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Systematic Risk Analysis for Negotiators  
and Litigators: How to Help Clients  
Make Better Decisions

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# **Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions.<sup>#</sup>**

**Professor John Wade\***

## ***Outline***

This article will set out:

- What is a written risk analysis
- Reasons why such a document is essential for any negotiator, or for any disputant who is considering ending negotiations, or undertaking “litigotiation”
- Reasons why such documents currently appear to be uncommon in many legal cultures
- Examples of the use of risk analysis prior to negotiation and mediation
- Precedent forms to assist a client or lawyer to prepare a risk analysis

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<sup>#</sup> The topics in this paper are not new. They are dealt with extensively in literature on decision-making and “counselling”. However, professional practice anecdotally does not live up to the wisdom in this literature. The anonymous case studies used in this article have occurred in a variety of jurisdictions, and details have been altered to prevent identification of the parties involved. An earlier version of this paper appears in (2002) 13 *Bond Law Review*, 462-485.

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### **What is a risk analysis?**

A risk analysis is a list of known or guessed (benefits and) detriments which could flow from a particular decision. In business language, it is a “cost-benefit analysis”, with particular precision about the “costs”. In other terminology, it is a listing of the “pros” and “cons” of a particular course of action.

One ideal form of a risk analysis includes:

- Writing
- In familiar language, diagrams and figures
- A short summary in one page if possible
- Evolving in several successive versions as more information becomes available to clarify the risks
- Outcomes expressed in “good day – bad day” ranges where precision is not possible
- Inclusion of personal, legal, social and business risks

Litigation lawyers and their clients are constantly making conscious or subconscious risk-analyses when making decisions whether to begin negotiation, what settlement offers to make, when to suspend negotiations, when to file a formal claim with what strategies to pursue a claim.<sup>1</sup>

#### **CASE STUDY – When to switch from Negotiation to Litigious Levers?**

A married couple were negotiating about the division of an Australian business and cash held in the USA valued at \$6 million. The husband had contingent debts which, if they ever become payable by him, would eat up all of those assets held in his name. At mediation, the parties negotiated along two different tracks: first in classical positional bargaining, to pay the wife out in cash and houses; or alternatively, to rewrite the disorganised accounts of the family businesses over time, pay out any realised debts, and divide the residue 60/40 to the wife. They agreed twice on the latter course in complex written agreements, which the husband breached immediately. The Husband suffered from attention deficit disorder and had a history of marihuana use.

The repeated breach of the mediated agreements convinced the wife that a complex co-operative solution was not likely to be effective. Accordingly, the wife’s lawyer successfully sought interlocutory injunctions to freeze expenditure in the husband’s business and seize his passport. These imposed inconveniences led to a phone call from the husband’s lawyer, some hasty positional bargaining, and an immediate payout and indemnities to the wife.

<sup>1</sup> See D. Binder, P. Bergman, S. Price, *Lawyers as Counsellors* (St Paul: West 1991) esp. chs 1, 19, 21 (identifying consequences of various alternatives before making a decision). On this general topic of risk analysis, see now *Law, Probability and Risk – A Journal of Reasoning Under Uncertainty* (Oxford University Press, 2002).

## Introduction

One of the benefits of being a mediator is that a mediator voyeuristically observes negotiation behaviour – of both disputants and sometimes their legal representatives.<sup>2</sup>

In this role as observer, a mediator sees outstanding, journeyman and incompetent negotiators. A recent survey of forty of the most-employed commercial mediators in Australia recorded the following four most commonly observed unhelpful negotiation or problem solving behaviour by lawyers. That is, lawyers sometimes became part of the problem, rather than part of a solution for clients. The statistical incidence of these behaviours was not measured – only that it was “often”.

- 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<sup>3</sup>

One of the essential prerequisites to wise decision-making is to know what alternatives are available, and what are the costs and risks attached to each alternative. It is indeed foolish to negotiate without first carefully cataloguing alternatives and risks.<sup>4</sup>

In the jargon of negotiation, every wise negotiator should attempt to set out in writing his/her WATNA, BATNA and PATNA **before** the negotiations begin.<sup>5</sup>

“While success in negotiation is affected by how one plays the game, the most important step for success in negotiation is how one gets ready for the game... Although time constraints and work pressures may make it difficult to set aside the time to plan adequately, the problem is that for many of us planning is simply boring and tedious, easily put off in favour of getting into the action quickly.”<sup>6</sup>

The writer’s experience as a mediator is that:

- lawyers often describe the trilogy of legal risks (delay, cost, uncertainty of judicial decision) only, and omit personal and business consequences
- lawyers often use vague language such as “danger”, “no guarantees”; “who knows what a judge will do”

<sup>2</sup> C. Menkel-Meadow, “Lawyer Negotiations: Theories and Realities – What We Learn from Mediation” (1993) 56 *Modern L. Rev.* 361; J. Lande, “Law Will Lawyering and Mediation Practices Transform Each Other?” (1997) 24 *Florida State U. L. Rev.* 839; J.H. Wade, “Lawyers and Mediators: What Each Needs to Learn From and About Each Other” (1991) 2 *Aust. Dispute Res. J.* 159.

<sup>3</sup> J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), p 180.

<sup>4</sup> J.S. Hammond, R.L. Keeney and H. Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (Boston: Harvard Business School Press, 1999).

<sup>5</sup> R. Fisher and W. Ury, *Getting to Yes* (Boston: Mass: Houghton Muffin, 1991).

WATNA – Worst Alternative to a Negotiated Agreement; BATNA – Best Alternative to a Negotiated Agreement; PATNA – Probable Alternative to a Negotiated Agreement).

<sup>6</sup> R.J. Lewicki, D.M. Saunders and J.W. Minton, *Negotiation* (New York: Irwin McGraw Hill, 2000), p 52.

- clients have selective deafness even when risks are described orally
- lawyers rarely set out risks in precise, one-page written form – but rather use long rambling opinions, or just anecdotal conversations.

This kind of preparation makes it impossible for the client and lawyer to negotiate confidently, or to make a wise life and business decision.

