Customer value theory and dispute resolution strategy

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Customer Value Theory and Dispute Resolution Strategy

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Abstract

Legal education within common law jurisdictions traditionally prioritises doctrinal and adversarial approaches. There is a strong emphasis on case law and statutory materials, which students are required (often from memory) to critically apply in order to identify and articulate solutions to complex legal problems. However, following significant changes to the legal and higher education sectors in recent years, there are now growing calls for such approaches to be supplemented by fresh perspectives which can prepare law graduates more fully for modern professional life, whether they ultimately go on to practise law or not. This paper presents the findings of an interdisciplinary, theoretical study which explored the application of customer value theory to modern dispute resolution strategy in a private law context. It is argued that customer value theory: (1) offers explanatory insight into the nature of dispute resolution strategy itself; and (2) has significant potential to enhance the effectiveness of such strategies in a given context. Accordingly, it is further argued that the inclusion of this and similar perspectives within the modern law degree would complement its longstanding and important doctrinal content and enhance the employability value of such programmes.

Keywords: customer value, strategy, dispute resolution, litigation, commercial awareness

Introduction

Legal education often prioritises doctrinal and adversarial approaches at the expense of more expansive, socio-critical perspectives.[1] There can be a strong emphasis on case law and statutory materials, which students are required (typically from memory) to critically apply in order to identify and articulate

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[1] Ben Waters, 'The importance of teaching dispute resolution in a twenty-first-century law school' (2017) 51 *The Law Teacher* 227.

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solutions to complex legal problems. This has previously been justified by the strong vocational link between the undergraduate law degree and the regulated legal professions (in England and Wales the roles of solicitor and barrister specifically), together with a suggestion that such approaches mimic those of the practising lawyer.[2] Whilst this argument may historically have carried sufficient weight to justify adherence to the status quo, more recent changes within the legal and higher education (HE) sectors have weakened it significantly.

Firstly, many law students do not go on to practise law in the traditional sense. Indeed, law graduates have reported 'anger' at not being able to secure employment opportunities within the profession.[3] As such, although lawyer qualification remains a highly significant (if not the most significant) area of focus in the marketing materials that university law schools produce for prospective law students, there is a strong case for arguing that the modern law degree must do more for those students who will inevitably find themselves working in very different roles than they might have envisaged when they first embarked upon their legal studies.[4]

Clearly the perceived purposes of university legal education - specifically as regards its relationship to the legal professions - vary from jurisdiction to jurisdiction. However, in England and Wales, the case for reforming course content is particularly strong, since the regulator of the solicitors' branch of the legal profession (which is much larger than its counterpart) recently received final approval of its plans to completely overhaul its qualification process.[5] A key feature of the new regime is that aspiring solicitors will no longer be required to have studied a so-called "qualifying law degree" (QLD). Whilst the QLD remains of significance for students hoping to qualify as barristers, this

[2] Alex Nicholson, 'Research-informed teaching: a clinical approach' (2017) 1 *The Law Teacher* 40.
[3] Julian Webb and others, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (LETR 2013) <www.letr.org.uk/wp-content/uploads/LETR-Report.pdf> accessed 11 November 2020, 281.
[4] Graeme Broadbent and Pamela Sellman, 'Great expectations? Law schools, websites and "the student experience"' (2013) 47 *The Law Teacher* 44; Alex Nicholson, 'The value of a law degree - part 2: a perspective from UK providers' (2020) *The Law Teacher* https://doi.org/10.1080/03069400.2020.1781483 (published online 30 June 2020).
[5] Legal Services Board, 'Legal Services Board approves significant changes to how solicitors qualify' (*LSB,* 28 October 2020) < https://www.legalservicesboard.org.uk/news/legal-services-board-approves-significant-changes-to-how-solicitors-qualify> accessed 11 November 2020.

change undoubtedly weakens the link between the law degree and the legal profession, and some have argued that this deregulation provides a much needed opportunity for law schools to refocus their curricula and deliver a more specialised, more rounded, or even a more intellectual legal education, thus providing much-needed diversity within an otherwise largely homogenous market.[6]

Additionally, there are arguments for saying that even future lawyers would benefit from the inclusion of a wider range of perspectives within their undergraduate legal education, which has traditionally had a very narrow focus. One such argument is that within the legal sector there has been a noticeable shift away from litigation and towards alternative dispute resolution methods (ADR), many of which have a more collaborative and commercial ethos than a purely doctrinal perspective might suggest – after all, legal rules on their own are arguably a blunt instrument for resolving disputes, since the "best" resolution will take account of a much broader range of factors.[7]

If ever it was, it is now simply not true to say that contentious lawyers primarily litigate. Whether or not the shift away from court proceedings has also resulted in a corresponding decline in the use of adjudicated methods generally (and therefore overtly doctrinal and adversarial approaches), is contested.[8] However, what is clear is that the starting point for lawyers at the outset of a dispute has changed. It is incumbent upon litigants to explore at an early stage whether there is an opportunity to resolve the matter without reference to the courts, and they may face significant cost consequences if they fail to do so.[9] Accordingly, ADR has become mainstream, and in England and Wales this

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[6] See for example Luke Mason, 'SQEezing the jurisprudence out of the SRA's super exam: the SQE's Bleak Legal Realism and the rejection of law's multimodal truth' (2018) 52 *The Law Teacher* 409; Ben Waters, 'The Solicitors Qualification Examination: something for all? Some challenges facing law schools in England and Wales' (2018) 52 *The Law Teacher* 519; Alex Nicholson, 'The value of a law degree – part 3: a student perspective' (2020) *The Law Teacher*, https://doi.org/10.1080/03069400.2020.1843900 (published online 3 December 2020).

[7] R H Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 1.

[8] Gillian K Hadfield, 'Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Cases' (2004) 1 *Journal of Empirical Legal Studies* 705 and Judith Resnik, 'Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts' (2004) 1 *Journal of Empirical Legal Studies* 783; Robert Dingwall and Emilie Cloatre, 'Vanishing Trials: An English Perspective' (2006) *Journal of Dispute Resolution* <https://scholarship.law.missouri.edu/jdr/vol2006/iss1/7> accessed 10 November 2020.

[9] For England and Wales see CPR 44.4(3)(ii).

was the result of a deliberate policy decision.[10] The suggestion that legal education programmes should incorporate ADR methods should therefore not be controversial, and indeed there have been calls for such change.[11] At the very least, advising on and negotiating settlements is now a central feature of legal practice, in respect of which aspiring practitioners require appropriate instruction.[12]

Relatedly, law firms – and consequently also universities – have for some time emphasised the importance of "commercial awareness" as a key employability skill.[13] From the author's own experience teaching undergraduates, it seems that when tackling legal problems students tend to gravitate in their analysis towards substantive legal issues and often struggle to identify or engage with practical or procedural considerations - yet lawyers must be able to evaluate the wider commercial factors which might influence the strategic approach that is needed in order to deliver value for the client through the dispute resolution process. Accordingly, it is important that practical lawyer skills which take account of this bigger picture are also incorporated within legal education programmes.[14]

Such refinements are clearly important. However, calls for reforming the legal education curricula go much further than these relatively uncontroversial changes. There is now a growing consensus that there is a need for fresh

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[10] See Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (TSO 2009) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> accessed 11 November 2020. For an academic discussion of the impact on legal education see also Nigel Duncan, 'Preparation for Practice: Developing effective advocates in a changing world of adversarial civil justice', in Chris Ashford, Nigel Duncan and Jessica Guth (eds), *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* (Routledge 2018).

