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## Thumbs up/thumbs down

### Efficiency in the courts

Paul Brennan

Much time is spent by the legal profession worldwide agonizing about how to fix court systems, which are universally acknowledged to be slow, expensive, over complex and not customer focused.

Many claim that courts are all about lawyers and judges showing off their huge egos and that they are unconcerned with the real problems facing the punter. They argue that the public would be content with the certainty of a quick, cheap, simple decision, good or bad, so that they could get on with their lives.

Is it time to implement a two tier system of justice? Keep the present

one for the "details people" with money and for the rest of us adopt a "thumbs up/thumbs down" model. A "one minute" submission from each side and no appeal. It would be quick, cheap and simple. Legal advisers would have a 50% chance of being right, a definite improvement in some circles.

But hold it. Hasn't the "thumbs up/thumbs down" method been tried before? Did we not get rid of that as the public wanted something a little more considered and transparent?

Over the centuries, the legal profession, to its credit, has tried many methods of dispute resolution. Trial by combat, trial by ordeal, ducking, even swallowing a feather in a piece of bread (if the person choked he was guilty). However, litigants remained dissatisfied.

Isn't the underlying problem that litigants often demonstrate a lack of aggression and questionable commitment? They dip out of the legal process, through mediation or early settlement, just when it is getting interesting. The legal profession not only copes with the disappointment of so few cases coming to trial but also with a repetitive, dull caseload brought by cautious, under funded litigants.

Meanwhile, our society seems to have more to complain about than ever. Listen in any pub, coffee shop, taxi etc. and you will hear people complaining like never before. Rather than flogging a dead horse the legal profession should harness these complaints and channel them through the courts.

But how? Well, I suggest a competition inviting members of the public to come forward with their complaints to a certain hotel on a certain day. In a room, behind a table we could place three litigation funders to listen to each of the complaints and decide which candidates should be asked back. One of the litigation funders (or possibly a retired judge) would tear a strip off the contestants and the whole thing would be televised. The combination of TV coverage and a forum to vent their complaints should attract 1,000s of complainants.

Each week, contestants would appear before the panel with a different complaint and be judged. Eventually we would have identified a core of competitive, talented and enthusiastic complainers. The TV royalties would be divided between the contestants to allow them to launch court

actions as they choose. This would provide the legal profession with interesting cases, which were well funded and clients ready to go the distance. It would give the whole public access to justice by venting their anger on prime time TV.

Courts would be opened to TV coverage. The standard of court advocacy and judgments would be much improved, shorter with more sound bites. Lawyers generally would be better dressed and appear more dedicated, especially if their Mums were watching.

Transfer of judges between courts could result in huge transfer fees for the more disagreeable ones. Court seating would need to be expanded and there may be a need for live evening fixtures.

The idea could be sold internationally under the name "Sue Idol".

Cheer leaders and maybe even lions could be introduced to entertain the crowd in the breaks.

Finally, after centuries, lawyers would find themselves popular TV celebrities and a public, released from the burden of paying for justice, would start to enjoy and even see the fun side of the legal process.

I have two words for those who think that this is not worth trying: "Judge Judy".

An extract from a speech given by Paul Brennan to the University of Queensland Law Graduates Association. Paul Brennan is an after dinner, conference speaker and MC.



## Contract- it is not over until it is over

Paul Brennan

It may be depressing to be told that if you enter into a deal to do something with someone else, the Courts expect you to honour your part of the bargain.

But what if the other party doesn't deliver on time, has lousy products and makes a pass at your wife? Usually, the Courts will still make you do your bit. What if the other party is doing his best to wreck the

contract? Well it depends how good he is at trying to wreck the contract and how good is your evidence of unlawful action.

The bottom line is that commerce works because "contracts are contracts" and Courts are very mindful of this when faced with someone who wants to get out of a contract. Generally, Courts will not protect you from yourself and if you enter into a lousy deal however unfair, you are on your own.

This means that you had better speak to your lawyer before picking up your ball and going home. If you terminate a contract even the day after signing it and the other party suffers loss, you may be sued. Loss includes costs of assembling the products, getting rid of them after your refusal (usually at knock down prices) and loss of profit.