### ***Written Risk Analysis – Why So Important?***

Set out below are some of the reasons why it can be argued that a written risk analysis is essential for every client who contemplates or insists upon starting or ending negotiations, or upon a litigation or “litigotiation” path. This will be followed by a list of reasons why such clear documentation of risks attached to continuing a conflict is apparently rare for most lawyers.

It is essential to have a written analysis of the risks which may flow from a failure to settle a conflict because:

- (1) One decision-making adage is “garbage in, garbage out”. If risks are not progressively defined and listed, clients and lawyers (or other advisers) will make decisions to end or continue negotiation based upon false data and assumptions.
- (2) It is definitely not sufficient for clients to “give instructions” to end negotiations, or to commence on the litigation pathway. Clients must give “informed consent”. Informed consent requires:
  - (i) the capacity to consider, reflect and decide
  - (ii) appropriate education and understanding of alternative courses of action
  - (iii) appropriate education and understanding of specific legal, personal and commercial risks attached to each alternative.
- (3) All decision-making processes are fraught with psychological tendencies towards error particularly if the decision is made at a time of conflict.<sup>7</sup>

Our error-prone capacities as humans have been categorised as “psychological traps” or “cognitive biases” under such labels as:

- **ANCHORING TRAP:** over-relying on first thoughts
- **SUNK-COST TRAP (ENTRAPMENT):** protecting earlier choices
- Mythical **FIXED-PIE** Beliefs
- **STATUS QUO TRAP:** keeping on keeping on
- **CONFIRMING EVIDENCE TRAP:** seeing what you want to see

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<sup>7</sup> *Smart Choices* supra note 2; J.Z. Rubin, D.G. Pruitt & S. Kim, *Social Conflict: Escalation Stalemate and Settlement*, 2<sup>nd</sup> ed. (New York: McGraw Hill, 1994); M.H. Bazerman and M.A. Neale, *Negotiating Rationally* (NY: Free Press, 1992); R. Hastie and R. Dawes, *Rational Choice in an Uncertain World* (NY: Sage, 2001).

- **FRAMING TRAP:** triggering a premature answer with the wrong question
- **EASILY AVAILABLE INFORMATION TRAP:** “What an impressive chart!”
- **WINNER’S CURSE:** “Perhaps we could have done better?”
- **OVERCONFIDENCE TRAP:** being too sure of your knowledge and ability
- **BASE-RATE TRAP** (the law of small numbers): neglecting relevant information
- **SELF-SERVING BIAS:** environment versus personality
- **IGNORING OTHERS’ INTERESTS AND PERCEPTIONS:** “Let’s get down to business”
- **REACTIVE DEVALUATION:** ridiculing “opposition’s” ideas and behaviour<sup>8</sup>

Litigation lawyers can readily identify the names of their own clients and of other lawyers (and sometimes self?) who fit into each of these psychological traps.

If there are already so many subconscious factors pushing us as (conflicted) decision-makers towards error, why add the conscious omission of “considering” predictable risks?

#### CASE STUDY – The Sunk-Cost and the Overconfidence Trap

For an excellent case study of apparent failure to undertake a risk-analysis, see J. Vidal, *McLibel – Burger Culture on Trial* (New York: New Press, 1997). McDonalds conducted 313 days of libel litigation against two demonstrators who had helped to distribute pamphlets in London which detailed alleged misconduct by the hamburger chain. McDonalds (at least!), over-relied on first thoughts, kept on keeping on, engaged in group think, misunderstood the nature of “power”, was overconfident, and protected early (bad) choices! Their educational mistakes are now eternally recorded in a website (McSpotlight), book, legend, a video and a musical stage play. McDonalds had partial “success” in the libel judgment at the price of eight years of international ridicule. McDonalds never collected their multi-million dollars of legal costs and lost time and opportunity costs; much less the tiny judgment against the two unemployed demonstrators. Additionally, the trial judge found that a number of statements in the pamphlets were true.

<sup>8</sup> *Smart Choices* supra 4, Ch.10. See also G Goodpaster “Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest, Valuation and Cognitive Error” (1993) 8 *Ohio St. J. on Dispute Res.* 299; R Korobkin and C Guthrie, “Psychology, Economics and Settlement: A New Look at the Role of the Lawyer” (1997) 76 *Texas Law Rev* 77; S Plous, *The Psychology of Judgment and Decision Making* (New York: McGraw-Hill, 1993); R J Lewicki, B Barry, D M Saunders, J W Minton, *Negotiation* (New York: McGraw-Hill) 2003, Ch. 5.

This is yet another sober example of where it is professional negligence for a lawyer to predict to a client that “you will win this case”. In the writer’s experience, using the word “win” without express, immediate and written qualification amounts to professional negligence. Clients are not experienced enough to understand the limited meaning of that emotive “win” word, or the nature of pyrrhic victories.

- (4) Lawyers, like other skilled helpers, are wise to engage in professional self-protection. When a chosen process turns out to be disappointing for a client, then those clients may refuse to pay fees, claim damages for negligent advice, bad-mouth the skilled helper, and/or make reports to professional disciplinary committees. Doctors, computer suppliers, manufacturers and lawyers increasingly document a list of risks attached to any chosen process or service as a means of documentary (rather than verbal) defence against a raging client.
- (5) A verbal risk analysis is hardly worth the paper it is not written on. This is because all clients hear only a small proportion of what an adviser says; clients hear selectively; the adviser is at risk in a subsequent memory-battle on what was actually said; and without clear writing, the client will convey inaccurate messages about risks to key constituents, relatives and bosses. These “outsiders” need accurate information in order to influence the visible disputants towards a wise decision.
- (6) There are some studies which suggest that customers are far less satisfied with litigation lawyers than litigation lawyers believe.<sup>9</sup> That is, as litigation lawyers, we live in a state of delusion about the level of satisfaction of our customers, particularly once a dispute “goes to court”.