[11] Dr Julie Macfarlane, 'The challenge of ADR and alternative paradigms of dispute resolution: How should the law schools respond?' (1997) 31 *The Law Teacher* 13; Duffy and R. Field, 'Why ADR Must Be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 2.

[12] Judy Gutman, Tom Fisher and Erika Martens, 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' (2006) 16 *Legal Education Review* 125.

[13] Caroline Strevens, Christine Welch and Roger Welch, 'On-line legal services and the changing legal market: preparing law undergraduates for the future' (2011) 45 *The Law Teacher* 328.

[14] See for example Juliet Turner, Alison Bone and Jeanette Ashton, 'Reasons why law students should have access to learning law through a skills-based approach' (2018) 52 *The Law Teacher* 1.

perspectives within legal education – perhaps drawn from different disciplines - which will better equip law graduates for modern professional life, whether they ultimately go on to practise law or not.[15]

Customer value theory offers one example of a fresh perspective. It is concerned with what customers value, why they value it, and how products or services can be developed to maximise the value that customers will perceive. Lawyers' clients are essentially their "customers", each with their own unique conceptions of value. Parties to a dispute will have a wide range of objectives in seeking legal representation and what they each value about the dispute resolution process is likely to be just as varied. By understanding customer value theory, students and practitioners alike can gain a better understanding of what dispute resolution strategy is, and what it means to a client, thus enabling them to formulate strategies that are value-driven, and therefore more "valuable" from the client's perspective.

This paper presents the findings of an interdisciplinary, theoretical study which explored the application of customer value theory to modern dispute resolution strategy in a private law context. It is argued that customer value theory: (1) offers explanatory insight into the nature of dispute resolution strategy itself; and (2) has significant potential to enhance the effectiveness of such strategies in a given context. Accordingly, it is further argued that the inclusion of this and similar perspectives within the modern law degree would complement its longstanding and important doctrinal content and enhance the employability value of such programmes.

What is customer value?

The concept of "value" has been the subject of study for centuries and was originally conceived in purely economic terms, influenced by the work of classical economist writers such as Adam Smith, David Ricardo and Karl Marx.[16] As Publilius Syrus put it: 'everything is worth what its purchaser will pay for it'.[17] The value of goods or services was purportedly construed entirely

[15] Greta S Bosch, 'Deconstructing Myths about Interdisciplinarity: is now the time to rethink interdisciplinarity in legal education?' (2020) 1 *European Journal of Legal Education* 27.
[16] Douglas McKnight, 'The Value Theory of the Austrian School' (1994) 62 *Appraisal Journal* 465.
[17] As quoted in W J Baumol and A S Blinder, Economics: Principles and Policy (13 edn, Cengage Learning 2016), 81.

objectively, with reference only to their intrinsic attributes and their potential to be exchanged for different quantities of commodities, such as silver, gold, or rice (so-called "exchange value").[18] However, later theorists also came to recognise extrinsic components, or - in other words - that the true value of goods and services depended not only on objectively ascertainable attributes (such as quality or scarcity), but also on the use that such goods or services might have for a purchaser (so-called "use value"), and there was also recognition that the nature and perceived importance of such uses would vary from person to person.[19] Modern economic theories of value generally adopt this wider conception, but there remains a strong emphasis on what (in financial terms) a purchaser might need to exchange in order to procure goods or services of the relevant kind within a particular market.

By contrast, "customer value" refers to something that is qualitatively different. This much more recent term comes from the marketing discipline, and refers to a highly subjective concept.[20] Woodruff defines it as 'a customer's perceived preference for, and evaluation of, those product attributes, attribute performances, and consequences arising from use that facilitate (or block) achieving the customer's goals and purposes in use situations'.[21] The essence of customer value therefore is the extent to which products, services or other intangibles provide net benefits to a customer of a kind that they recognise and appreciate. Generally, customers will be prepared to pay for such benefits - with money or otherwise – but their true "value" exists only in the eyes of the beholder.[22]

On its own, a definition like this one has limited practical utility.[23] Arguably, all organisations - and all of their activities - exist to create customer value in some form or other,[24] and where culture and processes are carefully designed

[18] T Woodall, 'Conceptualising 'Value for the Customer': An Attributional, Structural and Dispositional Analysis' (2003) *Academy of Marketing Science Review* 1.
[19] Ibid. 4.
[20] Simon Kelly, Paul Johnston and Stacey Danheiser, *Value-ology* (Palgrave Macmillan 2017), 4.
[21] R B Woodruff, 'Customer value: The next source for competitive advantage' (1997) 25(2) *Journal of the Academy of Marketing Science* 139, 142.
[22] V A Zeithaml, 'Customer Perceptions of Price, Quality, and Value: A Means-End Model and Synthesis of Evidence' (1988) 52(2) *Journal of Marketing* 2.
[23] A Parasuraman, 'Reflections on Gaining Competitive Advantage Through Customer Value' (1997) 25 *Journal of the Academy of Marketing Science* 154.
[24] S F Slater, 'Developing a customer value-based theory of the firm' (1997) 25(2) *Journal of the Academy of Marketing Science* 162.

to maximise customer value, then this can create a competitive advantage which can help an organisation to succeed in a relevant market.[25] However, in order for customer value to be a useful concept, it must be operationalised – that is: theories, models and frameworks are needed which help to explain (amongst other things) what customers value, why they value it, and how organisations or processes can be developed to create new customer value. It is in this respect that the concept of customer value becomes complex and contested. For example, types of customer value that can be identified from the literature include concepts as wide ranging as: co-creation value;[26] economic value;[27] epistemic value;[28] experiential value;[29] functional value;[30] happiness;[31] material value;[32] practical value;[33] symbolic value;[34] and utilitarian value.[35]

Various attempts have been made to operationalise these concepts through typologies and frameworks.[36] However, Smith and Colgate argue that each of these such attempts has significant limitations, either in terms of breadth, depth, measurability or operationalisability.[37] Instead, they present their own framework which provides a mechanism by which value can be analysed systematically and holistically, and it comprises just four dimensions:

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[25] ibid 164.
[26] Stephen Vargo and Robert Lush, 'Evolving to a New Dominant Logic for Marketing' (2004) 68(1) *Journal of Marketing* 1.
[27] Michael E Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press 1985).
[28] Jagdish N Sheth, Bruce I Newman and Barbara L Gross, 'Why We Buy What We Buy: A Theory of Consumption Values' (1991) 22 *Journal of Business Research* 159
[29] Morris B Holbrook, 'Customer value and autoethnography: subjective personal introspection and the meanings of a photograph collection' (2005) 58 *Journal of Business Research* 45.
[30] Whan C Park, Bernard J Jaworkski and Deborah MacInnis, 'Strategic Brand Concept-Image Management' (1986) 50(4) *Journal of Marketing* 135.
[31] Kevin Kaiser and S David Young, *The Blue Line Imperative: What Managing for Value Really Means* (Jossey-Bass 2013), 2.
[32] M L Richins, 'Special Possessions and the Expression of Material Values' (1994) 21(3) *Journal of Customer Research* 522.
[33] K de Ruyter and J Bloemer, 'Customer loyalty in extended service settings: The interaction between satisfaction, value attainment and positive mood' (1999) 10(3) *International Journal of Service Industry Management* 320.
[34] Kevin Lane Keller, 'Building strong brands in a modern marketing communications environment' (2009) 15 *Journal of Marketing Communications* 139.
[35] Woodall (n 18).
[36] See for example Park, Jaworkski and MacInnis (n 30); Sheth, Newman and Gross (n 28); Woodall (n 18); W Ulaga, 'Capturing value creation in business relationships: A customer perspective' (2003) 32 *Industrial Marketing Management* 677.
[37] J B Smith and M Colgate, 'Customer Value Creation: A Practical Framework' (2007) 15(1) *Journal of Marketing Theory and Practice* 7, 8.

