).

[264] "Role of Risk Analysis", *supra* note 203 at 36.

[265] *Ibid* at 38-39.

[266] The Law Society of Upper Canada, "Litigation Cost Estimate," *LSUC Practice Management Topics*, online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491192>.

[267] Paula Hannaford-Agor & Nicole L Waters, "Estimating the Cost of Litigation" (2013) 20:1 National Center for State Courts 1, online: <http://www.courtstatistics.org/~/media/microsites/files/csp/data%20pdf/csph_online2.ashx>.

[268] Just Resolve, "Total Costs of Litigation Calculator", online: <http://www.justresolve.com/tcl-calculator/>.

A simple, practical framework in action: observations and conclusions about its use by law students

Boiled down to its essential steps, a risk analysis is not conceptually complex – and yet, we know from the feedback of lawyers (and, for all of the reasons we have articulated above) that it may still not be easy "in action." We are keenly interested in learning whether a basic framework can be accessible and applicable for advocates, and what impact it might have on the negotiation process in particular. In 2015, one of the authors used the Negotiation course, taught to second and third year law students at the University of Saskatchewan, as an opportunity to introduce a module on risk assessment. Students were taught the simple framework described above, just before they embarked on a course assignment, the negotiation of a hypothetical civil litigation (personal injury) file. Our observations about the experiment are passed on below. Some law students – even with little or no litigation experience – were able to develop and use risk assessment effectively in the negotiation. But not all were able to accomplish that. The discussion below describes the contents of the "good" risk assessments, and how they were used to ground the negotiator with a clear BATNA, help identify the bargaining zone, reduce adversarial posturing and even build trust.

The hypothetical scenario was more complex than law students typically see in a negotiation roleplay. Divided into teams of two and representing either the Plaintiff (the injured individual) or the Defendant (owner of a construction business), students were required to review court documents: pleadings; a brief of law; client communication; and summaries of evidence including witness statements, doctors' reports and engineers' reports. They submitted "Preparation Plans," conducted a one-hour negotiation with the other side (video-recorded), reviewed the video file, debriefed with teammates, and submitted a written reflective analysis of the experience.

There are a multitude of issues that may arise in the hypothetical case we use for the simulation. The key issues are:

(1) Was there a breach of the standard of care on the part of the Defendant, through the failure to take certain preventative steps to control a construction blast? Industry practice is relevant.
(2) Was there contributory negligence on the part of the Plaintiff, for being on a clearly dangerous worksite?
(3) What is an appropriate assessment of damage, given uncertainties around causation and proof?
    a. Did the damages flow directly from the accident, or from other causes (her depression, or other pre-existing injuries or conditions)?
    b. Did she fail to mitigate by not fully following the advice of health professionals (also a contributory negligence issue)?
    c. Is there enough evidence to support some parts of the claim (such as the claim of permanent disability and future loss of employment)?

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[269] The Law Reform Commission of Saskatchewan's recent work notes the common gap between actual costs and awarded costs (Law Reform Commission of Saskatchewan, *Awards of Costs and Access to Justice* (Law Reform Commission of Saskatchewan, 2011).

The Plaintiff's full claim amounts to approximately $1.5 million. The students are given latitude to prepare for their negotiations on their own – to identify their own BATNAs, reservation values, and bargaining strategies. The way they manage the file is a rich opportunity for learning – for them, and for their instructor – on what produces agreements in the process, and how well each side is able to meet client interests. The introduction of a module on Risk Assessment was intriguing, and we have focused below on the experience of two groups of students (eight students), who conducted two excellent negotiations. Their experience is offered as a "story of success" when it comes to the challenging task of completing and then strategically using a risk assessment in a civil litigation file.