Courts don't expect you to wait around if the other party does not have the capacity or intention to perform the contract. The difficulty is in proving this. For instance, if the supplier does not deliver on time then Courts will expect you to give the supplier more time unless you have made it clear it must be delivered by a certain day. In a purchase of property if the seller does not sell on the completion date you may need to serve written notice giving a reasonable period (say three weeks) appointing a day by which he must sell. To make it clear that it must be delivered on a certain day, lawyers use the term "time is of the essence", which means if you do not complete on time, you are dead.

But "time of the essence" is a two edged sword. If in a property

purchase, your financier is knocked over by a bus on the way to settlement (cheque in hand) then that is tough, you cannot complete and the seller could terminate and sue you for any loss or more usually keep your deposit. Fortunately, most sellers just want to get on with the contract and are ready to wait for you to go out and retrieve the cheque.

You may be pleased to hear that there is a way that you can make a person entering into a contract with you "jump when you say jump". It is to have a contract which dots every "i" and crosses every "t" in such a way that nothing is left to the imagination. Courts will respect such a rigid framework and not disregard the strict intention of the parties. If you are a tedious, pedantic person, you could try to draft your own "rigid term" contract however it may be best left to your lawyer. A good example of this is a standard property contract, which has page after page of small print.

However, even where "time is of the essence" the courts may give a little bit of leeway where neither party tries to complete the contract on the stated day of completion. In that case the contract is still "on foot" and both parties can try again giving reasonable notice to the other appointing a day to complete.

Therefore, Courts can be a little relaxed on how quickly or well you perform the contract provided you do perform it.

If you are a fairly "average" supplier of goods you are probably much relieved after reading this column. However, the point is that provided the buyer goes through with the contract, however difficult this may be, he can still sue you for being useless and recover his losses after the event. He can still go to a court during the contract and get you wrapped over the knuckles for being slack and get an order for you to pay the costs.

Terminating a contract, after a party fails to honour its obligations, can be risky. Terminating it when it looks like the party will not be able to honour its future obligations is dangerous.

In either circumstances, go to your lawyer and get advice on how to manage the termination process in such a way that the supplier cannot complain about the termination. This means setting up the right amount of evidence of default.

However, the innocent party must be able to show that it not only had the disposition to complete but also the capacity. Lawyers call this being "ready, willing and able" to complete.

Does this all seem a little complicated to you? Well it is. It is very easy to get sued if you spit the dummy. So don't.

Brennans are business and litigation lawyers.



### Dealing with Will Resistance

Paul Brennan

In 1957, Eastbourne GP, John Bodkin Adams was acquitted of murder, despite being found to be the beneficiary of 132 patients' wills.

Having identified someone who may leave you an inheritance, you may encounter "will

resistance".

You may need to pay for the will yourself. If you are not a generous person you can look on it as an investment. But do not make it too obvious, as to embarrass wealthy relatives and friends, is to risk all.

Consider a "Will Gift Certificate" as a Christmas present. If your own lawyers do not offer these then you may find that they will start doing so shortly after you put the idea in their minds.

Alternatively, buy a will session and tell your relative that you won it in a raffle. If you use your own lawyer you may find that they are prepared to put in a good word for you, especially if you make regular referrals.

If a free will accompanied by the economic and/or duty arguments cannot entice your relatives to make a will then explain wills can be fun too.