'functional/instrumental value'; 'experiential/hedonic value'; 'symbolic/expressive value'; and 'cost/sacrifice value'.[38] Functional/instrumental value is primarily concerned with how well a product or service helps a customer achieve the objective they had in mind when procuring it;[39] experiential/hedonic value is about how a customer feels when they experience the product or service;[40] symbolic/expressive value relates to the psychological meaning that customers attach to the product or service;[41] and cost/sacrifice value is concerned with associated transaction costs and ultimately making an 'overall assessment of the utility of a product [or service] based on perceptions of what is received and what is given'.[42]

Whilst even Smith and Colgate's framework does also have areas of overlap (for example, a customer's specific objective to pay as little as possible for a product might be framed in terms of either functional/instrumental value or sacrifice/cost value), at the time of writing it does arguably represent the most useful framework within the literature for developing customer value creation strategies, models, or frameworks.

What is dispute resolution strategy?

Chandler defined strategy as '…the determination of…long-run goals and objectives of an enterprise and the adoption of courses of action and the allocation of resources necessary for carrying out these goals',[43] whereas Mintzberg defined it as merely as 'a pattern in a stream of decisions'.[44] These apparently opposing definitions illustrate a current debate within the management discipline as to whether strategy is best seen as deliberate long-term planning or navigation which is responsive to changing circumstances. From the author's own experiences as both an organisational leader and as a practising dispute resolution lawyer, it seems that there is in fact a continuum, and strategy variously finds a place on that continuum at different times and in different contexts. Even when planned, strategy typically evolves with a degree

[38] J B Smith and M Colgate, 'Customer Value Creation: A Practical Framework' (2007) 15(1) *Journal of Marketing Theory and Practice* 7.
[39] Woodruff (n 21) 142.
[40] Holbrook (n 29).
[41] Smith (n 38) 10.
[42] Zeithaml (n 22) 14.
[43] Alfred D Chandler Jr, *Strategy and Structure: Chapters in the History of the American Industrial Enterprise* (Beard Books 1962), 13.
[44] Henry Mintzberg, *Tracking Strategies: Towards a General Theory* (OUP 2007), 2.

of undiscernible complexity and a certain randomness,[45] and there may be some merit in recognising this absence of linear rationality.[46] Additionally, the development and implementation of any strategy often involves the application of a significant quantity of tacit knowledge, which cannot necessarily always be accounted for within a formal strategic process.[47]

Where time and circumstances allow, strategy formulation should begin with an internal evaluation of strengths and competencies and a thorough consideration of external factors.[48] In that context, strategic options can be evaluated in terms of suitability (for meeting aims), acceptability (to stakeholders), and feasibility (in terms of capabilities and resources).[49] However, strategy is rarely developed in such a deliberate, systematic and positivistic way, since strategists often have to work with limited information and will themselves be influenced by their own biases and experiences.[50] As such, strategy is like a roadmap with a clearly marked destination and one or more tentatively sketched out routes, any of which may be varied during the journey in response to roadblocks, traffic, new information, or even a change in destination.

In a dispute resolution context, the modern lawyer might usefully be described as a legal strategist. Subject to the boundaries of her ethical responsibilities, it is the lawyer's role to evaluate: (1) the strength of the client's position (e.g. the legal merits of a claim or defence); (2) the external context (e.g. the client's broader aims and the implications of pursuing a particular course of action in that context); and (3) the suitability, acceptability, and feasibility of different strategic options that exist for the client. Accordingly, dispute resolution strategy must be about more than simply selecting a method (e.g. litigation or

[45] Stéphane J G Girod and Richard Whittington, 'Change Escalation Processes and Complex Adaptive Systems: From Incremental Reconfigurations to Discontinuous Restructuring' (2015) 26 *Organization Science* 1520.
[46] Marshall Scott Poole and Andrew H van de Ven, 'Using Paradox to Build Management and Organization Theories' (1989) 14(4) *Academy of Management Review* 562.
[47] Richard Whittington, 'Strategy as Practice' (1996) 29 *Long Range Planning* 731.
[48] CK Prahalad and Gary Hamel, 'The Core Competence of the Corporation' (1990) 68(3) Harvard Business Review 79; David Bach and David Allen, 'What Every CEO Needs to Know about Nonmarket Strategy' (2010) 51(3) *MIT Sloan Management Review* 41.
[49] Gerry Johnson and others, *Exploring Strategy: Text and Cases* (11th edn, Pearson 2017), 380.
[50] Richard M Cyert and James G March, *A Behavioral Theory of the Firm* (2nd edn, first published 1992, Prentice-Hall 2001).

ADR) by which to resolve the dispute. Rather, dispute resolution strategy is the process by which such mechanisms are selected, and this is a process which must be continually reviewed throughout the lifecycle of the dispute. In this respect, developing the perfect dispute resolution strategy in any given case may therefore constitute what Rittel and Webber have termed a 'wicked problem', in that as solutions are more proactively explored with clients this serves only to expand awareness of the complexity of the "problem".[51]

Much has been written about how to approach dispute resolution methods (e.g. litigation, negotiation, and other forms of ADR) "strategically", though this literature tends to focus on the specific strategic choices that might be available when using a particular method.[52] Similarly, there are lots of pre-existing examples of theory from other disciplines (particularly organisational management and psychology) being applied to dispute resolution in order to support and enhance strategic thinking in that context.[53] However, to the author's knowledge no attempt has yet been made to explicitly consider the application of customer value theory to dispute resolution, in order to elucidate what constitutes a valuable dispute resolution strategy from the client's perspective.