It might help to fast-forward, for a moment, to the "end" of the exercise in a best-case scenario. A reasonable interpretation of the client instructions and likely outcomes at litigation would set the bargaining zone between $450,000 and $700,000. An outcome in that range could be justified, on the information given, by both Defendant and Plaintiff. Anything less, for the Plaintiff, would mean that her counsel "left too much on the table" and compromised her long-term interests; anything more, for the Defendant, would leave him unable to meet his future goals. Taking combined litigation risks into account, an outcome in that range meets both sets of client interests and should also fall within reasonable risk assessments focused on litigation outcomes. Some students are also able to "create value" through an integrative approach, and an example of that is offered below – but the distributive outcomes of the negotiation should, on a successfully negotiated file, fall within that range.

Perhaps not surprisingly, most students are not able to reach a deal within the scope of this assignment. It is a complex file, without "real access" to their client to explore nuances; and they only have an hour to complete the negotiation. However, the objective of the exercise is to encourage students to explore "what works" at the negotiation table outside of the typical one-dimensional roleplay – in what ought to feel more like the "gritty" setting of a real litigation file.

Overall, the addition of a risk assessment module in the preparation for this assignment had an encouraging result. The way students approached risk assessment *mattered* to both process and the outcome. We will convey some of our observations below, focusing on the negotiations of "Group 1" and "Group 2."[270]

A word, first, on the less successful examples. Having observed 40 students conduct 20 different negotiations since introducing the risk assessment module, we can make the following anecdotal observations. Students who prepared no RA at all tended to be much more positional, and presented inflated demands inside the negotiation. For example, the Plaintiffs might anchor the negotiation at the full claim amount of $1.5 million. They tended to be less compromising, and more adversarial in their behavior. Anecdotally, those groups that had not done an RA were more apt to start with a discussion about liability, and let it evolve into arguments about the evidence and interpretations of law,

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[270] Group 1 and Group 2 were each comprised of four students, participating in two different offerings of the Negotiation class: one in March, 2015, and one in November, 2015, both taught by Professor Keet. Those eight students are now graduates of the College, and have each provided permission to refer to their materials. Any quotes from their assignment material are referred to as belonging to Student 1, Student 2, etc.

arguments designed to persuade, rather than explore – similar to the arguments that would be offered at trial. More often than not, these negotiations produced no deal.

Other students did attempt to construct an RA, but did so weakly. From the Plaintiff side, this typically meant that they over-emphasized their risk, attached risk to too many factors and magnified individual risk factors. Compounded, these errors took the projected litigation outcome to a level far lower than is justified. For example, some Plaintiff risk assessments projected likely outcomes as low as $50,000. These teams tended to convey a weak negotiating position in their negotiations, and – while many reached deals – they ended up compromising far too much in the end, and later, regretting it. It has already been noted that a careful RA can have a dampening impact on the litigator, decreasing confidence in the file. "There are some very intelligent lawyers out there who could never litigate because they get so hung up on the risks."[271] This might suggest that doing no RA at all is less damaging for the client than doing a weak RA which loses "the forest for the trees."

The rest of this discussion focuses on the example of the well-constructed and well-used risk assessments, and the work of eight students in particular.[272] The successful features of these two examples demonstrate the points raised in Part IV of the paper. In the next part, however, we will focus on how these tensions were resolved in the context of a hypothetical file, and what gains were achieved in the negotiation process.

A well-prepared RA looks very different from an informal, or ill-informed, one.

     1. It boils liability down to the key risks:

Group 2's liability assessment is presented in the form of a chart, listing "law," "evidence," and "probability" for each of 6 key elements and/or defenses: duty of care, standard of care, causation, remoteness, *volenti*, and contributory negligence. How these are worked through shows a good understanding of the *relationships* among these factors.

First, the assessment avoided "knee-jerk reductions." For example, the chance of successfully getting over the duty of care element is listed at 100%. On the facts of this case, this is the right approach: duty of care ought to be established. In contrast, students who completed poor RA's were more apt to add a general risk reduction, reducing this factor to 90% even in the absence of a legal or factual dilemma in the duty assessment. We might call this the "nothing is guaranteed" perspective on assessing risk. Because it was a case with numerous elements, those students ended up with artificially inflated conclusions about risk.

