

## Does Publicity Resolve Disputes?

By Tristan Barnett

According to Wikipedia dispute resolution processes fall into two major types:

- 1) Adjudicative processes, such as litigation or arbitration, in which a judge, jury or arbitrator determines the outcome
- 2) Consensual processes, such as collaborative law, mediation, conciliation, or negotiation, in which the parties attempt to reach agreement.

Wikipedia quotes “One could theoretically include violence or even war as part of this spectrum, but dispute resolution practitioners do not usually do so; violence rarely ends disputes effectively, and indeed, often only escalates them”.

A major complication in disputes is the ability for both parties to obtain “total” resolution, since in a two-person zero-sum game, a gain for one party is the equivalent loss for the other party. As an example, consider an actual work agreement dispute that the author (as the “worker”) was involved in over a disputed amount of \$13,000. The worker was under the impression that he was an employee of the company and hence superannuation and holiday pay would apply. When issues were brought up about the type of agreement, the company stated that he was an independent contractor. The company had not issued any tax forms and no tax was taken out. The wages were invariably late, forcing the worker to eventually hand in his resignation and be out of the work force. The amount for each query is given in table 1 and shows the total disputed amount of \$13,000. Suppose that total resolution from the worker’s perspective in monetary terms is achieved only if the worker receives a payout from the company of at least \$8,000. However, suppose the company is under the impression that the worker is not owed any amount of money, and that total resolution from the company’s perspective in monetary terms is achieved only if the company pays out to the worker no more than \$3,000. Therefore, total resolution from both parties cannot be achieved from monetary terms. Negotiation may give total resolution to the company by paying out \$3,000 to the worker, but consequently leaving the worker \$5,000 short of total resolution. Litigation could result in both parties receiving less than what is required for total resolution. As a consequence of either or both parties being less than total resolution; other means to obtain “justice” such as violence may be utilized. This includes non-physical violence such as cyber-bullying and workplace bullying.

Query	Amount (\$)
Holiday pay	1,000
Late payments	1,000
Superannuation	5,000
Out of work	6,000
Total	13,000

Table 1: Type of query with the associated amount for an employment dispute

After adjudicative and consensual processes failed to obtain total resolution from monetary terms; the author analyzed the scenario as a piece of research which led to a publication in *Law, Probability and Risk* [1]. The article analyses the risks and rewards involved in the litigation process, and whether it is

beneficial for a victim to file a lawsuit against the injurer given there are risks involved if unsuccessful in court. The analysis can be used to determine whether a victim should have legal representation in court to obtain a higher expected payout, or minimize risk through legal costs by representing oneself in court, even though the expected payout is reduced without legal representation. Analysis is given to obtain insights as to how much a victim should accept in an out-of-court settlement. A further publication [2] was later obtained by the author where an arbitration value is obtained in a litigation game, where the amount awarded to the victim is less than expectation and shown to be 'fairer' when compared with the amount obtained using the well-established Von Neumann and Morgenstern game theory framework.

From the author's perspective, obtaining a formal publication was a significant step to obtaining total resolution from the dispute without the need for a monetary payout. Therefore, it could be argued that total resolution can be obtained for both parties even though monetary terms have not been met by one of the parties; but rather the process of publicity through publication. According to Wikipedia, "Publicity is the deliberate attempt to manage the public's perception of a subject". Therefore, publicity is not limited to publishing articles and hence has wider appeal than just being academically-based. Other forms of publicity include website content, blogs, media (TV, radio, newspaper) and social media (facebook, twitter, Wikileaks). In essence, publicity allows a disputant to obtain a sense of closure or justice by documenting and sharing the scenario with a large audience, with possible outcomes of retributive or restorative justice. Whilst the process of publicity itself may lead to other complications such as defamation, it could be argued that when adjudicative and consensual processes do not obtain total resolution for one of the parties; that publicity is a better process than resorting to any form of violence.

[1] Barnett T (2010). Applying the Kelly criterion to lawsuits. *Law, Probability & Risk* 9(2), 139-147.

[2] Barnett T (2011). Obtaining a fair arbitration outcome. *Law, Probability & Risk* 10(2), 123-131.