This suggests that one response may be for lawyers to continue to search for creative ways to deliver the familiar but awkward double message. That is, lower client expectations about the possible benefits of continued conflict/litigation/war; and yet emphasise that sometimes aggression, stonewalling or litigation (“non-settlement”) may be necessary pain.<sup>10</sup>

- (7) A written risk analysis can make a client and lawyer powerful during negotiations. Bluffing, lying and pontification are reduced. A client can state “We have completed a detailed 16 point risk analysis and tried to assign percentage chances and monetary values to each risk. That list is confidential, but most items on it would already be known to you (for example A, B, C...). We assume/hope that you have a similar written analysis”; “Can you suggest some risk we have omitted if we do not reach a settlement today”; “If our current risk analysis is approximately correct, we believe we know what is the worst that could happen outside this negotiation, and will not be able to go above/below that figure/outcome”; “If we are wrong, we would be glad for you to give us more information so that we can make a better decision” etc.
- (8) (Legal) professionals live in a climate which demands transparency, multi-skilling and accountability.

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<sup>9</sup> eg J. Lande, “Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions” (1998) 3 *Harvard Neg. L. Rev.* 1; P. McDonald (ed) *Settling Up* (Sydney: Prentice-Hall, 1986) Ch 13; ALRC, *Managing Justice – A Review of the Federal Civil Justice System* Report No 89, 1999, pp 78-88; *Studer v Boettcher* [2000] NSWCA 263 (24 November, 2000) 63 (Fitzgerald JA).

<sup>10</sup> eg See J.H. Wade, “Don’t Waste Money on Negotiation or Mediation, This Conflict Needs a Judge” (2000) 18 *Mediation Quarterly* 259. Apart from potential benefits to *individuals* from litigation, there are sometimes important *social* benefits – see D. Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 *Georgetown L.J.* 2619.

Compare the awkward double message delivered daily by medical doctors “Drugs or surgery may have some benefits but .....

To be employable and retain customers we need to be traditional dobermans and drafters; but also wise diplomats, doubt creators and decision-makers.

### ***Apparent Reluctance to Prepare a Written Risk Analysis***

If there are so many reasons in favour of writing one or more risk analyses for any client who cannot “settle” a conflict, why are these documents apparently so rare in most legal circles? No doubt there are some individual lawyers and corners of legal culture who regularly use detailed written risk-analyses of “no-settlement” (or at least no early settlement). What follows are some possible reasons for rarity (none of which, in the writer’s opinion, is particularly convincing).<sup>11</sup>

- (1) **Habit.** Creation of such a document has not been part of the systems in law firms, or the habits of many lawyers.
- (2) **No Training.** Lawyers have not been trained to prepare risk-analyses routinely and have few role models to learn from. By way of contrast, risk analysis and decision-making courses appear to be a normal part of the curriculum in university business schools.
- (3) **Expense.** To prepare an initial risk analysis, and then subsequent amended versions as new information emerges, is yet another expense for a client. A client may be more willing to spend a limited conflict budget on discovering weaknesses in the opposition’s arguments, rather than carefully systematising his/her own weaknesses and risks.
- (4) **Repetitive client Education.** Educating inexperienced clients about the harsh realities of conflict and of the legal system is often an exhausting and expensive process.<sup>12</sup>

Lawyers sometimes lecture and debate with inexperienced disputants for months in an attempt to dispel the myths which surround the litigotiation system. Robert Benjamin has observed that inexperienced litigants sometimes allow the myths of justice, truth, rationality and finality to influence their decision in favour of a litigation path.<sup>13</sup>

Some lawyers may too readily cease this demanding education of clients who do not want to hear.

- (5) **Unnecessary Scare-mongering.** A comprehensive listing of the risks of conflict or litigation may unnecessarily scare some clients. They may react to a three-page list and be unable to see that the vast majority of these risks are inapplicable or statistically unlikely. For example, a list of risks which result

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<sup>11</sup> Analogous discussions can be found in abundant medical literature which addresses the ideal and tensions of patients giving “informed consent” to medical interventions; eg. K. Cox, *Doctor and Patient: Exploring Clinical Thinking* (Sydney: Uni of NSW Press, 2000).

<sup>12</sup> A. Sarat and W. Felstiner, *Divorce Lawyers and Their Clients* (New York: OUP, 1995); D. Binder, P. Bergman & S. Price, *Lawyers as Counsellors* (1991).

<sup>13</sup> R. Benjamin, “Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts” (1998) 15 *Mediation Q* 245.

from driving a car would be so long and dramatic that some readers would unnecessarily abandon driving forever. The medical profession struggles with this factor whenever legislation requires a comprehensive catalogue of possible side-effects of new drugs or surgery.<sup>14</sup>

- (6) **Loss of a Client.** Following from the previous factor, some lawyers need money. They fear the loss of a client if the client hears “negative” comments from the lawyer.

Accordingly, they sell the client too readily what (s)he wants, rather than what may be needed.

- (7) **Client is “not ready” to hear.** Following the previous two factors, some people in conflict have suffered profound losses – loss of farm, business, reputation, mobility, self-respect, spouse, health, or hope for the future. These losses send them into a normal cycle of grief which may be manifested by shock, denial, bargaining with God, depression or anger.<sup>15</sup>

People in the early stages of grief (which may last for years) are “not ready to hear” difficult truths about conflict. Skilled helpers may wait until the aggrieved client emotionally “moves on” before attempting any detailed risk analysis.

- (8) **Irrational Nature of Human Decision-Making.** A more permanent version of the emotional rollercoaster is the theory that human beings are frequently irrational, and that we have and will always make a “number” of important decisions based upon irrational factors and feelings.<sup>16</sup>

Many anecdotes about war and litigation indicate unequivocal stupidity on the part of the instigators, or promulgators. The decision to “fight” had little or no possible benefit for any one.<sup>17</sup>

What persuasive effect will a systematic and rational risk-analysis have on such irrationality? Probably none.

Nevertheless, one side benefit of the cognitive and written exercise may be to help protect a warrior lawyer (or soldier) from subsequent allegations of failure to advise competently.

This theory about the irrational nature of (some) decision-making, guarantees long term employment for lawyers, arms-dealers and soldiers, whether as aggressors or defenders.