Overall, Group 2's RA focused in on the two areas which are true liability risks: standard of care, and contributory negligence. The document summarizes the law and evidence, on both sides, and then assesses each element. It concludes that there is a 50% chance of proving standard of care. That assessment could be slightly higher on the facts of the case, but 50% is on the low end of a reasonable range. Contributory negligence is then dealt with as described below.

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[271] Interview with Lawyer #1, noted earlier in Part III at n 197.

[272] Many – indeed, the majority – of students did great work on this project. The examples of these two negotiations have been chosen simply for clarity on the takeaways.

2. It captures the different impact that apportionment issues have:

Contributory negligence is an example of a "tricky" issue, when it comes to risk assessment, again underlining the importance of understanding the relationship among elements in a claim. Duty, standard (or breach) and causation (factual and legal) are all preliminary elements. If one is not proven, then the claim will fail. Any uncertainty attached to each of these elements must be compounded, then, as explained above. Contributory negligence is a different consideration – raising issues of apportionment, once liability is established. That posed problems for some students.

Some assumed a chance of a contributory negligence finding at 50%, but added it as a risk to be compounded in with the other liability elements. The impact of this addition inflates the overall risk and leads to unnecessarily low numbers on that side. Contributory negligence is actually a partial defense, and not part of the initial liability equation. Its proper treatment inside a risk assessment is as a "stage two" assessment, with two separate steps. First, what is the chance that she will be considered to have contributed to the initial accident? Then, if she has contributed, by what amount will the overall claim be reduced? The average student's instincts in this case, that there is a 50% chance she will be considered contributorily negligent, is reasonable. But the range of responsibility that will be assigned to her is low, lower than 50%. And the chance of her getting a 10% reduction is much higher than the chance she will get a 50% reduction. The proper contributory negligence calculation multiplies the chance of a finding, by the degree apportioned to the Plaintiff; and a sophisticated approach leaves some room for the different directions this could go.

Group 2 handled the contributory negligence issue best. After a reasonable projection was calculate on liability and damages, they presented a table of contributory negligence scenarios, representing apportionment to the Plaintiff of anywhere from 10 to 50%. This introduces the right sequence for the analysis, but misses the nuance that a weighted average calculation might have.

For example, let's say that we're dealing with a projected damage assessment of $100,000, with a 50% chance of proving breach of the standard of care. The value assigned to a projected trial outcome, taking risks into account, is then $50,000. Let's assume a 75% chance that she will be found contributorily negligent and that the most likely reduction, in that case, would be 25%. There would also be a 25% chance that she would not be found contributorily negligence at all. A weighted average projection would look like this:

75% chance of her receiving a 25% reduction:

.75 x .75 (her share) x $50,000 = $28,125

PLUS a 25% chance of her receiving no reduction:

.25 x $50,000 = $12,500

Weight average assessment of what she's likely to get after contributory negligence is taken into account: $28,125 + $12,500 = $40,625

On a $100,000 damage assessment, then, the risk projection would be $40,625 taking these two factors into account (50% chance of proving standard of care, and 75% chance of a 25% apportionment of fault).

Very few students mastered the translation of contributory negligence into the risk assessment calculation – but understanding the principle behind it should help.

The other way that students confused the relationship among elements was by double-counting some factors. This showed up in the risk assessments in two ways: remoteness issues, and mitigation. Remoteness is an element which is considered preliminary to the assessment of liability: the result of the negligence act or omission must not be too remote from the act itself. Many students, however, reduced this between 50% and 80% because they felt the injuries may have been caused by other things (pre-existing causes, for example). This can be a remoteness issue – but remoteness on damages is a different consideration than remoteness on liability, and the placement of the risk in their analyses was wrong. Because they hadn't properly located the issue in terms of proof of damages, they were then more apt to count the risk a second time when assessing the chance of success on the damages side of the equation.

