

# Alan Jones

## *rattles the support of the injured*

Alan Jones is Australia's leading broadcaster. He currently hosts a breakfast radio program on 2GB and a segment on Channel 9's *Today* program each weekday. The following is an extract from his speech at APLA's recent NSW conference.

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One of the reasons the government's been able to pull wool over the eyes of the electorate in relation to plaintiff lawyers is that thankfully the overwhelming majority of people will never need you. But if we are to be all the things politicians would have us believe we are, then one of the rights that ought to be enshrined in a democracy is the right to have someone of skill and knowledge represent us in circumstances we don't understand, and

which plainly we could never navigate on our own.

What's worse, the battler is often confronted with insuperable resources, be it big business, the employer or, more particularly, government. And in the case of the latter, governments oil themselves with our money to deny citizens - often with not much - the very basic principles of justice.

And it's not just the workplace; accidents can happen anywhere. I constantly say to politicians who look at me blankly, 'What would happen if your wife was shopping at Westfield Miranda, and a sheet of corrugated iron driven by gale force winds cleaned her up? If she hasn't got an adequate plaintiff lawyer, she may as well pray to die, because sure as hell, no one else will come to her aid.'

The same is true in hospitals. Who cares that people have died unnecessarily, apart from the victim's family, and a few much-maligned nurses, who are

cages in



The keynote address at APLA's 2004 NSW Conference was delivered by Alan Jones.

prepared to put their hands up in support of those who have been disgracefully abandoned?

What we've seen in New South Wales in recent times in relation to public liability insurance, workers' compensation, motor accident insurance and medical indemnity insurance, is shameful. Any politician worth his salt would blanch with shame that things had come to this.

The headlines have been captured by the most extreme judicial cases, which are selected as proof that every Tom, Dick and Harry is racing off to litigation. The tabloid newspapers parade these decisions, often without any understanding at all of what an award to a quadriplegic, or a totally and permanently disabled individual, might mean. And that's then followed on radio by people who just read the headlines back to those who choose to listen.

Not one single question has been

asked of insurance companies who have put the right to insurance cover beyond the capacity of many individuals and many worthy organisations to afford.

Now the state's legal watchdog, the Law Society, is gearing up for a fight on the blanket ban on advertising for personal injury cases.<sup>1</sup> It's a simple story: so simple, in fact, that it is not understood.

Basically it means that legislation drafted in ignorance, or even malice and revenge, stops accident victims knowing how to assert their rights. And then you are told that a television campaign to argue such a case would be illegal, and could lead to professional misconduct charges. If this is not an abuse of process, and a denial of basic rights, what is?

Thirty solicitors have been warned. They face disciplinary proceedings after

allegedly advertising in the Yellow Pages and in the regional community and ethnic newspapers; and the proliferation of website advertisements is now, we're told, also posing problems.

"If the role of parliament is to perpetuate ignorance and to keep innocent people in the dark then we should close the joint down."

How on earth could it ever be wrong to try to assist innocent people who have become victims to understand their rights? And if the legislation in relation to personal injuries were as it ought to be on the statute books, to protect citizens' and community rights, why would you need a law to ban anybody from making sure that innocent and unknowing people understood those rights?

If the role of parliament is to ►

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perpetuate ignorance and to keep innocent people in the dark, then we should close the joint down.

I know from my correspondence that business for personal injury lawyers has dwindled after changes to the law limiting liability and payouts. There's room now for rethinking the role of personal responsibility. We don't want a society where people charge off to the courts every time they meet misadventure. In principle, there is a case for limiting liability and payouts, so long as the principle is consistent with the practice, and I'm afraid that's not the case.

“Why would you need a law to ban anybody from making sure that innocent and unknowing people understood their legal rights?”

How many people know that there is a three-year time limit on suing for personal injuries? Where does the battler start? Who does he go to? How does he finance it? Of course, if the government gets into strife it hires the best lawyers in town. But how does the battler put all this together in three years?

Take Case A. He was knocked back for compensation under the *Motor Accidents Act* after a motorcycle accident. He had to satisfy an impairment level, as you know, of greater than 10% of whole permanent person impairment. Even though he suffered a serious neck injury, he is found to be 10% WPI, but not greater than 10%. He had to have surgery, was in continual pain, and unable to pursue his career as a computer systems designer. This could be any one of us. Under the AMA guidelines, he could be assessed only on how he presented on

the day. The doctor was unable to take into account the risk of further injury, or to include the psychological effect on him. I wonder whether the lawmaker would want that kind of fate for his son, or his daughter, or his wife?