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<sup>14</sup> M. Weir, *Complementary Medicine: Ethics and Law* (Brisbane: Prometheus, 2000) pp 93-101; *Rogers v Whitaker* (1992) 109 ALR 625; *Chappel v Hart* (1998) 156 ALR 517 (It is professional negligence if a patient consents to a medical procedure without also consenting to even remotely possible side effects.)

<sup>15</sup> See E. Kubler-Ross, *On Death and Dying* (Macmillan, 1969).

<sup>16</sup> eg D. Kagan, *On the Origins of War* (Doubleday, 1995); J. Keegan, *A History of Warfare* (New York: Vintage, 1993).

<sup>17</sup> eg J. Vidal, *McLibel: Burger Culture on Trial* (London: Macmillan, 1997). Every litigation lawyer has a catalogue of stories about “insane” claims or litigation.

- (9) **Avoid Creation of Dangerous Documents.** Some lawyers rightly fear that a *documented* list of risks will be “leaked” to the opposition. A letter, e-mail or fax can be copied by a disgruntled employee, accidentally lost, stolen by a surveillance team, or left visible on a table during negotiations or mediation.

However, the benefits of clarifying decision-making processes can usually be balanced with the risks of losing “sensitive” information to the “opposition”.

- (10) **“Woops ... Before this Escalates Further, Can we Consider ...”** During an emergency or crisis consultation with a lawyer, there is a predictable tendency to focus on the crisis, and only to consider the systematic risks of ongoing conflict *later*, rather than *earlier*. Lawyers are then sometimes reluctant to deliver later news of risks to an entrenched client who can (rightly?) retort – “Why did you not tell me this earlier before I spent x dollars....?”; “Are you losing your nerve in this fight?”

Lawyers sometimes rely upon mediators, judges or other expert lawyers to deliver tactfully the belated risk analysis (“bad news”) in these cases.

- (11) **Avoid Premature Advice.** Many advisers are wary of giving any advice about risks before more alleged facts and evidence are collected. Of course, all relevant facts are never known before, during or after a trial. Some lawyers wait until the door of the court when a few more facts fall into place – such as the identity of the judge, illness of lawyers or witnesses, documents produced under subpoena – before giving a first or revised risk analysis.

Anecdotally, the writer in the role of mediator has found one small but dangerous group of lawyers who allegedly “represent” inexperienced litigants. These lawyers file claims in the “insult” zone, and then refuse to give good day-bad day ranges and risks to their naïve clients, using the repetitive excuse, “we don’t have all the facts yet”.

The deferral of at least a *preliminary* risk analysis is a dangerous habit as ironically the process of collecting facts and evidence usually escalates conflict. Working towards creating a *comprehensive* risk analysis is itself a risk.

- (12) **Fear of inaccuracy.** Some lawyers seem to avoid writing out any list of “no-settlement” risks for a client for fear of understating or overstating the dangers. This is a form of perceived self-protection. “Put nothing in writing and you can never be proved to be wrong.”
- (13) **Standardised Risk List.** The logical converse of the previous point is that some lawyers, like doctors, are unwilling to prepare pro forma precedents which set out 68 standard risks of a business continuing with unresolved conflict or commencing litigation. Such a standard form may contain “truth”, but will rarely be read by a client, does not lead to “informed” client consent, and may give the client the impression that the lawyer lacks competence as a warrior and negotiator: or is trying to avoid responsibility for minimising some of these risks.

Nevertheless, such forms may become increasingly common in lawyers' offices, as they are in medical surgeries, and on manufacturer's labels.

- (14) **Avoid public denigration of courts.** A risk analysis will necessarily itemise in detail the accident prone nature of the court system. The criticism of Western court systems is abundant and public – slow, uncertain, error-prone, expensive, stressed judges, judges ignorant of clients' lives and businesses, tactical gamesmanship by lawyers, client loss of control, translation of conflict into narrow legal and monetised categories, repetitive adjournments, process by attrition etc. etc.<sup>18</sup>

These repetitive and publicised critiques of courts are well known by litigation lawyers. Their own anecdotal vitriol towards courts usually far exceeds the surveyed and published dissatisfaction.

However, many lawyers remain wary about cataloguing court and judicial failings in writing for clients. These documents will inevitably get back to the judges. Some sensitive judges may be offended and the lawyer may alienate an ally needed at a later urgent hearing.<sup>19</sup>

Thus lawyers tend to tell stories to clients about the accident prone nature of the judicial system, rather than record these tales of woe in writing.<sup>20</sup>

- (15) **I'm a lawyer, not a counsellor.** Some lawyers take the approach that they will advise only on "legal" risks, not about personal, community or business risks. Thus they readily state that litigation is delayed, uncertain and expensive (a "lottery").

However they do not investigate the client's life, goals and business in detail or set out how ongoing (litigious) conflict may impact those "non-legal" areas – eg. newspaper publicity, perceived employee incompetence, loss of work references, lost opportunities to compete, diversion from work, deterioration in health, exposure of personal or trade secrets, humiliation in a witness box etc.

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<sup>18</sup> Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* Report No. 89; 1999 pp 69-97.

<sup>19</sup> One mediator colleague tactfully hands a large-print copy of the following *judicial* quote to overconfident lawyers and disputants  
 "[I]t is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow." *Studer v Boetcher* [2000] NSWCA 263 (24 November, 2000) [63] (Fitzgerald JA).

<sup>20</sup> eg A. Sarat & W. Felstiner, *Divorce Lawyers and Their Clients* (New York: OUP 1995). (Tape recordings of family lawyers speaking to clients reveal constant oral warnings about the arbitrary and chaotic nature of the court system.)

Such “commercial” analyses are often left to the client or other more expert advisers.

This artificial division between legal and non-legal effects of conflict is conceptually flawed and professionally dangerous.<sup>21</sup>

Medical doctors have particularly been criticised for an analogous tendency to say, “I am an expert in disease; I do not discuss illness”. By way of contrast, patients want consideration of their whole life and life goals; not just the “curing” of a technical disease.<sup>22</sup> It is not acceptable for a surgeon to say “I am an expert cutter; the psychological, economic and injury risks attached to surgery are not my business”.