Similarly, students who discounted at the liability stage for contributory negligence, but cited the failure to get proper medical treatment as the reason, usually ended up double-counting risk. At the liability stage, contributory negligence assesses the Plaintiff's responsibility for the accident itself, not what happens after. A risk assessment that clouds those things at the liability stage may have also included a "mitigation factor" at the damages stage, inflating the risk and lowering the numbers.

3. **It addresses heads of damage with their separate risks, and uses weighted average calculations to add specificity:**

Above, we described the utility of a weighted average calculation at certain stages. Group 2 Defendants used this approach at exactly the right point in the damages assessment. First, they assessed the likelihood of proving each head of damage separately, which allows distinct risks to be taken into account. For example, loss of earning capacity is a lot more difficult to prove than pain and suffering, in this case. For loss of future earning capacity, they used a range with a weighted average which suited the head of damage extremely well:

> 10% chance she'd be seen as 100% disabled in the future (10% x $882,020.25)
> 20% chance she'd be seen as 75% disabled (20% x $661,514)
> 40% chance she'd be seen as 40% disabled (40% x $352,807)
> 20% chance she'd be seen as 25% disabled (20% x $220,505)
> 10% chance she'd be seen as not disabled at all (10% x 0)

Their weighted average projection came out at $405,728.63.

The Plaintiffs in Group 2 applied a more straightforward approach to the projection of damages. They added up the full amount claimed on each head of damage (less the loss of future income), and reduced the whole amount by a factor for mitigation. Then, they created a table with three scenarios for future loss of income (a decision tree of sorts), with amounts representing an ability to work full-time, part-time, and not at all. Those values, under the three scenarios, were added to the remaining damage

projection, to create a range of outcomes. This is a reasonable and easier way to handle the projection on damages, but does not capture as many nuances as the approach used by their counterparts.

4. **It articulates and quantifies "interests/goals," "indirect and direct costs":**

The Group 2 Defendant's risk assessment also factors in client interests in a way that most failed to do. That RA lists "interests and goals in pursuing litigation," "indirect costs in pursuing litigation" (time, stress, opportunity cost) in two separate tables, and assigns values to those. A third table assesses "direct costs in litigation." Some of the items factored in included "Time spent by the client in litigation" at $5,000; "Stress due to litigation risk" at $5,000; and most importantly, on the facts of the case, the "opportunity cost of losing the chance to sell the business." These students assessed the loss of opportunity at $137,700, which represented the difference between the existing offer to purchase and the "book value" of the business. To those indirect costs, they added the projected $50,000 in actual litigation costs. Most other students noted client interests in their preparation plans, but did not go through the process of naming and valuing those interests.

5. **It repeats the analysis from both the Plaintiff and the Defendant's perspective:**

Again, the Group 2 Defendant document repeats the analysis a second time, viewed from the opponent's perspective, and then identifies a projected bargaining zone.

Sometimes, a second risk assessment would be warranted, examining the risks and benefits of different processes as well. "Part of our function in the process was not just an external risk analysis with respect to the litigation, but also a risk analysis with respect to the settlement. If we do this, what could happen in the future?"[273] He elaborates:

> From a risk analysis perspective, there were two sides of the tree: the litigation side and the settlement side. If we settle it like this, then there are all these risks and contingencies on the settlement side. On the flip side, if we agree to that, what are the risks of this, and this, and this. How does that impact the outcomes? That was really delving into the business of the client. They're much better at doing that, but we pushed them to undertake that process, and this guided the scope of the range for a settlement structure.[274]

6. **It incorporates tables to represent variable outcomes and predictions, to help the negotiator be more nimble and responsive during the negotiation process:**

Finally, both Defendants and Plaintiffs in Group 2 added a table or an Excel spreadsheet to show a range of outcomes above and below the projected risk, with the variables that would affect where it would fall. For example, the Defendants had assessed liability at 35%, but they produced a table which listed the value of the case from anywhere from 5% to 100% chance of success on liability. They also ran the same assessments for two main calculations of damages: first, their projection of the most realistic outcome on damages; and then again for (2) the maximum damages claimed. This prepared them very well for versatility inside the negotiation itself.