The literature on strategy in general emphasises value creation activities and their central function in organisational processes.[54] Entrepreneurs and organisations routinely identify and exploit opportunities to create new or enhanced value for their customers.[55] Similarly, it is argued that – by looking at disputes through the lens of customer value theory – it may be possible to

[51] Horst W J Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Sciences* 155, 160.
[52] For example, see Ray Fells, *Effective Negotiation: From research to results* (3rd edn, Cambridge University Press 2016), ch 5.
[53] For example, see Marc B Victor, 'The Proper Use of Decision Analysis to Assist Litigation Strategy' 40 *The Business Lawyer* 617; Catherine H Tinsley, 'Culture and Conflict: Enlarging our Dispute Resolution Framework' in Michelle J Gelfand and Jeanne M Brett (eds), *The Handbook of Negotiation and Culture* (Stanford Business Books 2004), ch 9; Anurag Agarwal, Sridhar Ramamoorti and Vaidyanathan Jayaraman, 'Decision Support Systems For Strategic Dispute Resolution' (2011) 15(4) *International Journal of Management and Information Systems* 13; Ho-Won Jeong, *International Negotiation: Process and Strategies* (Cambridge University Press 2016), ch 3.
[54] See for example Michael E Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (first published 1985, Free Press 2004).
[55] Scott Shane and S Venkataraman, 'The Promise of Entrepreneurship as a Field of Research' (2000) 25 *Academy of Management Review* 217; Robert G Cooper, *Winning at New Products: Creating Value Through Innovation* (4th edn, Basic Books 2011).

identify and exploit opportunities to develop new (or at least more nuanced) dispute resolution strategies which deliver greater value.

Methodology

Since this study was inspired by changes to and consequent calls for legal education reform, it was principally underpinned by a pragmatist philosophy which emphasises the importance of identifying practical solutions.[56] The aim of the study was to explore the ways in which customer value theory might be applied to dispute resolution strategy in order to identify opportunities to better equip students (and ultimately practitioners) to develop such strategies which deliver greater customer value for their clients.

The application of theory from beyond the discipline to deliver new explanatory insight in this way is not a novel methodological approach. Previous studies have considered other areas of theory that might be relevant to dispute resolution. Conflict theory provides one example.[57] To see "conflict" as a contest which depends solely upon ascertaining the correct application of legal principle is to fundamentally underestimate the complexity of this concept when studied from a psychological perspective.[58] Theory from the discipline of psychology is therefore helpful in developing understanding of dispute resolution strategy.

A theoretical study of this kind has the potential to facilitate the development of theory, models and/or frameworks which students/practitioners can then use to enhance their employability and/or to deliver value for their clients. Whilst empirical studies could conceivably provide data on the relative weight of certain value components amongst client populations in general, the inherently subjective nature of "value" would be a significant limitation on the generalisability of any such study. A purely theoretical approach however is capable of illuminating the full range of value components that have been identified within the marketing discipline in order to provide a generally

[56] Mihaela L Kelemen and Nick Rumens, *An Introduction to Critical Management Research* (Sage 2008); Bente Elkjaer and Barbara Simpson, 'Pragmatism: A lived and living philosophy. What can it offer to contemporary organization theory?' in Haridimos Tsoukas and Robert C H Chia (eds), *Philosophy and Organization Theory* (Emerald 2011).
[57] See B. Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (John Wiley & Sons, 2010), pp. 98–102.
[58] MacFarlane, 'The New Advocacy: Implications for Legal Education and Teaching Practice', in Roger Burridge and others (eds), *Effective Learning and Teaching in Law* (Routledge, 2003).

applicable framework through which students/practitioners can holistically evaluate the value of particular strategies to particular clients.

Whilst disputes can and do arise in a variety of different settings, this study focused on disputes within the private law context and in so doing adopted a single case, case study research strategy.[59] The purpose of such a strategy is to facilitate the generation of rich data and analysis and - although the findings presented here cannot be generalised in a positivistic sense - it is hoped they can be treated as applicable beyond the case study context.[60] The private law context has particular relevance in England and Wales, since it is in this context that aspiring lawyers will be examined on dispute resolution in the forthcoming solicitors qualifying examination (SQE).[61]

This study utilises pre-existing customer value theories and frameworks to explore conceptually the dimensions of value which might have relevance to the development of dispute resolution strategy, thereby providing both explanatory insight into the nature of dispute resolution strategy itself, and practical recommendations in relation to the development of effective strategies. Where appropriate, the author also draws upon his own experience teaching undergraduate law students at a UK university, as well as his experience practising as a commercial dispute resolution lawyer.

The intention was to develop a comprehensive model that could be utilised in respect of all types of private law dispute and which would facilitate a more systematic and value-driven approach to the development of dispute resolution strategy. Similarly, the use of such a model within legal education could provide students with a more holistic and accurate perspective on the modern dispute resolution process, enhancing their ability to deliver value for clients, and thus their employability.

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[59] Robert K Yin, *Case Study Research and Applications: Design and Methods* (6th ed, Sage 2018).

[60] Bent Flyvberg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE 2011); Anna Dubois and Lars-Erik Gadde, 'Systematic combining: an abductive approach to case research' (2002) 55 *Journal of Business Research* 553; Hans-Gerd Ridder, Christina Hoon and Alina McCandless Baluch, 'Entering a Dialogue: Positioning Case Study Findings towards Theory' (2014) 25 *British Journal of Management* 373.

[61] Solicitors Regulation Authority, 'SQE 1 Assessment Specification' (*SRA* 14 October 2020) <https://www.sra.org.uk/sra/policy/solicitors-qualifying-examination/sqe1-functioning-legal-knowledge-assessment-specification/> accessed 12 November 2020.

Customer value theory as an explanation of dispute resolution strategy

In this section of the article, theoretical concepts from the customer value literature are identified and their significance for the dispute resolution context is explored.

Instrumental value

Instrumental value is primarily concerned with the utility of a product, service, or process, in respect of its potential to help the customer achieve specific objectives.[62] In the context of dispute resolution, a client's objectives are likely to be diverse and varied.

For example, insofar as a client's sole objective for the dispute resolution process was to secure compensation, then it might be reasonable to rely only on an economic conception of value, such as exchange value. From this perspective, dispute resolution would be perceived purely as a commercial transaction whereby the client will (ideally) receive payment of damages in exchange for the satisfaction of its cause of action. On this view, dispute resolution is somewhat analogous to the purchase of commodities which have an objective worth quite apart from that which is subjectively perceived by the customer, and which can be traded for other goods or services.[63] Indeed, disputes often do have an economic value, and in some limited circumstances it may even be possible for a claim (or more easily its proceeds) to be sold (or rather contractually "assigned") in order to realise this value more promptly.[64]

However, only in exceptional circumstances will this so-called "exchange value" provide a full explanation of a client's dispute resolution objectives. In most cases it seems likely that a client will also perceive certain extrinsic aspects. For example, drawing an analogy with the "use value" concept (see above), each unique client is likely to have specific objectives (or uses) for the dispute, such that the dispute resolution process has perceived utility of some kind beyond any assignable or realisable financial value.

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[62] Woodruff (n 21) 142.
[63] McKnight (n 16).
[64] See for example *Re Oasis Merchandising Services Ltd* [1995] 2 BCLC 493.