The writer anecdotally meets some lawyers who give a “legal” risk analysis based on their own expertise and research; and then switch to a brainstorming process with the client to create a second “commercial” or “personal” risk analysis.

- (16) **Hired a Doberman.** There are several variations on the previous reason for certain lawyers being reluctant to provide a written risk analysis. For example, some lawyers say that they have been hired in a specialist role as an aggressor, hired gun, bad cop or doberman. They have not been hired as a diplomat or as a wise decision-maker. It would be patronising to a client to assume uninvited (and non-expert) roles.

This interpretation continues by saying that all the lawyer’s intellectual and emotional energy must be directed at discovering “weaknesses” and doubts in the opposition’s position – not listing risks in his/her own client’s chosen course of action. No doubting dobermans required.

There is no doubt that some lawyers who have adopted this interpretation of their “bad cop” role, have found long term employment. Others have not.

- (17) **Wise elder and god-professional.** One interpretation of the professional-client contract is that the submissive client brings his/her problem to the wise expert for the expert to provide a solution.<sup>23</sup>

The client wants this contract and wants the expert to make judgments on his/her behalf. The client does not want to be bothered with lists of doubts, risks, options or alternatives. It is clear that there remains a class of clients who still want (at least initially) this god-professional contract, and will shop around until they find the right fixit doctor, dentist, builder or lawyer.

Given market forces some of these god-professionals will be successful.

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<sup>21</sup> eg J.H. Wade, “Forever Bargaining in the Shadow of the Law – Who Sells Solid Shadows? (1998) 12 *Aust. J. of Fam. L.* 256.

<sup>22</sup> eg K. Cox, *Doctor and Patient: Exploring Clinical Thinking* (Sydney: Uni of NSW Press, 2000).

<sup>23</sup> D. Schon, *The Reflective Practitioner; How Professionals Think in Action* (Harper Collins, 1983).

However, particularly as lawyers, they live in increasingly mine-infested territory.<sup>24</sup>

- (18) **Belated Risk Analyses by Third Parties.** The preceding catalogue suggests reasons why many lawyers do not undertake a systematic and comprehensive written risk analysis early, if ever, for their clients. Accordingly, it sometimes becomes the belated task of a mediator, business adviser or barrister to undertake this task in an attempt to create clarity, and to assist a disputant make a wise decision in the face of inevitable uncertainty. A barrister and a mediator will usually also attempt to protect the initial lawyer from any criticism for failure to prepare such a document earlier – eg. “I’m sure that your lawyer will have told you all of this already”; “All I am doing is helping you create a list of the many things your lawyer has told you in the past”; “Your lawyer has helpfully analysed the legal advantages and dangers, now can you help me understand the commercial dangers if this dispute goes on endlessly?”; “Many of these risks have only become apparent recently and you must now re-evaluate in the light of this new information”; “Litigation is like war, clients commonly plunge into it in a moment of passion; as the emotions subside, it comes time to evaluate” etc etc.

One of the major reasons that lawyers employ mediators is to “beat up” a client who is not listening to the lawyer’s repetitive written and oral warnings about continuation of conflict or litigation. What follows is an example of a colloquial questionnaire form of risk analysis given to all team members prior to a mediation.

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<sup>24</sup> eg M. Behm, “A Risk Perspective of Managing a Mediated Matter” (1999) December *Proctor* (Queensland) 27.

### CASE STUDY – Example Risk Analysis for Jammed Negotiations<sup>25</sup>

(Typical service provider – customer “contractual” dispute)

A cotton factory owner contracted with an expert factory designer and builder to renovate sections of his mill for \$2million. When the renovations were complete, the owner was disappointed as the promised rate of production did not eventuate until three months thereafter. (The new machinery often did not work during the first three months – the factory experienced repetitive “down-time”.) Accordingly the factory owner withheld the last payment of \$250,000 to the renovator. Incensed, the renovator commenced court action in one state (the state of the contract) to recover the last instalment. Predictably, the factory owner cross-claimed, in the state where the factory was actually constructed, for three months of diminished profits, being around \$1million. The entrenched parties and lawyers were required to attend mandatory mediation.

The “legal issues” distilled by the mediator during telephone preparation with lawyers and clients were as follows:

#### **POSSIBLE FACTUAL AND “LEGAL” QUESTIONS/ISSUES??**

- |                   |   |                      |
|-------------------|---|----------------------|
| FACT              | 1. How many minutes of down-time occurred during the relevant period?   | <input type="text"/> |
| FACT              | 2. What combination of factors caused each down-time?   | <input type="text"/> |
| FACT/<br>EVIDENCE | 3. What expert evidence is available/credible to argue (2)?   | <input type="text"/> |
| FACT              | 4. Which particular down-time minutes were arguably “normal” incidents of an overhaul? (eg. compared to other mills around Australia) | <input type="text"/> |
| LAW               | 5. Who has the joint or individual responsibility to remedy each particular stoppage? In what time frame?                             | <input type="text"/> |
| FACT              | 6. What steps were taken by whom to remedy each down-time?  | <input type="text"/> |
| LAW               | 7. At what minute does each particular down-time become a possible/probable breach of contract?                                       | <input type="text"/> |
| LAW &<br>FACT     | 8. How should “loss” be measured for those minutes of down-time in breach?  | <input type="text"/> |

On the day of the joint mediation meeting (which involved two teams with 5 members each), the mediator met with each team and gave each of the members the following risk-analysis. Each team member was asked to fill in the form and then discuss each risk with fellow team-members.

<sup>25</sup> J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), pp 62-66.