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[273] Interview with Lawyer #4.
[274] *Ibid*.

The use of a strong risk Assessment in a negotiation can ground the negotiator with a clear BATNA, help identify the bargaining zone, reduce adversarial posturing and even build trust

Those that completed strong (well-reasoned) risk assessments were better able to make progress in what seemed to be a presumptively adversarial setting. It grounded the team with confidence, allowing them to rely on the strength of their side rather than powerful or manipulative dynamics such as bluffing, and also preventing them from drifting towards a "bad deal."

The most advanced teams were able to use their well-reasoned risk assessments strategically in the negotiation itself, with interesting results. First, they were surprisingly able to shift an adversarial discussion to more of a collaborative one. They did not get drawn into positional discussions about the "law and evidence," but were able to have matter-of-fact transparent conversations about their view on where this might go at trial. Where this was matched by the other side, they could make progress extremely quickly and with very courteous and professional dialogue.

The following observations, written by the students as they analyzed their negotiations after-the-fact, are interesting:

Group 1:

> Rather than hashing out the arguments it just made it clear where we all stood and the uncertainty that both our sides were facing, which gave further incentive to negotiate.[275]

> Your presentation of a structured risk analysis and your explanation of it made me feel like you had taken care to think about the issues thoroughly and realistically, and I was less nervous about your settlement figure being unreasonable. It made me made me [sic] much more willing to accept the numbers proposed as reasonable and not just arbitrary. It helped the negotiation flow much more smoothly, since we didn't have to spend time inquiring how you arrived at those numbers.[276]

> I found the approach of contrasting our two legal positions a very useful way in quickly getting through the information and acknowledging that there are potential strengths and weaknesses on both sides of the argument. This allowed us to move forward fairly quickly on this legal issue.... It allowed us to talk about the liability issues in an objective way so we didn't become mired in our legal positions at this stage.[277]

> The comparison of our risk analysis documents was a good way to perform a somewhat objective analysis. Putting both numbers on the table really encouraged us to work towards a goal. Knowing that you took the time to compile a risk analysis prior to attending the negotiation with reasonable numbers made me feel like both parties were on the same page and that the zone of agreement was within reach for both parties.[278]

Group 2:

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[275] Student #3.
[276] Student #2.
[277] Student #4.
[278] Student #1.

I could not help but smile, as the Plaintiff lawyers outlined the estimates they had prepared, as they were so closely aligned with the numbers we had generated in our risk assessment. Thorough preparation and reasonable expectations from both sides led us to have similar estimates.[279]

To me, this was the moment when each side breathed a sigh of relief because our numbers were similar enough that we could fine-tune without having to discuss big issues for the entirety of the negotiation.[280]

This was a pivotal moment for us. Did our numbers match up? … This really goes to show the impact that risk analysis can have![281]

Techniques used by the students to manage the risk assessment discussion:

1. They embedded it in an interest-based approach, using non-adversarial language.

As Group 1 ventured into a discussion of law and evidence, they referred immediately to the preparation of risk assessments on both sides. The language they used to introduce this was non-adversarial: "We believe …. about the evidence"; "We're not trying to challenge you on this, but we see it a bit differently"; "It is good for us to both see where we feel the strengths and weaknesses are in our case." One of the only articles which discusses how one might handle a risk assessment during negotiation suggests similar phrases, designed to be exploratory, to open dialogue: "Can you suggest some risk we have omitted if we do not reach a settlement today?; "If we are wrong, we would be glad for you to give us more information so that we can make a better decision."[282]

The students tended to use the risk assessment not to gain power in the negotiation, but to identify points of difference in how they each saw the law and evidence. Once they narrowed down points of difference, they traded views on what might unfold at trial. Because the points of difference were not huge, they were able to move off that fairly quickly. As stated by one student during the negotiation:

I still think our numbers are pretty close on our risk assessments overall. It sounds like we both understand the law in the same way, and that we have both done a similar risk calculation. We both know, going to trial, what we're looking at – which has helped us to move towards what we're here to negotiate today.[283]

Couched in terms of risk assessments, approached reasonably by each side, the discussion about the law "helped to decrease any tension that might be starting to build"[284] – interestingly, the opposite impact that a discussion of law and evidence often has, in negotiation. It is noteworthy that the students were all relatively open about their clients' goals, and it is impossible to know which "came first" – the

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[279] Student #6.
[280] Student #8.
[281] Student #7.
[282] Wade, *supra* note 70 at 7-8.
[283] Student #4.
[284] Student #3.

interest-based approach, or the open and exploratory tone of the discussion about risks. As one student noted, after the fact:

> … your numbers seemed very reasonable and we knew when you started explaining that we would be able to make an agreement. I think, however, this only worked because of the integrative framework we were both using. Because we were trying to be cooperative, we tried to be very reasonable with your numbers, which left very little wiggle room. If the other party had been very positional and had started with a number very far from ours, it would have been harder, because we had very little wiggle room in our numbers… We would have either been stubborn and inflexible, or we would have had to inflate our numbers to try and compete.[285]

2. They were transparent about the risk assessment results and how they were developed.

The Defendants in Group 1 were open about where they saw the risk, but also where they could concede that points would not be in issue. For example, they accepted duty of care. They ranked breach/standard of care at (mentioning industry standard) at 50%. They accepted causation (as a liability element).

In both sets of negotiations, neither side seemed to assume that their assessments would line up perfectly. For example, in Group 1, the Defendant had assigned a probability of proving standard of care to be 50%, whereas the Plaintiff's side assessed that at 70%. One side discounted for remoteness and the other side did not. Assessments on contributory negligence also differed. The Defendants anticipated a 30% chance she would be found to have contributed, with an apportionment of 30% responsibility to her. The Plaintiff anticipated a 95% chance she would not be found contributorily negligent, and if she was found liable, it would only be at the level of 10%. Without debating the exact numbers, the students in this group accepted that their general view of the case was not drastically different, and then moved on to a discussion of client concerns and possible terms of an agreement.

In Group 2, each side had taken similarly different steps in constructing their risk assessment. The Plaintiff's risk assessment had a much higher liability prediction (82% as opposed to 35%), but they took more variables into account in terms of contributory negligence and mitigation. Their risk assessment was excellent in a similar way, in that it attempted to capture a range of possibilities, using tables with different values.

In neither negotiation did it impede progress that the same factors were taken into account in different ways. In each group, negotiators were willing to disclose what numbers they had assigned on those points, and that helped signal a range to which the negotiation was moving. Because the overall, cumulative assessments on each side were not radically different, and did not convey positionality (bluffing, etc.), it had a positive impact. The students' reflections confirmed this. Several students mentioned that it "defused" or "stabilized" emotions, helping them to "focus on the problems, rather than any personal conflicts"[286] and two students noted the positive impact on "trust":

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[285] *Ibid*.
[286] Student #6.

The level of trust established made it possible for us to exchange numbers in an honest way... I don't know what we would have reached a settlement without knowing that we had both been prepared and were both willing to share the numbers honestly.[287]

When we found out that the other side had similar estimates, it went a long way in terms of strengthening the trust. Suddenly, the confidence and trust that we held in our own research and numbers was projected upon the opposing side. This building of trust allowed us to be open and collaborative, and helped to facilitate an agreement.[288]