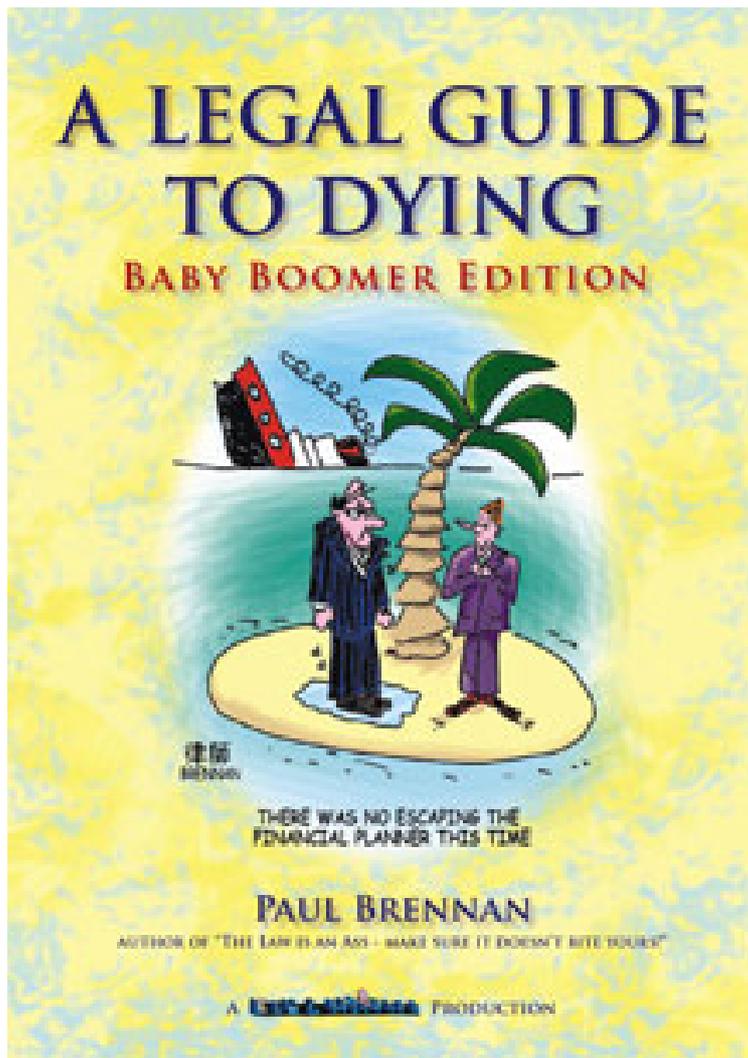
For instance, there was once a miser in a small village in Germany. He was so mean that everyone hated him. However, when he died he had made a will in which he had left something to everyone in the village. He provided in his will that there would be a wake with a generous allowance for food and drink. All the villagers trooped up to his house. He had provided in his will to be laid out on his bed in his best suit. The villagers went upstairs to his bedroom and stood around his bed. They started to say that he wasn't such a bad old guy after all, when "crash" the floor gave way and three villagers were killed. He had sawn away the joints below the floorboards of his room.

Once you tell this story your aging wealthy relatives will look upon you as a helpful conspirator rather than a grasping beneficiary and you may find yourself further up the list.

In persuading your rich relatives and friends to make wills, try to be creative. It can be worth it.

Extract from "A Legal Guide to Dying-Baby Boomers Edition".

If you are in the finance industry and want to be involved in the launch of the book or would like Paul to speak at your event then please contact [laura.pound@brennanlaw.com.au](mailto:laura.pound@brennanlaw.com.au).



## Introducing the Legal Guide to Dying-Baby Boomers Edition

Johnny Carson once said, "For three days after death, hair and fingernails continue to grow, but phone calls taper off". Generally people can laugh about death, provided it is not their own.

But for many Baby Boomers (b. 1946-1962), it can be a touchy subject. They need to keep their inheritance away from step relatives, charities

and caring neighbours. The more money at stake, the more potential beneficiaries seem to turn up. Meanwhile, their parents are growing older and less inclined to leave all their money to their children, as of right.

Even after receiving an inheritance, the Baby Boomer's own adult children are a challenge. They can range from "competent and never call", to "have trouble sitting the right way round on a toilet seat". Their children are forever marrying (or failing to marry) spendthrift, drunken, philandering partners.

At 62 years of age the oldest Baby Boomers increasingly find themselves under siege from many different quarters to make a decision. This attention is heightened by there being more money at stake.

The Legal Guide to Dying-Baby Boomer Edition is the ultimate Exit Tool for those Boomers with little time to spare. It will tastefully and

humourously lead the Boomer through the Three Ages of Exit Planning.

Part 1: How to secure an Inheritance.

Part II: Contemplating your own death.

Part III: The Final Furlong.

If you are a Baby Boomer this eBook is mercifully short and at \$13.99 (AUS) it will not break the retirement fund.

If you believe that this eBook will interest your Baby Boomer clients and you want to be involved with the launch or promotion of the eBook or have Paul speak at your event or conference then contact [laura.pound@brennanlaw.com.au](mailto:laura.pound@brennanlaw.com.au).

## **Lawcentral Bulletin**

This week the Lawcentral Bulletin featured:

1. Self Managed Super Funds holding trust assets
2. Splitting a Family Trust in two

It is free and often provides articles on tax and trust related issues.

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