**Business Risk Analysis for Each Participant in each Team**

(1) How far will I and my employees be able to concentrate on new projects over the next x years of conflict?	\$	
(2) How many days of worktime will I and my employees lose over the next x years preparing for this dispute?	\$	
(3) Do I/they have anything better to do?	\$	
(4) How much money, best to worst, will I spend on	\$	
• Lawyers		
• Duelling witnesses		
• Duelling experts		
• Travel		
Over the next x years?	\$	
(5) How much money, best to worst, will be spent on <i>procedural</i> issues (eg. which court), before we even focus on historic analysis?	\$	
(6) What damage, if any, might flow in my business community by a public hearing during which we each label the other:	\$	
• Impetuous		
• Deceptive		
• Incompetent, etc.		
(7) If war continues for x years and bitterness escalates, how far (if at all) can each of us lose customers from bad-mouthing by the other?	\$	
(8) What are the chances that a judge will understand my industry and how it operates?		
(9) What are the chances that a judge will believe 100% of my version of “the facts”?		
(10) During years of conflict, what are the chances that a judge will attribute “fault” 100% to one side, and zero to the other?		
(11) What dynamics will emerge when my colleagues are subpoenaed and cross-examined?		
(12) What pressures will x years of conflict put on our families?		
(13) After x years of historic research, will perceived facts and dynamics be any different at the door-of-the-court? (if so, how)	Yes	
	No	
	Maybe	
(14) Will x years of argument effectively convince either of us that the other is legally or morally “right”? (back to question 13)	Yes	
	No	
	Maybe	
(15) What are the risks of miscommunication by using letters and legal documents over the next x years?		
(16) If one of us is incensed by the trial judge, what chances of an appeal and recycling risks (1)-(14)?		
(17) Other risks???		

ATTEMPT TO PUT BEST/WORST MONETARY VALUES ON EACH OF THESE RISKS FOR YOU. THEN ADD UP BEST/WORST TOTALS.

The dispute settled at the mediation after 8 hours of sometimes tense communication. **One** of the many factors (as told to the mediator by a legal representative) which removed barriers to settlement was that the written exercise and team discussion refocussed the teams on risk management, long term interests beyond just money, moral and legal rights.

**TERMS OF THE SETTLEMENT** (drafted in detail at the mediation)

- (1) Mutually drafted press release for Trade Newspaper about re-establishment of excellent working relationship between parties.
- (2) Signed contract for renovation of another factory.
- (3) Claim for lost profits abandoned.
- (4) Payment to renovator of \$75,000; plus a further \$25,000 for an earlier outstanding debt.
- (5) Agreement to include in any future contracts a security clause for instalment payments.
- (6) Establishment of emergency trouble-shooting phone numbers if/when conflicts arose in the future.

### **Precedent Risk Analysis<sup>26</sup>**

What follows are two example forms of risk analysis which can be used or adapted. Many variations on this are possible – though writing, lists and multiple specific categories (as compared to oral, literary and generalised risks – “you may lose”; “there are no guarantees”; “it depends who is believed”) are essential.

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 cost of litigation, or unpredictable nature of the behaviour of judges or other decision-makers.



The following are examples of another way of trying to analyse and communicate ranges of risk.

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<sup>26</sup> J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University Dispute Resolution Centre, 2000), pp 59-61.

**Example 1****Client Information Sheet – Risk Analysis**

NAME \_\_\_\_\_

Normal transaction costs of filing a formal court claim and proceeding to the door of the court (or occasionally even to the Umpire)	Applicable to me  / 	Estimated \$ value Best to worst	Applicable to other disputants	Estimated \$ value Best to worst
1. ....Years of personal stress and uncertainty				
2. ....Years of stress of family members				
3. ....Years of stress on others and my work associates				
4. ....Weeks of absenteeism from work				
5. ....Weeks of lost employee time preparing for court				
6. ....Years of lost concentration and focus at work				
7. Life/business on hold for ....years				
8. Inability to “get on with life” for ....years				
9. Embarrassment and loss of good will when relatives/friends/ business associates are subpoenaed to court				
10. Negative publicity in press or business circles				
11. My lawyer’s fees				
12. My accountant’s fees				
13. My expert witness’s fees				
14. Possible costs order against me				
15. Interest lost on money received later rather than sooner				
16. Loss of control over my life to professionals				
17. Post litigation recriminations against courts, experts and lawyers				
18. Loss of value by court ordered sale/appointment of receiver etc				

19.Lost future goodwill with and “pay backs” by opponents				
20.Cost and repeat of all previous factors if there is an appeal				
21. Other?				
22. Other?				
23. Other?				
ESTIMATED TOTAL of Transaction Costs (best to worst)*		\$	No.	\$
Date _____				
Signed _____ (client)				

NB: These are only rough estimates. All these figures will fluctuate up or down as the conflict develops and as more factors emerge.

\* The best-worst transaction cost estimates should be deducted from best to worst BENEFITS of LATE SETTLEMENT (or umpired decision).

### Example 2 – Risk Analysis

In a recent family property mediation, the wife drew up the following more specific list of risk attached to ongoing conflict. She ranked the importance of each risk by number, and placed the list on her refrigerator for reflection between sessions.

### RISKS ATTACHED TO ONGOING CONFLICT?

	<b>Rank 0-5</b> 0 = unsure 1 = small concern 5 = big concern
1. 2-3 years of uncertainty.	
2. 2-3 years of sniping; lawyers letters; miscommunication.	
3. Risk of semi-public documents bad-mouthing each other <b>Long term family albums and memories.</b>	
4. Long term sense of bitterness. The lawyers say that "I had to say those things about you".	
5. Public gossip for 2-3 years.	
6. Strain on families, grief for boys.	
7. <b>Inability to plan</b> ; or <b>spend</b> own \$ for 2-3 years; or to <b>travel</b> ; or <b>start business.</b>	
8. Loss of control of life to " <b>experts</b> ".	
9. \$ paid to <b>lawyers</b> and <b>experts</b> – 2% of the estate.	
10. <b>Spotlight</b> on your <b>super</b> fund with detailed affidavits for <b>tax</b> department to <b>examine.</b>	
11. Judges <b>ignorant</b> of your businesses; random decision-making.	
12. " <b>Same</b> " <b>settlement</b> forced on you at door-of-court in 2 years' time.	
13. <b>Injury, illness</b> or <b>death</b> before <b>solution</b> emerges	
14. Other?	