Case B suffered a knee injury at work and developed a chronic condition known as reflex sympathetic dystrophy. The claim was initially accepted by his employer's mutual indemnity on behalf of WorkCover. They terminated his benefits after a conflict with his doctor. WorkCover said the GP wasn't complying with their injury management plan and told him to change doctors. When he refused they sent him 'doctor shopping', until they found enough evidence from ten doctors to withdraw WorkCover benefits. So what does he do? It would never have happened in the Workers' Compensation Court. These are basic denials that have been enshrined in legislation.

A person with a 25% permanent impairment of the back, and 10% permanent loss of efficient use of the right leg, at or above the knee, would have received \$32,500 under the old Workers' Compensation regime: \$15,000 for the back, \$7,500 for the leg, and \$10,000 for pain and suffering. Under the new system, they'd get \$10,000 for an 8% whole person impairment, plus nothing for pain and suffering as it's less than the 10% threshold. And, as you know, under the old system - and we're talking about innocent people here, these are accidents - you'd claim for pain and suffering.

Imagine we're the victim. Pain and suffering. Future medical treatment, sometimes for the rest of your life. Lost wages. Past and future. The cost and value of care and assistance which could be for the rest of your life. Live-in carers, special accommodation, modified motor vehicles... How do you manage?

And before we start thinking that's like winning lotto, which the headlines would have us believe, consider the Calandre Simpson case - how would you like to be her family? When she got the \$12 million damages, not a word

was said about the fact that all the medical benefits that had been paid for up to that point would be deducted from this sum. Not a word about the fact that she'd hope to be able to live another 35 years, that she'd have to invest the money, that she's got to change the house, get full-time care, or that she can't do a thing for herself. Meanwhile they're parading headlines across the papers that someone's being ripped off because she got \$12 million dollars.

That's what we're here for, aren't we, as a civilised community, to support people who can't support themselves? There but for the grace of god could go any one of us. So, it's not like winning lotto. None of us would want to walk or sit in that chair. We wouldn't swap places with the legitimate victim. But since November 2001, they can stay on Workers' Comp, as you know, or receive weekly compensation payments and a little lump sum for physical pain and suffering. If they sue for damages, they now have to qualify for medical thresholds of 15% of whole body impairment. Understandably, virtually no one qualifies. But remember, insurance premiums keep going up, the payouts either don't exist or are diminished...where's the money going?

A qualified and experienced orthopaedic surgeon has told me that, under the new system, fewer than one in 100 injured people who would have qualified for common law claims under the old scheme would now reach the 15% threshold. And if you do qualify to take common law proceedings, you can only claim a maximum of \$200,000 for physical loss and pain and suffering. Future lost wages claims are capped at \$1,000 a week. This stuff has been drafted by bureaucrats and, I'm telling you, that from the Premier down, no one in government has a clue what they are doing to innocent

people. They could not stand at this microphone and conduct a conversation on this matter for more than two minutes.

There's this simplistic notion that the modern world is full of ambulance-chasing lawyers and brainless judges awarding multi-million dollar payouts. It gets the headlines, and it's easier than finding out what the real situation is.

It is not a matter of favouring lawyers, judges or anyone else. I'm amazed that I'm accused of this but, as I've often said, 'Well, go ahead. Close down every public liability law practice or workers' compensation law practice in the state.' That must be what they want to do. But lawyers are educated people and, difficult though it might be, they will find another source of employ-

ment, whether it's just doing real estate contracts or sorting out people's divorces. But if the worker who is injured in the workplace, through no fault of his own, can't be adequately represented, how does he gain redress, or become gainfully employed again and keep a family surviving? What is his other source of income? Nil.

How could a Labor government so ruthlessly bash up its own constituency? It's not you it's bashing up, at the end of the day it's the workers who are copping it.

This is a product of lawmakers failing to do any homework, and just responding to headlines and dealing in half-truths. Basically government is saying it's ok for insurance companies to charge thousands and thousands of dollars in homeowners' warranty insurance but, at the same time, refuse to give that insurance to a builder, unless the builder indemnifies the insurance company. So, they take the premium, but abandon the risk.