Dispute resolution aims will differ between clients and cannot be presumed. Consider for example the conjoined appeals of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Limited v Beavis*.[65] Both cases concerned the application of the rule against contractual penalties to specific clauses within contracts between the various parties. Mr Makdessi hoped that the court's ruling would pave the way for him to recover an eight figure sum by way of a legal remedy from Cavendish, whereas ParkingEye's claim against Beavis was for the principal sum of just £85, thus suggesting that the claimants in these two appeals may have had differing objectives in pursuing their actions. Whilst we cannot say definitively what was in the minds of the parties, it is reasonably safe to assume that whilst obtaining compensation might well have been the primary concern for Mr Makdessi, for ParkingEye it almost certainly was not. Client objectives are likely to be as diverse and varied as client populations themselves, and may not in all cases even be entirely rational, since even sophisticated contracting parties do not always act entirely rationally.[66] However, from the writer's experience as a practising dispute resolution lawyer, examples might include: the preservation of reputation; the restoration of commercial, professional, or personal relationships; or simply an apology.

Recognition of a wide range of litigant objectives can also be found within the law itself. For example, the objectives of the law of tort are acknowledged to go beyond mere compensation and are commonly cited as including: deterrence; vindication; and corrective justice.[67] These aims might well also be framed as client objectives when engaging with the dispute resolution process. For example, when Annie Woodland received a £2m out of court settlement some 16 years after she suffered life changing injuries as a result of a negligently conducted school swimming lesson, her mother was reported as saying that the lengthy battle had never been about the money, but rather, to ensure that this kind of incident would not be repeated.[68] For the Woodland family, deterrence was apparently therefore a key objective that any dispute

[65] [2015] UKSC 67.
[66] Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211.
[67] Steve Hedley, 'Making Sense of Negligence' (2016) 36 *Legal Studies* 491.
[68] Haroon Siddique, 'Woman gets £2m over near-drowning in school swimming lesson' *The Guardian* (London, 21 August 2016) <https://www.theguardian.com/uk-news/2016/aug/21/woman-awarded-2m-compensation-over-near-drowning-16-years-ago> accessed 10 November 2020. See also *Woodland v Essex County Council* [2013] UKSC 66.

resolution strategy needed to satisfy. Similarly, in *Ashley v Chief Constable of Sussex*, the family of a man shot dead in his own home by a police officer brought a tortious claim in spite of the fact that the Chief Constable had already admitted negligence and agreed to pay aggravated damages.[69] Despite having already secured the Chief Constable's agreement to pay as much in compensation as any court was likely to award, the House of Lords nevertheless allowed the claim to proceed on the basis that vindication was a legitimate basis in its own right for bringing a claim.[70]

Additionally, some disputes are supported by charitable or special interest groups which may have their own objectives, for example to change the law and/or practice for the benefit of society. This multi-stakeholder dimension brings even greater complexity to the development of dispute resolution strategy and introduces the possibility that client objectives may be philanthropical or moral in nature. For example, it is settled law that a claimant's illegality can provide a full defence to any tortious claims arising out of that illegality.[71] However, in *Hounga v Allen and another*, the claimant was an illegal immigrant working as a 'sort of au pair' for the defendants and was subjected to physical abuse.[72] Supported by several anti-trafficking and related groups, Miss Hounga was able to persuade the court that her claim should not be denied on the grounds of illegality, and the court held that there was not 'a sufficiently close connection between the illegality and the tort to bar the claim'.[73] Not only does this case highlight a client objective of a social justice flavour, but it also illustrates that a court's decision might be heavily influenced by such an objective. In *Hounga*, the court explicitly alluded to the strength of public feeling against human trafficking at that time, and indicated that this had influenced the outcome of the case.[74] As such, by understanding clients' objectives, legal advisers equip themselves not only to develop value-driven dispute resolution strategy, but arguably also to better understand and predict judicial reasoning which will often have regard to those objectives.

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[69] [2008] UKHL 25.
[70] For completeness it is worth noting that judicial review may sometimes provide an alternative route for 'victims' to achieve objectives such as vindication or social policy reform, for example when the decision of a public body has infringed their rights under the Human Rights Act 1998, but this is beyond the scope of the present case study context.
[71] *Gray v Thames Trains* [2009] UKHL 33.
[72] [2014] UKSC 47.
[73] *Ibid.* [59] (Lord Hughes).
[74] *Ibid.* [52] (Lord Wilson).

Similarly, although the strong policy trend in recent years has been to direct cases away from the courts, Mulcahy argues that in some cases it is completely appropriate that a case is heard within a public forum, not least to facilitate the development of common law precedent for the benefit of the legal system and for society more broadly.[75] Clients or other supporting charitable organisations might well share this view that certain disputes are appropriately resolved only through the formal court process. Furthermore, it is easy to envisage procedural or practical objectives that a client might have which would necessitate particular dispute resolution methods. For example, litigation may be necessary where a limitation period is close to expiry in order to preserve the validity of the claim. It may also be necessary where court powers are specifically needed, for example to freeze a defendant's assets or to obtain disclosure of an important document where a party refuses to provide this.

In addition to the immediate, short-term objectives that a client might have, dispute resolution lawyers should also seek to discern any longer-term objectives associated with the dispute at hand. One assumes for example that in the iconic case of *Carlill v Carbolic Smoke Ball Co*, the defendant had in mind not only Mrs Carlill's claim for £100, but also the many other claims that it might also subsequently have to settle if the court were to find in Mrs Carlill's favour.[76] In ParkingEye's case, its likely objective was even longer-term in nature. As an operator of private car parks, its entire business model was predicated on an assumption that the contractual mechanism by which it would "fine" its customers for breaching its parking conditions, was legally enforceable. Prior to its case against Beavis, the legal position on this issue was unknown, and it is likely that private car park operators simply took the strategic decision *not* to test the enforceability of its contractual provisions in the courts (presumably based on legal advice from dispute resolution lawyers) because the stakes were too high. Although during that time any decisions not to enforce in an individual case might mean that the contractual charges were not paid by an individual customer, a court judgment against a private car park operator on this issue would undermine its entire business model and threaten its very survival. During those times, any dispute resolution strategies which generally resulted in payments from defaulting customers without the need for litigation would have delivered significant customer value to private parking operators, even if the success rate or amounts recovered were lower than they

[75] Linda Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 *Oxford Journal of Legal Studies* 59.
[76] [1893] 1 QB 256.

might have been through a court process. However, *ParkingEye v Beavis* marks a turning point and a presumably fundamental change in ParkingEye's instrumental objectives. It seems that ParkingEye decided that it now needed a ruling on the law that would validate its business model, and the Supreme Court's decision did just that.

To take this one step further, Vargo and Lush write about "co-creation value" – the idea that significant value is created and only realised at the point of use.[77] As a result, to fully appraise the opportunities that dispute resolution strategies employed now might produce for value creation in the future – particularly for corporate clients - it is necessary to understand a client's overarching legal strategy and/or business model, of which the present dispute is just a single mechanical piece. Indeed, Bagley has argued that 'legally astute' managers can use law to proactively create value for their organisations over the long-term.[78] One good example of this is Coca Cola, which has notoriously adopted an aggressive dispute resolution strategy for decades, routinely litigating in order to protect its brand.[79] This is a corporate legal strategy which has undoubtedly contributed to its sustained position as one of the world's most valuable brands, at $64.4bn.[80] Similarly, the Walt Disney Company is known to take a proactive approach to its legal strategy in general, and famously successfully lobbied the US congress to extend the copyright period for all creative works by 20 years, pre-empting the otherwise imminent expiry of its copyright over Mickey Mouse.[81] Therefore, in the context of commercial disputes at least, dispute resolution strategy is almost never exclusively about the present dispute and lawyers should view all disputes within this wider strategic/corporate context.

