Never Give Up

An Address to the Australian Plaintiff Lawyers Association National Conference, Noosa, Queensland 19th October 1996

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"Here is the News – Radical changes to the system of commercial and corporate litigation, effective immediately, were announced by the Attorney-General in Parliament this afternoon. Concerned by the rising cost of commercial litigation and its impacts on the share prices of major companies, the Government has made several important changes.

The Attorney said that our Courts were becoming increasingly clogged with the American style corporate litigation.

From today, a company will only be permitted to sue if it suffers a serious loss, defined to be 30% or more of the company's gross market capitalisation (as defined in the tables published by the American Securities Exchange Commission).

Otherwise, litigation is to be determined by a no-fault system of conciliation and mediation. In this system company C.E.O.'s are required to attend in person, and are not to be represented by lawyers. If either company does not accept the mediator's ruling, the matter can be appealed to a "corporations magistrate", but only on questions of law.

A table of losses has been established which gives corporations 90% of their loss for the first 4 weeks, and 70% thereafter up to a maximum of 52 weeks. Companies, said the Attorney, should be encouraged to get back into full production as soon as possible, as some otherwise become dependant on a "compensation mentality".

Caps on damages have been fixed, with a 10% threshold and a $200,000 maximum.

The Australian Insurance Council welcomed today's announcement, but said they would seek an exemption to the general rules if one insurer wanted to sue another."

Can you imagine it? Is there not a more unlikely scenario than that? Doesn't it even sound so far fetched as to be humorous?

And yet these are precisely the sorts of restrictions that Australian workers who are poisoned, maimed or disfigured, at work, have to deal with every day. And when it's put like that, you have to ask – why?

Why are insurance companies and employers given the benefit of these restrictions and caps and thresholds that leave injured and debilitated people or their surviving dependants so much worse off, when corporations suing each other are free to recover all of their losses from the past and into the future?

Why are restrictions and legislative intervention to restrict the common law so often imposed on tort law, which by definition, assumes someone has acted wrongly?

Why do Governments seeking to justify such intervention so often target the lawyers who are simply doing what the Governments fail to do, by making the Courts accessible to ordinary people?

Why do Governments call for lawyers to compete in systems based on modern business principles, and then label them crass and unrespectable and as pursuing "American style litigation practices" when they advertise, utilise the media and offer litigants deferred or contingent fees to attract their business?

Why are Governments, so often, with barely a whimper raised in opposition, permitted to remove, by legislative stealth, rights of access of citizens to our Courts, to review Government actions?

Why are these same Governments permitted to abolish Courts, remove judicial powers and threaten judicial independence and discretion?

Why don't our State Constitutions enshrine the separation of powers so that these things can't happen?

What sort of moral code prevails in the medical profession that permits doctors, with impunity to refuse to proffer expert opinions on a colleague's malpractice, thus leaving a disabled or disfigured victim without recourse to justice?

Why should a doctor's notes be so sacrosanct as to deny their own patients the right to the benefits of their views when, save for the legal professional privilege – (itself a somewhat eroded vestige of itself) – no other professional or fiduciary relationship has such protection?

Why is it OK for large national defendant insurance law firms to write alarmist pieces every few weeks in the national financial press about the threat of a "litigation explosion" and "American-style litigation tactics" when there is no truth in the threats, and they are simply advertisements for their firms to be engaged to carry out manufacturing audits for worried product-producers – thus adding far more to the unit cost of production, than any litigation ever did?

And why whenever politicians or corporations seek to demean the tort system do they constantly refer to the McDonald's case – where a woman ("get this") "got $2.2 million for spilling hot coffee"?

Why don't the media or others concerned point out the true situation there – that a 79 year old woman spilt scalding coffee, 185°F, 40 degrees hotter than the retail competition or what you brew at home, – because the Company figured out that really hot water extracts a little more coffee from each bean; that the woman was in hospital for 8 days, with skin grafts and third-degree burns on six percent of her body. Why don't they point out, that she offered to settle for $20,000 and McDonald's told her to get lost, even though they had received hundreds of complaints from scalding victims, and settled some of them, or that the jury's award was a modest $200,000 for compensatory damages, and the $2 million in punitives, worth about 2 days' coffee? Or that a few days after the trial the coffee at McDonald's was down to 159 degrees.

Or that the real litigation madness concerning McDonald's is that multi-billion corporation tying up an English Court and Judge for over a year suing some impecunious environmentalists who refused to stop handing out a leaflet critical of the company?

Why do all of these things happen?

I suspect the answer relies on the same attitudes that inspired Pastor Martin Niemoller, when he reflected on the Nazi ascent in pre-war Germany, to say:

"In Germany, they first came for the communists, and I didn't speak up because I wasn't a communist. Then they came for the Jews and I didn't speak up because I wasn't a Jew. Then they came for the Trade Unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a protestant. Then they came for me – and by that time, no-one was left to speak up".

I trust, now that they have come for the lawyers and for the rights of ordinary people in Australia that we will have the courage to speak up.