## Life-Goals Analysis – A Useful Flip-Side of a Risk Analysis

One of the interesting ongoing activities of lawyers, mediators and counsellors who are involved in conflict management, is to swap stories and research on “interventions” used successfully or unsuccessfully with clients.<sup>27</sup>

A “life-goals analysis” is a short (preferably one page) written list of a person’s short and long term business, health, financial and emotional goals. The goals are specified by a client, with careful listening and some prompting from a skilled helper, whether mediator, lawyer or counsellor. The writer frequently uses these documents in the capacity of either lawyer or mediator; either early in a consultation, or late when negotiations have jammed.

A “life goals analysis” may be more suitable in some situations than a “risk-analysis”. These two analyses are the same except each list is expressed in different language. The former emphasises the glass half full, while the latter may sometimes seem to be referring to the glass half empty.

This switch may find some justification from several psychological studies<sup>28</sup> which suggest that most (not all) people are “risk averse”. Therefore, any list should express positively what has already been *gained* by the current offer, not how far the current offer is short of a “target” or perceived “entitlement”. This persuasive negotiation or decision-making language may seem obvious, but the writer rarely sees these linguistic transitions being systematically used by lawyers or clients in mediations or negotiations. The linguistic transition from a “risk analysis” to a “life goal” is illustrated by the chart below:

<b>Risks if Conflict Continues</b>		<b>Life Goals?</b>	<b>This Offer?</b>
1. Another 2-3 years of delay.	↔	1. To get on with life	<input type="checkbox"/>
2. Subpoenas and stress for business partners and family.	↔	2. To minimise stress for colleagues	<input type="checkbox"/>
3. Legal costs of between \$30 000 – \$40 000.	↔	3. To minimise legal costs	<input type="checkbox"/>
4. Lose control of life and decision-making to lawyers.	↔	4. To regain control of my life	<input type="checkbox"/>
5. Delay making a decision to expand a business	↔	5. To diversify my business	<input type="checkbox"/>
6. Lose interest on cash for 2 years	↔	6. Receive and invest cash now	<input type="checkbox"/>
7. etc	↔	7. etc	

<sup>27</sup> eg G Egan, *The Skilled Helper* 5<sup>th</sup> ed (California: Brooks/Cole, 1994); L Boulle, *Mediation – Skills and Techniques* (Australia: Butterworths, 2001); J H Wade, “Strategic Interventions Used by Mediators, Facilitators and Conciliators” (1994) 5 *Aust Dispute Res J* 292; J H Wade “Tools From a Mediator’s Toolbox: Reflections on Matrimonial Property Disputes” (1996) 7 *Aust Dispute Res J* 93.

<sup>28</sup> R H Mnookin, “Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict” (1993) 8 *Ohio St J Dispute Res* 235; and references in footnote 7, and Goodpaster, footnote 8.

To repeat, a number of studies indicate that changing language towards the language in the right column emphasises current gains. Additionally language, brevity and visuals influence perception, and the majority of people being risk averse, will decide to “hang on” to the existing offer made “late” in negotiations when it is expressed as gains.

Of course, such knowledge of psychology and language, (if it is correct!) potentially places considerable power in the hands of negotiators and mediators when working with less experienced negotiators.

In the tool box of interventions, the writer (as mediator) regularly converts a risk analysis into a one page “life-goal chart” either during separate preparation with each individual disputant, and/or at the last gap in the negotiations, when one or all disputants have become focussed on “what I have already lost” during the course of the negotiations.<sup>29</sup>

This mediator (and negotiator) intervention commonly has the following steps in a private meeting, the mediator –

- (i) Acknowledges the client’s sense of frustration that (s)he feels (s)he is “giving away too much”.
- (ii) Confirms that the mediator’s (and lawyer’s) job is to help the client make a wise decision in the face of uncertainty, and to reduce the possibility of future client regrets. If it is a wise decision, then the client should “end” the round of negotiations, and continue the conflict.
- (iii) Asks the client to brainstorm on a whiteboard a list of life goals (in the client’s reframed words); and prompts the client about other possibilities to add to the list. Predictably, a list of multiple life goals emerges (one life goal may be “To be paid \$1million dollars!”) Set out below is an example of the type of list that commonly emerges in family property disputes.

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<sup>29</sup> See J H Wade “The Last Gap in Negotiations – Why is it Important? How can it be crossed?” (1995) 6 *Aust Dispute Res J* 93

## LIFE GOALS?

## THIS OFFER??

➤ To get on with life	<input type="checkbox"/>
➤ To open a new business	<input type="checkbox"/>
➤ To invest money	<input type="checkbox"/>
➤ To stop paying lawyers	<input type="checkbox"/>
➤ To stay healthy	<input type="checkbox"/>
➤ To minimise contact with “x”	<input type="checkbox"/>
➤ To reduce stress on colleagues	<input type="checkbox"/>
➤ To take a holiday	<input type="checkbox"/>
➤ To focus on my work	<input type="checkbox"/>
➤ To avoid becoming bitter	<input type="checkbox"/>
➤ To regain “control” of my life	<input type="checkbox"/>
➤ To settle “in the range”	<input type="checkbox"/>
➤ To reduce risks of paybacks	<input type="checkbox"/>
➤ To receive [\$540,000]	<input type="checkbox"/>
➤ Other??	<input type="checkbox"/>

- (iv) Asks the client to work down the list and tick (or check) the boxes if a life goal is achieved by the current offer. Other boxes are marked with a question mark. Standardly, the client decides that more than 90% of his/her life goals are contained in the current offer! This is a visual surprise.
- (v) Immediately copies the whiteboard “life goals” and ticks chart to a single hand printed sheet of paper and gives this to the client to ponder in silence.
- (vi) Asks the client whether (s)he would like to continue the negotiation immediately, or take a break to consider the current offer, or immediately meet to call off the jammed negotiations for a time.