Some lawyers we interviewed also spoke about their experiences, sharing risk assessments with opposing counsel during a negotiation process, or condensed/focused versions of those documents.[289] One lawyer elaborates: he keeps his own risk assessment confidential, but would share "a print out which represented an aspect of the work which had been produced by the risk analysis," or "a summary output," condensing the factors and their impact.[290] Because they had spent so much time on their risk analysis, understanding and forecasting the impact of changing variables, "the benefit of that was that, when we engaged the other side in the specifics of the risk analysis, and they mentioned a number (a risk factor) to us, I knew what it was going to do to the outputs. All of the iterations we had run gave us a reasonable sense of what the impact would be." In the end, he felt this served them extremely well: "having seen where it went, it put us at a tremendous advantage. If I was settlement counsel on the other side, I would have felt completely disarmed by the fact that they are doing this, and we're not. And I don't have control over it."[291]

Although less extensive, the advanced preparation done by Group 2 helped in a similar way. They had completed charts representing different scenarios and brought those charts into the negotiation. Computer programs, and in the following example, TreeAge, can create efficiency on this front:

Once we got the model in place, we were fairly imaginative about injecting numbers into the program, and looking at the results of the numbers. We developed our own view, and then would go to the other side and hear what they had to say. Towards the end of the negotiation, we were actually getting their numbers and injecting them into our own program. On the last day of negotiations, we could see that we had authority that overlapped with what their numbers indicated they were willing to accept.[292]

Risk assessments, even creatively constructed, can be used effectively inside a negotiation. The example described earlier was a situation where a client had completed the risk assessment with input from two retired judges, who had given their input without knowing which side had retained them.[293] Once completed, the risk assessment was then given to the negotiating party on the other side, with the

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[287] Student #4.
[288] Student #6.
[289] Interviews with Lawyers #4 and 7. They may also share a risk assessment confidentially with a mediator or a settlement conferencing judge, to test the assessment. Another lawyer spoke of going through the risk assessment in caucus with the mediator, in order to "bring the client along with" him; interview with Lawyer #3.
[290] Interview with Lawyer #4.
[291] *Ibid*.
[292] Interview with Lawyer #4.
[293] Interview with Risk Assessment Consultant #2.

request that it be forwarded to the Board of Directors (they did so on the argument that the other lawyer had a responsibility to so forward the document). "The case settled."[294] Here, the neutral input into the risk assessment likely had persuasive impact.

3. **They used a structure for the negotiation, and brought up the risk assessment relatively early.**

Students in Groups 1 and 2 took care to bring up their risk assessments at a certain point in the process, after they had engaged in discussion about interests and objectives, and had the opportunity to set a non-defensive tone. In this way, they used the risk assessment conversation to complement an approach which remained collaborative, and was indeed structured into the stages of negotiation they chose to navigate through.

After setting an agenda for the discussion, one student in Group 2 introduced the discussion this way: "We recognize it would be in neither interest to go to litigation. There is a risk that either could "lose" at litigation. I don't know if you've gone through a thorough risk assessment, but we have put together some numbers. I think it would be useful to compare those numbers, see if we can come to some agreement as to where the risks lie and what range of numbers we're each looking at."[295] Using their most favorable projection generated through the risk assessment, they effectively anchored the negotiation, in a neutral and persuasive way. As they began explaining their approach to the assessment of liability, they were clear about their projection of 82% on the elements of liability, subject to a concession on contributory negligence. They then worked through their damages calculation "if everything goes our way on damages." Using that damages assessment as a starting point, they multiplied it by the 82% liability value, and then added reductions for contributory negligence (and mitigation), ending up at $435,000. That starting point eventually led the group to a framework of an agreement, with a positive tone flowing into the next scheduled meeting.