Instrumental value also incorporates notions of quality – a product, service, or process that is of high quality is more likely to help the customer achieve their specific objectives. Therefore, when developing dispute resolution strategy, it is important to consider the attributes and efficacy of particular dispute resolution methods, and their consequent utility in facilitating the achievement

[77] S Vargo and R Lush, 'Evolving to a New Dominant Logic for Marketing' (2004) 68(1) *Journal of Marketing* 1.
[78] Constance E Bagley, 'Winning Legally: The Value of Legal Astuteness' (2008) 33 *Academy of Management Review* 378.
[79] Constance E Bagley, *Winning Legally: How to use the Law to Create Value, Marshall Resources, and Manage Risk* (Harvard Business School Press 2005), 142-143.
[80] Marty Swant, 'The world's most valuable brands' (*Forbes* 2020) < https://www.forbes.com/the-worlds-most-valuable-brands/> accessed 13 November 2020.
[81] Robert C Bird and David Orozco, 'Finding the Right Corporate Legal Strategy' (2014) 56(1) *MIT Sloan Management Review* 81.

of particular client goals. For example, different methods of ADR have their own advantages and disadvantages.[82] Before selecting certain methods therefore, there should be an assessment of their compatibility with the client's objectives.

Finally, it is important to note that perceptions of instrumental value are impacted by perceptions of quality which can change during the receipt of a service,[83] and that a customer's objectives themselves can also change over time.[84] Dispute resolution strategy is therefore a continuous process which must be routinely revisited and updated to ensure that the lawyer continues to act in the client's best interests and in a way that delivers value that the client will perceive.

Experiential value

Holbrook defines experiential value as: '(1) interactive, (2) relativistic…(3) preference, and (4) experience',[85] and in so doing he emphasises that customer value often has something to do with how the customer experiences either the product or service itself, or the associated transaction. As with instrumental value, the extent of experiential value which is perceived by a customer is likely to change during an experience, and so must be regularly reviewed.[86]

On the face of it, experiential value appears to be of greater significance in the purchase of consumer goods or services than it is in the context of a distressed purchase such as dispute resolution. It might seem that whilst going on holiday might be rich in experiential value, dispute resolution strategy would be unlikely to deliver significantly on this dimension. However, other concepts related to this broader category of value reveal that there are senses in which value of this kind might be relevant in this context.

On such related concept is "sensory value", i.e. that which is created through the environment within which consumption takes place.[87] In the dispute

[82] See Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (4th edn, OUP 2016), ch 3.
[83] Ruyter (n 33).
[84] J Lapierre, 'Customer Perceived Value in Industrial Contexts' (2000) 15(2-3) *Journal of Business and Industrial Marketing* 122.
[85] Holbrook (n 29) 46.
[86] S Kalafatis and L Ledden, 'Carry-over effects in perceptions of educational value' (2013) 38(10) *Studies in Higher Education* 1540.
[87] Smith and Colgate (n 38) 16.

resolution context then, this has to do with precisely where the dispute is resolved, and the feelings that this might invoke for a client. One might assume that a dispassionate commercial client would pay little regard to such matters. However, it is conceivable that an individual (whether they are a commercial client's employee or a client in their own right) might relish the opportunity to spend time in the formal and prestigious context of a law firm's offices, or even a courtroom.

Similarly, whilst "enjoyment" is also rarely likely to be the primary driving force behind dispute resolution strategy, it is conceivable that some approaches/methods will be more enjoyable (and therefore deliver greater "emotional value") than others. A client may for example take pleasure in participating in more formal dispute resolution mechanisms (such as litigation or arbitration) and, contrastingly, less formal mechanisms (such as mediation) may promote feelings of trust and solidarity. Equally, a client may value the relationship that they build with their legal team.[88]

A third related concept is "epistemic value" or, in other words, 'the perceived utility resulting from [the] ability to arouse curiosity, provide novelty, or satisfy desire for knowledge'.[89] Once again, whilst it is clear how such value might be realised through (say) the purchase of a book or attending a museum, its role within dispute resolution strategy is more subtle. However, clients may for example perceive some value in strategies which enable them to develop their own knowledge about the relevant substantive legal issues or dispute resolution processes involved. Alternatively, it is conceivable that a client may wish to pursue litigation primarily out of a dominant desire to ascertain the true legal position in the context of uncertain or underdeveloped legal rules. Therefore, whilst it seems likely that epistemic value will in most cases represent a very small proportion of the holistic customer value provided by certain dispute resolution strategies, it has a role to play in understanding the complete picture.

When acting for a commercial client, it is important to distinguish between the client's interests and the interests of the client's representative(s) liaising with the lawyer in relation to the dispute. When dispute resolution strategy is

[88] See for example C Grönroos, 'Value-driven relational marketing: From products to resources and competencies' (1997) 13(5) *Journal of Marketing Management* 407-419, and K E K Möller and P Törrönen, 'Business suppliers' value creation potential: A capability-based analysis' (2003) 32(2) *Industrial Marketing Management* 109.
[89] Sheth (n 28) 162.

considered from a customer value perspective, it is easy to see how these interests might conflict. The representative may (for example) have a personal vendetta, or may themselves have made relevant mistakes that they wish to conceal by obtaining a prompt settlement. In the context of experiential value, the risk of conflict is even more acute. For example, where an individual is driven (even in part) by a desire to seek out the experiential value associated with spending time in plush law firm offices, or experiencing the drama of the courtroom, this will need to be carefully considered to identify whether a conflict of interest exists.

Symbolic value

Symbolic value is arguably the most subjective of all value types. It is primarily concerned with a customer's need for meaning or identity, and usually depends upon the perceptions of third parties of particular relevance to the customer. Park, Jaworski and MacInnis define symbolic needs as 'desires for products that fulfill [sic] internally generated needs for self-enhancement, role position, group membership, or ego-identification.'[90] In the context of dispute resolution strategy, a thorough assessment of stakeholder perceptions, and their relative significance for the client, will be necessary.

One aspect of this is "personal meaning", i.e. that which is unique to each individual, influenced by their own values and past life experiences.[91] Consider for example the broadly similar contract law cases of *Storer v Manchester City Council* and *Gibson v Manchester City Council*.[92] In both cases, the claimant had applied to purchase their council house at a heavily discounted price, but a subsequent political change meant that Manchester City Council refused to proceed with the sale. Given the discounted prices, it is of course entirely conceivable that Mr Storer and/or Mr Gibson primarily wished to recover damages in respect of the financial loss that they had each suffered as a result of the council's refusal to proceed with the transaction. Alternatively, it is also conceivable that their primary concern might have been to *actually* exercise their right to purchase their home. A property may well have personal meaning for a resident which means that money alone would not represent a sufficient remedy for the claimant in such circumstances. Indeed, the equitable remedy

[90] Park, Jaworski and MacInnis (n 30) 136.
[91] Smith and Colgate (n 38) 11.
[92] *Storer v Manchester City Council* [1974] 3 All ER 824; *Gibson v Manchester City Council* [1979] 1 WLR 294.

of specific performance exists precisely in recognition of this fact.[93] Few assumptions should be made about this aspect of symbolic value but dispute resolution lawyers should take time and care to discern the particular significance of a dispute for a client, and to allow that meaning to inform strategy development.