There can be no doubt that the challenge facing us in this regard is as daunting as it is immediate. The coalition of big corporations, their insurers and eager-to-please governments, who clearly have no understanding of the dangers in trifling with the pillars of a free and democratic society such as the separation of powers and the rule of law, is a formidable one with a well-defined agenda. It is well under way.

There should, equally, be no doubt about the justness of the cause I am suggesting we pursue with renewed vigour.

For example, can there be any longer, any doubt about the ability of the law of torts to regulate behaviour for the better?

The McDonald's case is one example on a small scale. My own experience and that of Slater & Gordon in the last 10 years yields several more, on perhaps some broader canvases.

The revelation through litigation, of the human tragedy and suffering that was the consequence of the wilful ignorance and disregard of the Australian asbestos industry, in particular at Wittenoom, has beyond the remotest doubt made corporations more wary of exposing workers to potentially hazardous substances and forced them to provide basic safety warnings and equipment. "We don't want another Wittenoom" is a familiar theme running through health and safety meetings and from statutory regulators. But any suggestion that the response would have been even remotely adequate without the ability to pursue damages claims against CSR and James Hardie (among others), and the imposition of Australia's first punitive damages award for an industrial accident being meted upon CSR's Wittenoom subsidiary, is dubious.

And most recently the Ok Tedi litigation. Here, against what may have appeared almost insuperable odds, one piece of litigation (and associated publicity) has surely changed for all time the way that Australian (and indeed any first-world country's) mining companies conduct themselves with regard to environmental standards in third-world and developing nations.

The common law, the ability of indigent litigants subsidised or funded by their lawyers to access our Courts, the willingness of those Courts to protect the rights of those litigants against the most powerful coalitions of corporations, their lawyers, complicit domestic governments and foreign governments, must be powerful forces indeed. To force a monolithic edifice like BHP to acknowledge mistakes and radically change its ethos and standards must rank as one of the most significant credits possible for our law, our Courts, and their practitioners.

And it is precisely because of the power of those rights, so clearly seen in these few examples, that members of that unholy coalition would seek to render nugatory and powerless those very factors.

Now, it is time to defend them, for if we do nothing – like Pastor Niemoller so pointedly explained, – we will undoubtedly, soon, lose these powerful tools

of change and surrender basic and hard-won freedoms forever to a new order in the image of major corporations and their proselytizers where workers are cannon fodder and the bottom line is the only imperative.

Can I offer one piece of inspiration (if the examples referred to above are not enough)?

Do you remember that wonderful Paul Newman movie "The Verdict"? Based, apparently, on the life of a courageous litigator from Boston, attorney Frank Galvin has one last shot at a big case. A young woman is rendered paralysed on a life support system and in a coma from medical malpractice by two respected doctors, who then sought to cover up their mistake by fraudulently altering the patient's records.

Galvin is indifferent to the case until a visit to the hospital where he sees the young woman for the first time. "Do you know this woman?" asks a passing nurse, and Galvin replies "She's my client", clearly rediscovering the full meaning and burden and inspiration of that relationship.

However, the defendants and their blue-chip lawyers manage to keep from the jury all of the damaging testimony and documentary proof of the fraud perpetrated by the doctors. "Strike it from your minds" exhorts the judge. In his final address, Galvin beaten down by all of this, crunches up his prepared notes and looks to the jury, twelve ordinary citizens, and delivers this address:

"You know, so much of the time we're just lost. We say "Please God, tell us what is right, tell us what is true". I mean, there is no justice.

The rich win, the poor are powerless; we become tired of hearing people lie, and after a time we become dead – a little dead.

We think of ourselves as victims – and we become victims. We become – we become weak. We doubt ourselves, we doubt our beliefs, we doubt our institutions, and we doubt the law... but today you are the law.

Not some book, not the lawyers, not the marble statues or the trappings of the Court; see, those are just symbols of our desire to be just. They are ... they are in fact a prayer – a fervent and a frightened prayer.

In my religion, we say 'Act as if ye have faith – faith will be given to you'. If. If we are to have faith and justice, we need only to believe in ourselves and ACT with justice.

See, I believe there is justice in our hearts."

I promise you that on various dark days in the last decade I have drawn inspiration from those words, which have been pinned to my wall. I trust we can all do so as we set out in our defence of these things we have the privilege of knowing to be so important.

John Gordon was the joint recipient of APLA's 1996 Civil Justice Award.

APLA Exchange

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- Exposure to **Gluteraldehyde** in nurses. Contact Angela Sdrinis at Ryan Carlisle Thomas, Level 30, 80 Collins St, Melbourne.
  Ph: (03) 9240 1414. Fax: (03) 9240 1444
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- An expert in **phlebotomy** (the cutting into, or puncture of, a vein, usually for the purpose of removing blood) is required by Julian Johnson of Ilbery Barblett Barristers and Solicitors. Contact Level 9, 30 The Esplanade, Perth, WA 6000.
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