- (vii) Gives advice that many clients like to take a break of several days, stick the life-goals sheet on their refrigerator for quiet contemplation and discussion with influential friends or family<sup>30</sup> and phone the mediator back between 7-9pm on a specified day with a process decision – accept the offer, adjourn or resume an agreed process.
- (viii) Tells the other disputant(s) in a separate meeting what process is happening and perhaps repeats a similar confidential “life goals” analysis.
- (ix) The majority of clients have opted for the refrigerator break, and over 80% have phoned the mediator back on the assigned day with a speech to the effect “In the light of the life goals we listed (and a few more...), and discussions I’ve had with ..., I have decided to cut my losses etc and to accept the offer that was ‘finally’ made.”

Obviously, there are many interesting dynamics occurring during the course of this particular intervention extracted from the conflict managers’ toolbox.

## **Conclusion**

This article has set out briefly:

- a description of a risk analysis
- reasons why such documents are essential for professional advisers and their clients in conflict
- some hypothesised reasons why written risk analyses are uncommon in many legal practices
- examples and precedents of risk analyses
- the use of a “life goals” list, as a positive flip-side of a risk analysis

The writer’s hope is that the evolving written risk analysis will become a routine document in the offices of professional conflict managers – particularly lawyers and mediators (and armed services!).

In my opinion the problems attached to such documents are, usually outweighed by the clarity they provide for conflicted clients who are attempting to make wise decisions in the face of ongoing uncertainty.

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<sup>30</sup> It is a constant challenge to lawyers, mediators, managers and diplomats how to include influential “outsiders” or “tribal members” constructively in negotiations. See J Johnson and L Campbell *Impasses of Divorce* (New York: Free Press, 1988) Ch 2, “Unholy Alliances and Tribal Warfare”.

RISK ANALYSIS EXERCISE A
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You are a legal representative or mediator. The manager of a huge shopping mall comes to see you and asks for your advice as a recent attempt to negotiate with a tenant has been unsuccessful. The manager is puzzled at the tenant's unreasonable behaviour as all the legal rights and power seem to be on the landlord's side.

The lessee is a specialist retailer in the lessor's shopping mall. The lessee alleges that its recent downturn in profits has been caused by repair work done by the lessor to the pavement outside the lessee's shop. Allegedly, this repair work diverted customers walking in the mall. The lessee has had a history of conflict with the lessor's managers and has now left the mall and terminated his lease. He is now unemployed. The lessee initially claimed \$100,000 damages and the lessor offered nothing. The lessor has clear documentary evidence to show that the three shops adjoining the lessee's shop actually had increases in profits during the repair work.

The lessee's manager is the brother-in-law of the founder of the franchise of similar stores that exist across the country.

The Retail Shop Leases Tribunal ordered the disputants to mandatory mediation. They had one quick meeting where the lessee reduced his offer to \$50,000; and the lessor increased her offer to \$5,000.

Prepare a two-column risk analysis if a settlement is not reached.

- (i) Use a whiteboard or a large sheet of paper and draw up two columns of possible risks – one for the landlord and one for the tenant, if the dispute does not settle.
- (ii) Then in the light of that analysis, advise the manager of possible procedural options.

RISKS IF SETTLEMENT DOES NOT OCCUR "EARLY"			
FOR SHOPPING MALL	\$ VALUE	FOR FORMER LESSEE	\$ VALUE
1.		1.	
2.		2.	
3.		3.	
4.		4.	
5.		5.	
6.		6.	
7.		7.	
8.		8.	
9.		9.	
10.		10.	

EXERCISE B – RISK ANALYSIS AND LIFE GOALS ANALYSIS
--

A husband and wife, both Chinese, separate. She is 36 years, he is 45 years of age. There are no children of their eleven year marriage. He has an income of over \$400,000 per year and visible assets of about \$800,000. She runs an importing shop which does not make any money, and has assets of about \$300,000. They are in conflict about property distribution (under an equitable property distribution law).

The husband is a distinguished doctor and is revered by the Chinese community. He has many supporters and relatives who attend court and ridicule the wife. He has paid his lawyer's bills in advance. The wife has been somewhat isolated by her own community, and does not have sufficient money to pay her lawyers. She is indecisive, vengeful and emotional.

Several attempts to organise culturally appropriate mediations have failed, partly because the husband's lawyers and tribe are convinced that they will "win" in court. There are cross allegations of missing assets, inherited assets and of forgery of the wife's signature on a mortgage. The negotiations are emotional, escalated, and positional.

At the last round of negotiations, the parties are only \$40,000 apart. The wife wants \$180,000 cash and the husband has offered \$140,000. (The legal costs for *each* party will be well over \$100,000 if the case proceeds to trial.)

Choose one of the disputants, either husband or wife, and write out in parallel columns in point form (i) a risk analysis; and (ii) convert each point into a life goals' analysis for the person you have chosen.

Then, in the light of the risks and life goals, write out your advice to your chosen client (a full court hearing is scheduled in 8 weeks' time).

RISK FOR ..... IF CONFLICT CONTINUES	LIFE GOALS OF .....
1.	→
2.	→
3.	→
4.	→
5.	→
6.	→
7.	→
8.	→
9.	→
10.	→
11.	→
12.	→

**Advice??**

(4 lines)

## APPENDIX C

<b>CRITIQUES OF LITIGATION AND ADJUDICATION</b>
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- Results uncertain
- Legal costs higher than outcomes
- Hearings and judgments delayed
- Judges stressed; impatient
- Judges do not understand complex evidence
- Legal categories hide real conflicts
- Legal remedies unimaginative
- Inaccessible to poor and middle class
- Rarely “finalises” conflict
- Results depend on expert’s skill
- Involves constant deceit, ambush, tricks
- Process is convoluted
- Disadvantageous to “one-shotters”
- Disputants lose control
- Disputants suffer hidden costs of trauma, absence from work, etc
- Myths of justice, rationality and finality hide realities
- Lawyers have few incentives to settle early
- Judges tend to split difference
- DIY litigants confuse and clog courts
- Constant procedural reforms
- Case management multiplies hurdles
- Damaging publicity
- Perceived or actually incompetent lawyers or “experts”