How could the Tulip Festival at Oberon be a risk? They can't get public

“...Politicians hope to make heroes of themselves by arguing that they are pursuing tort law reform.”

liability insurance. How could ballroom dancing in the Blue Mountains be a risk? But not only can they not get public liability insurance, but when insurance companies eventually provide it, the increases run into hundreds and hundreds of percent. Because the headlines have told the world that everyone's racing off with buckets of money, this justifies the shoving up of premiums. You saw the reaction to Calandre Simpson. There are stacks of similar cases. And so the public mood has shifted towards the fact that 'Someone's got to pay for this, so we're all paying for it'. And so the insurance premiums for everything just go through the roof.

**"There was a price for union silence on workers' compensation reform. It's called WorkCover Assist, and is nothing more than a bribe."**

I'm just saying that those who want to criticise the 'ambulance-chasing lawyers' and the 'loony judges', wait until you're injured. Wait until something happens to you as an innocent party in the workforce. Wait until it's your son or daughter in a motor vehicle accident. Then you'll know who's telling the truth.

I had a letter from a lawyer; he was representing a client, who was 37 years of age, against an insurance company. The client suffers from the early onset of osteoporosis, which causes him to walk with the aid of a walking stick.

He was crossing the road at an intersection in Brisbane. He went on the green 'walk' sign. Halfway across the road he was struck by a council bus. All the witnesses confirmed that the victim was crossing the road legally. He went to a lawyer; he had nowhere else to turn. But the insurance company for Brisbane City Council alleged that the victim contributed to the incident and to his injuries, to the extent of 30%. Why?

Well, he knew his disability would have prevented him from making it across the street in the time given by the walk sign. If that reasoning were to hold up, this poor coot would never be able to cross the road again.

And what does that thinking say to people with disabilities when dealing with insurance companies? The insurance company said their position in relation to liability was in accordance with their obligations under section 41 of the *Motor Accident Insurance Act 1994* but, remember, the bus cleaned this bloke up. The insurance company said that its liability doesn't extend to any injury, loss or damage, alleged to have arisen as a result of the motor vehicle accident and the victim, quote, 'contributed to the accident by crossing the intersection when he was aware that his disability would have prevented him from making it across the road in the time allowed by the walk signals'. There you are, the victim was disabled, he just crossed at the green walk sign and got hit by a bus. It was 30% his fault.

I spoke to a doctor, obviously an 'ambulance-chasing doctor', in the Premier's terminology. He said for every high claim that makes the front page, there are hundreds of claims where nothing is paid despite significant injury. He talked to me about the plight of the worker, the battler, and the injured and, in his words, 'a humiliating and invasive obstacle course due to processes and delaying tactics that escalate costs astronomically and are responsible for the insurance crisis'. It's the way in which people deny the payment of legitimate claims and ratchet up the overall cost. He said that the so-called reforms – and remember, this is a doctor, not a lawyer talking – will only restrict ordinary people's access to fair compensation, particularly if they're poor. And he said the so-called reforms would do nothing about the core problem – the insurance compa-

nies' aggressive overspending.

But of course politicians hope to make heroes of themselves by arguing that they are pursuing tort law reform. If it wasn't for some bureaucrat writing what they say, I don't believe that they would be able to utter two credible sentences on the issue.

So for you people it's a difficult battle. Open your mouths and everything you say derives from personal and professional self-interest. That a politician should argue that is laughable. What is a further concern in all of this is the indifference of the public. Where is the union movement? The union movement went from blockading Parliament House over the changes to workers' compensation, to saying nothing when the Bill went through. There was a price for union silence. It's called WorkCover Assist. For three years, almost \$3 million has been ploughed into unions and employer groups, supposedly to educate their members about workers' compensation, occupational health and safety, all under the guise of WorkCover Assist. Three million dollars buys acquiescence and silence. Nothing more than a bribe. It's an expensive token that has effectively shut the union movement up. And the union movement represents many of the people who have suffered with the move to a Workers' Compensation Commission.

So do we surrender to headlines and clichés? I agree with the President of the New South Wales Bar Association, Ian Harrison, who said that the day is not far away when uncompensated or inadequately compensated voters will force the government of the day to reinstate unrestricted common law rights. And, as he says, this move will be driven by large sections of the community who are genuinely hurt. The old axiom is that you can only fool some of the people for some of the time. Conventional wisdom suggests that all of them will not be fooled for much longer.

I should just say that in the medical world, things are a little different. An imbalance has developed, such that responsible highly trained doctors undertaking very complex and demand-

ing procedures can find themselves in great legal jeopardy should an obvious risk inherent in the procedure materialise. And this is a big issue for procedural specialists; it's the other side of the coin. You want your son, your wife, your daughter, your husband, to have access to the best medical care, but often these procedures, with the advance of technology, are complicated, require enormous skill and, of course, are sometimes high-risk.