Group 1 also discovered that there was congruence in how both sides had approached their risk assessment, and established early on that there should be a bargaining zone. After some early comparisons of their risk assessments on liability and damages, they returned to a discussion of client interests, did a bit of brainstorming to capture more creative terms of an agreement and tentatively agreed on a couple of ideas. They agreed in principle on the idea of income replacement being paid over time (with regular medical reporting), and a short-term employment relationship between the Defendant and Plaintiff (this might be seen as a more integrative solution, not one which would be included in a normal court remedy). They reached a deal in the bargaining zone, at roughly $700,000, structured with $500,000 cash and another $10,000 per year to the age of 65 (20 years, another $200,000), contingent on proof that she continues to be unable to work full-time. To support the risk assessment conversations, both groups used visual aids. Consistent with the approach described by some lawyers above, one student in Group 1 created a document specifically to use in the negotiation. In the following comment, she also observes that the other side did something similar "in the moment": "I specifically separated them onto two sheets so we could show one without showing the other, and I

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[294] *Ibid*.
[295] Student #8.

think you did something similar by folding yours. It was a good way to test the waters without making ourselves extremely vulnerable, and also helped indicate that there was, in fact, a likely zone of agreement."[296]

We should note that flipchart use was not always helpful in the discussion about the law and evidence. Students who were not prepared for a "risk assessment conversation," but simply listed elements of liability and issues of evidence, looking to negotiate and record concessions point-by-point, ran into trouble. The discussion ended up getting adversarial and positional, and occupying much of the time allocated for the negotiation.

Conclusion

We started this Part by describing the essential steps of a risk assessment, their purpose, and the key objective at each stage of the analysis. We also offered a few tools that can be used at appropriate junctures. While the more sophisticated tools will assist (in large cases, or in the case of one senior litigator we worked with, where the lawyer is willing to dive in and keep those skills fresh) there is still a need for the average lawyer in the average practice to understand and apply the principles of risk analysis. And there is value in truly understanding the steps – because it forces thinking about the relationship between the factors in the case, and is more likely to connect intuitive thinking and logical thinking methods (it should refine the gap between them). That is, the students who didn't really understand *why* they were taking a step were also the ones who ended up out of whack in their risk assessment, and whose intuition didn't catch it (as we suggest above).

The other result which this experiment showed us is that an organic assessment – one that is generated by applying the framework of steps engaging the principles behind them – leaves room for the risk assessment to be constructed in slightly different ways. Diversity of approach may be entirely okay. It did not impede the negotiation processes of these two groups of students, as long as the team could explain why they viewed something a certain way. If the commitment to transparency was matched on the other side, it actually increased the respect brought to the engagement across the table, and still allowed them to identify their bargaining zone. It accomplished what it was meant to, acknowledged that the parties were indeed bargaining in the shadow of the law, but with more transparency and less positioning than normally accompanies that stage of the discussion.

CONCLUSION: Risk Assessment and Areas of Future Study

Risk assessment and its application to law have opened us up a rich and significant field of study. In reflecting on each section of this paper, we have identified further research questions and studies that we anticipate will continue to occupy us over the coming years.

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[296] Student #3.

Part I documented predictive mistakes in the context of U.S. litigation and opened up the behavioral economics literature that recognizes the limits to our predictive judgment. Allowing some room for cultural and pragmatic differences across the two jurisdictions, it would be useful to better understand the frequency and nature of decision-making or predictive error in the Canadian setting.

Many of the tools and methodologies in Part III are worthy of further study. In particular, the decision analysis tools and methods (and non-decision analysis methods) could be further tested on particular cases and compared, to determine the strengths and particularities of each approach. Similarly, software and diagrammatic tools could be developed to accompany even simpler frameworks.

As identified in Part V, an inventory could be developed to better identify and quantify client interests and impacts. Guidelines for lawyers on quantifying individual or corporate goals or interests could also be explored to better understand and evaluate the tangible and intangible costs of litigation. Further on this point, information needs to continue to be gathered on the average costs of navigating civil claims through various stages of the litigation process. Lawyers and repeat litigant organizations are rich and untapped sources of information on this.

Finally, as law professors, we recognize that what we do in the legal academy can have a significant impact on professional practice. Exposing law students to literature, ideas and methods will support professional growth in this area. In the end, our profession is premised on serving the needs of the client. If more accurate predictions of risk enable better communication and advice-giving by the lawyer to the client, the client is, in turn, better equipped to make informed decisions about their own dispute.