Another aspect of symbolic value is "self-expression", which is concerned with how a customer lives out their own personalities and values.[94] Just as with personal meaning, dispute resolution lawyers should take care to understand their clients in this way, whether those clients are individuals or organisations. A dispute resolution strategy which conflicts with the client's core values (for example by utilising a public forum for resolving a dispute with a client who values privacy, or attempting early settlement for a client who values vindication) is likely not only to lack instrumental value, but also symbolic value.

By contrast, "social meaning" relates to how the customer is perceived by other relevant individuals.[95] This is likely to be relevant to all clients, but consider for example the commercial client who values its reputation for fairness, or alternatively for taking a zero tolerance approach to the late payment of debts. These factors may not be articulated as key objectives (and thus may not be identified through examination of instrumental value) but yet they are important components of the holistic customer value that the client will receive through the dispute resolution process.

Sacrifice value

Sacrifice value also tends to have a strong economic flavour. It is concerned with the customer's overall assessment of the net benefits that they receive and particular attention is paid to what the customer has had to give up in order to gain those benefits, the so-called 'transaction costs'.[96] Often, these costs will include financial aspects, but not necessarily exclusively so.

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[93] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] UKHL 17.
[94] Smith and Colgate (n 38) 12.
[95] Smith and Colgate (n 38) 12.
[96] Smith and Colgate (n 38) 13.

From a purely economic perspective, sacrifice value is concerned with the process of calculating the net financial value of that which the client seeks to achieve (e.g. its instrumental value) after the irrecoverable costs associated with its recovery (or with defending the claim) have been deducted.[97] These figures can of course be estimated in anticipation of embarking upon any particular dispute resolution methods, and practitioners have professional conduct obligations to ensure that appropriate costs information is provided to their client.[98] Costs will also vary between methods and require careful evaluation. For example, litigation might appear to be the most expensive option, but the loser will typically be required to pay most of the winner's legal costs.[99] By contrast, a settlement (for example a *Calderbank* offer) may sometimes mean that parties bear their own costs.[100] The economic costs of each strategic option should be carefully calculated and regularly reviewed to ensure that the sacrifice value of the strategy remains high. In this respect, lawyers should also explore the funding options available to the client, as these are likely to have a significant impact on the economic costs of different strategies.

Additionally, a wide range of other costs which could be framed in economic terms might be associated with particular dispute resolution strategies and should be taken into account. For example, by adopting a highly adversarial strategy against an existing or potential commercial partner, supplier, or customer, a commercial organisation may irrevocably damage any relationship, and this may have significant economic implications. As such, a calculation of the true economic cost of each dispute resolution strategy would not be complete without consideration of such longer-term, consequential costs.

However, beyond economic costs, the "psychological costs" of different strategies should not be underestimated.[101] More adversarial dispute resolution strategies are likely to carry a much more significant emotional burden, particularly for individual litigants but also potentially for commercial litigants where the claim will be managed or heavily involve a small number of

[97] See Coase (n 7).
[98] Solicitors Regulation Authority, *Code of Conduct for Solicitors, RELs and RFLs* (SRA 2019) para 8.7 <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 10 November 2020.
[99] CPR 44.2(2).
[100] *Calderbank v Calderbank* [1976] Fam 93.
[101] Sheth (n 28) 161.

individuals.[102] A client's case may well be strong on the legal merits, but if the psychological toll (e.g. stress) on relevant individuals of bringing the litigation will be significant, then this will influence the client's perceptions of the value of such a strategy. Similarly, certain dispute resolution strategies may lead to the irrevocable breakdown of personal relationships of particular importance to the client, especially where the client and or the opposing party are private individuals.

Even where a client is able to handle the psychological effects of a protracted dispute resolution strategy, there is generally a significant time and energy commitment required. In developing the strategy, lawyers should discuss this "cost" with their clients, considering also how such time and energy might otherwise be spent and therefore what the opportunity cost of proceeding with the dispute resolution process might be.

Finally, one "cost" often overlooked by students is the risk of pursuing a particular strategy. No strategy is entirely risk free, but some methods will carry much greater risk than others. For example, Shell argues that the success of litigation depends not only on the legal merits of a claim, but also on: the legitimacy of the claim in the court of public opinion; the relative strength of the parties' strategic positions; the relative resources of the parties; and the extent to which each party has access to relevant decision makers (e.g. through lobbying government).[103] Any risks identified need to be weighed against the benefits of the particular strategy. Evidence is also key to assessing this risk, for example such as the strength of a party's witnesses. A client may have a very strong claim on the merits, but if the evidence is not there to support it then the position is significantly weakened, and this should influence strategy. A pre-action settlement in such cases may represent a more valuable resolution as the matter can be settled prior to the point at which documents may need to be disclosed or witness evidence exchanged.

A value slices framework for dispute resolution strategy

The Value Slices Model of Higher Education (VSM) – developed within a legal education context - provides a framework for the evaluation, creation, and

[102] Michaela Keet, Heather Heavin and Shawna Sparrow, 'Anticipating and Managing the Psychological Cost of Civil Litigation' (2017) 34(2) *Windsor Yearbook of Access to Justice* <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5023> accessed 10 November 2020.
[103] G Richard Shell, *Make the Rules of Your Rivals Will* (2004 Crown Business), ch 4.

articulation of value in respect of particular educational programmes or activities.[104] The "SLICES" mnemonic breaks down their typically obscured, holistic value, into five segments (or "slices) which are informed by customer value theory: "symbolic"; "lifetime"; "instrumental"; "community"; "experiential"; and "sacrifice".[105] By using this theoretical model, legal education providers are able to conduct a more comprehensive assessment of the value of their programmes/activities and identify opportunities to develop distinctive value of a kind that might not otherwise have been considered.

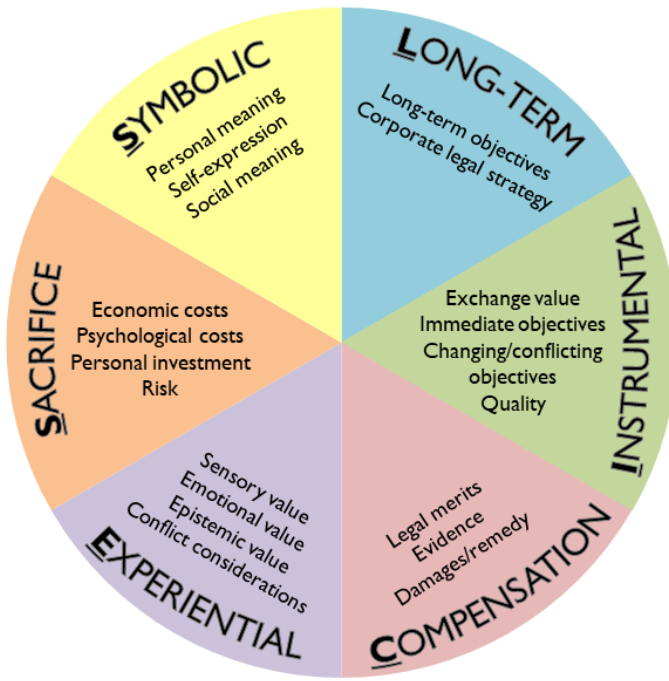

Figure 1: Value Slices Model of Dispute Resolution

A similar model might also assist law students (and ultimately also practitioners) to evaluate, create, and articulate value within their dispute resolution strategies. As such, figure 1 presents an adapted version of the VSM which provides a possible framework for the evaluation, development, and articulation of dispute resolution strategy. Whilst the core segments in general remain consistent with the HE model, the "lifetime" and "community"