The inherently high risk of major complication, or death, has resulted in large settlements and exorbitant premiums for medical defence insurance. If we want neurosurgeons, then you can't ask them to work for \$400,000 a year and pay up to \$150,000 in indemnity cover. They just won't do it. And where are we then, without that level of specialisation?

And that's why, in order to preserve neurological services in public hospitals, the state government rapidly arranged to cover indemnity costs for public hospital patients. So here they were, virtually acknowledging that while people have to be protected and were entitled to the benefit of this skill, you can't make doctors responsible every time at law for something that might go wrong.

Now, these are people who have completed doctors' competitive six-year university courses, a compulsory two-year residency program, and what's now another six years' post-graduate training. Surgical endeavours, we know, have developed enormously. And the patient's expectations in terms of outcomes are often unrealistically optimistic. Here the architects of reform are on stronger ground. One surgeon I spoke to began practice 30 years ago. Back in the 70s, he paid \$100 per annum in insurance premiums, without government intervention. This year he is paying \$80,000. Does this reflect a manifestation of greatly increased negligence by his profession, or does it reflect a gross distortion in the legal interpretation and implementation of tort law?

These problems are not going to be solved by governments fed by ingratiat-

ing bureaucrats trying to pretend that they've got immediate solutions. We first have to determine whether the problem is one of ambulance-chasing lawyers and brain-dead judges. Or is it greedy and alarmist insurance companies that have never had it so good and have never been investigated? Perhaps the real answer lies with the judge who recently retired from the Queensland Court of Appeal, Justice James Thomas. He said, 'Common sense had gone from the legal system when it comes to cases of negligence. 'Some judges had enjoyed playing Santa Claus, forgetting that someone has to pay for our generosity. 'We've allowed the tests for negligence to degenerate to such a trivial level that people can be sued for ordinary human activity. When I say we, I mean all levels of adjudication, right up to the High Court.'

In the same speech to the Queensland Parliament, Justice Thomas also said that 'there is no point' (his exact words) 'in blaming plaintiff lawyers. We, the judges, are the ones who've laid down the ground rules and given the judgments. The buck stops with us, not them. We're the ones who have let the quantum of damages get out of hand and who have lowered the barriers of negligence and causation.' He said, 'The trend of skyrocketing compensation payouts could only be altered by High Court rulings.' But he said nothing at all about letting politicians legislate to address their view of the problem.

He concluded by saying that 'I have, of course, faithfully followed precedent, but there is not a lot a judge, even at an intermediate appeal level, can do unless the High Court approves, except to bemoan the general trend.'

The disgraceful reality, in relation to injuries at work, in motor vehicle accidents and elsewhere, is that genuine victims are left without access to proper representation and appropriate compensation, which would enable them to lead a life in the future as they would be entitled to expect, based on the conditions of their past, had they not become innocent victims.

If there is no system explicitly

structured to protect such people, then we should stop preaching that the great strength of western democracies is their unapologetic commitment to freedom because, quite frankly, in this state, that is now more honoured in the breach than in the observance.

I see broadcasters as having an important public role but most journalists don't do the type of homework necessary to do justice to this particular issue. It is complicated, but it's not complicated when you have people write the type of letters they write to me, or arrive on your doorstep as they arrive for you.

So it's very difficult to mobilise opinion adequately unless you take the broader view that, in a civilised and decent society, we have an obligation to look after people who can't look after themselves when they are innocent. We certainly do it for people who are guilty; we fall over ourselves to give endless appeals to murderers and everybody else, at phenomenal cost. What justice is the poor coot injured in the workplace entitled to, for God's sake? That's the challenge.

And the reason that I have come here to make my rather limited observations is that you can't give up. I know that sounds a bit of a cliché, and I'm not here to give a pep talk, or to rally the troops, but if there are case studies where rights have been so significantly reduced, you've just got to get them to me. I'm not frightened of work; and this is going to take a lot of work to turn this thing around. And it isn't self-interest. We're able to walk here, most of us, and go home again. And whatever difficulties government might like to put in our way, we have a fair amount of job satisfaction and we can still go and have a game of tennis and kick a football. The people you're representing and who write to me have had that opportunity denied to them. Worse than that, they have no one in the forum of public political representation who seems to be at all concerned about their well-being, and that's the ultimate tragedy. **PL**

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**Endnote:** I APLA is in fact mounting this challenge.