[104] Alex Nicholson, 'The value of a law degree' (2020) 54 *The Law Teacher* 194.
[105] Ibid, 205.

segments are replaced with "long-term" and "compensation" respectively, to reflect: (1) the differing nature of the concepts under discussion; (2) the importance of evaluating both immediate and longer-term objectives; (3) the central importance in private law claims of establishing the legal merits of any such claim and the financial value of any likely compensatory awards; and (4) the fact that private law disputes are only very occasionally instigated for community benefit. Derived from the foregoing analysis, key issues that might usefully be explored within each segment might include:

- Symbolic
    - Personal meaning
      What significance does the client attach to the dispute?
    - Self-expression
      What are the client's core values?
    - Social meaning
      How will this dispute and its resolution be perceived by stakeholders?
- Long-term
    - Long-term objectives
      What longer-term implications might the resolution of this dispute have (e.g. in relation to reputation, relationships, or core business activity)?
    - Corporate legal strategy
      Does this dispute threaten the very survival of the client's organisation or core activities?
      Might particular dispute resolution strategies deliver a long-term competitive advantage for the client's business?
- Instrumental
    - Exchange value
      Could the client's rights in relation to this dispute be contractually assigned?
      Does pursuing this dispute represent a sound financial investment for the client?
    - Immediate objectives
      Beyond compensation, what specific objectives does the client have in relation to this dispute (e.g. apology, corrective justice, deterrence, vindication)?
    - Changing objectives
      How might the client's immediate objectives change during the dispute resolution process?
    - Quality

How effective/reliable are particular dispute resolution methods likely to be at achieving the client's objectives?

- Compensation
  - Legal merits
    What are the relative legal merits of the client's position as compared with their opponent?
  - Evidence
    What are the strengths and weaknesses of the client's evidential position?
  - Damages/remedy
    How much compensation is the claimant in this dispute likely to recover?
- Experiential
  - Sensory value
    Could the environment within which the client experiences the dispute (e.g. law firm offices, or a courtroom) have value for the client?
  - Emotional value
    Would any possible strategic choices be likely to result in positive emotions (e.g. enjoyment, pride, or trust) for the client?
  - Epistemic value
    Does the client have a particular interest in acquiring knowledge which might be served by particular strategic choices?
  - Conflict considerations
    For corporate clients only, is there sufficient alignment in perceived customer value as between the corporate client and its instructing representative(s)?
- Sacrifice
  - Economic costs
    What are the likely financial costs of pursuing these strategic choices and how do these compare to the anticipated financial rewards?
    Are particular strategies more or less likely to damage relationships of economic value to the client?
  - Psychological costs
    What psychological costs (e.g. stress) might also be incurred by the client through each strategic choice?
  - Personal investment
    What other non-pecuniary costs (e.g. time or energy) might be incurred by the client through each strategic choice?
  - Risk

How certain are the anticipated outcomes and how does this impact their value?

The model appears to suggest six dominant strategies for dispute resolution. However, in reality - whilst one or more of the "slices" may be dominant in a given case - all clients are likely to perceive aspects of value from within each segment to a greater or lesser extent. As such, in addition to identifying the answers to these questions, it would also be important to understand the extent to which the particular client perceives the value of each segment, since this may vary dramatically from client to client. Furthermore, students, educators, and practitioners must take care to ensure that any such assessment of customer value does not take place in a vacuum, but rather within the context of and subject to the ethical and regulatory frameworks within which legal advisors must operate.[106]

Similarly, just as with Smith and Colgate's framework, it is clear from the forgoing analysis that the dimensions of value (and consequently the "SLICES" in this model) are not mutually exclusive – there is a certain overlap. For example, if a client's primary objective in pursuing a resolution to their dispute is to receive compensation, then the achievement of this objective might be considered within the compensation value slice, framed as an aspect of instrumental value, or viewed in terms of the sacrifice value when weighed against the costs of pursuing the claim. However, this does not in itself diminish the utility of the model, the purpose of which is not to allocate aspects of value to particular slices, but rather to ensure that the fullest possible range of value components has been considered, specifically encouraging evaluation of dispute resolution strategies holistically and in a way that goes beyond mere analysis of the legal merits of the claim.

Finally, neither the model nor the theory on which it depends offers any definitive guidance as to how to reconcile potentially competing value components (e.g. a desire to receive the most compensation and a desire not to appear in court), but this is due to the inherently subjective nature of the value concept. Rather, the model provides a visual illustration and practical mechanism through which the value of a strategy can be evaluated holistically and adapted to reflect the client's perceptions. It can be utilised by practitioners

[106] See for example Solicitors Regulation Authority (n 98).

in their discussions with clients in order to develop a shared understanding of the client's value perceptions.

Conclusions and recommendations

Bosch has argued that interdisciplinary perspectives offer law students opportunities for: deeper understanding; the development of new solutions to pre-existing problems; and ultimately the acquisition of valuable analytical skills with obvious practical utility beyond the classroom, for example in professional life.[107] In this paper, it is argued that an appreciation of the customer value literature can enable law students to develop a deeper understanding of the nature of the dispute resolution process, and that the Value Slices Model of Dispute Resolution provides a mechanism by which they are able to develop more effective dispute resolution strategy.

Additionally, the resultant model also provides some direction for future empirical research which might usefully explore: additional value components which might be perceived in the dispute resolution context but which are not evident from the existing customer value literature; the prevalence and relative weightings of each value component amongst litigant populations; and the conditions which render some dispute resolution strategies more effective than others at delivering customer value. However, whilst such insight might help shape legal education programmes to some extent, given the subjective nature of value it will always be important for students and practitioners to understand the need to explore such weightings on an individual client basis.

This study has explored the explanatory insight that customer value theory from within the marketing discipline is able to offer to the development of effective dispute resolution strategy. It is easy to see how economic, philosophical, political, psychological, sociological, and even theological perspectives (to name but a few) might also be capable of adding additional insight which could strengthen even further students' understanding of the concept and which might therefore enhance their employability skills beyond those currently developed on programmes which exclusively adopt traditionally doctrinal and adversarial perspectives.

Given the apparently declining proportion of law students entering traditional legal practice, and the shift towards ADR, it is arguably more important that

[107] Bosch (n 15).

the modern lawyer can devise a value-driven dispute resolution strategy than it is that they have the technical skills to litigate. Furthermore, it is argued that the most important tool within that armoury is a framework which helps lawyers and litigants holistically evaluate the various options available to them.