JOHN GORDON, VIC

'Them's fighting words!'

This is an edited version of John Gordon's address to the Insurance Council of Australia Conference, Perth in July 2003. The full text can be found at www.ica.com.au.

I would like to congratulate the ICA on the success of the campaign to decrease short- and long-term liabilities and to increase member profits by convincing governments that they must act to reduce the right of people to sue for injuries, to reduce access to lawyers and to reduce the damages available to people if they are one of the lucky few still able to pursue a claim.

This campaign, viewed from outside, has had a number of critical prefatory causes.

At first there was the price war initiated by HIH, which drove down premiums to unsustainable levels. APRA, in their wisdom, did nothing to prevent this.

Then came the inevitable collapse of HIH. Suddenly one incentive to keep premiums down was gone. Then came September 11, and I don't need to tell this audience about what that meant to reserves, policy pricing and the availability of capital to Australian markets.

There followed the end of the US bull market, and the investment returns on premium income were also devastated.

The margins for insurers in the less attractive markets like public liability were squeezed. Premiums had to rise, and did. This was always going to make insurers who were issuing these massively increased premium notices, or denying coverage, very unpopular. How could the blame be shifted?

What opportunities might there be amidst this adversity to guarantee improved long-term profitability?

> "Never let the facts get in the way of a political reaction to media demands for action!"

Well, the blueprint had been successfully tested in the US and there was no reason why it could not work in Australia.

First, put the blame for the increases in premiums on litigation, that is, on injured people making claims for compensation – an easy target because no-one thinks they are going to get injured and so there is no-one to think they are being blamed.

With the aid of the tabloid press, radio and television, it was easy enough

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to convince people that litigation was out of control and that damages payments represent some sort of happy windfall to undeserving miscreants after the main chance.

Headlines appeared ... 'Our skating rink to close' (it didn't), 'High country huskies to be put down' (they're still running round) or photos of locked children's playgrounds (it was locked because there was in fact a risk of injury from one of the swings which was repaired and opened again the next day).

Politicians fell over themselves to point the finger at litigation and lawyers.

This occurred despite the fact that there was no litigation explosion, not even a bang. The federal government conveniently ignored its own Productivity Commission. Advice that civil litigation rates had been falling in Australia at 4% a year for four years (2001 report) went unheard.

It ignored the ACCC which said there was no link between litigation rates and increased premiums.

It ignored the Trowbridge actuarial data it commissioned, which struggled to find any link and concluded that 'there is no evidence of "an explosion of litigation' in recent years" (Report to Heads of Treasury, 30 May 2002).

The states ignored or did not seek information from the District and County Court registries which showed falls in litigation rates (save in New South Wales where a change in the dollar jurisdiction of the court transferred litigation from the Supreme Court).

They were not shown insurance company data, which, although apparently suggesting an increase in claims notified, showed a marked decline in actual claims per policy written.

Never let the facts get in the way of a political reaction to media demands for action!

So, all of a sudden, right around the country, state and Commonwealth governments enacted laws to reduce litigation and damages awards.

For insurers, these changes represented an immediate and massive benefit to the bottom line. If governments had extracted undertakings that the benefits must be passed back to those paying the premiums, this would not have been such a successful campaign.

If they had legislated requirements that the changes would be repealed if the benefits were not passed back, the campaign would only have produced a short-term gain. But, of course, no such undertakings have been sought or given, so that with already falling litigation rates, the removal of massive numbers of potential future claims, and an improving investment market, happy days are here again, and they are here to stay...until the next cyclical downturn, as has occurred every 20 to 30 years or so, at which time the campaign can be dusted off and wheeled out again to a new generation of gullible politicians and a willing media, and a few more of the common law rights we have held since bestowed by Magna Carta can be removed.

Even if you don't regard the loss of many people's rights to claim compensation as significant, there are a few pretty significant problems with this rush to 'reform'.

MEDICARE AND CENTRELINK

The health budget in Australia is already stretched to breaking point. Hospitals and health services are underfunded. Indigenous health is a national disgrace. Governments still refuse to pursue tobacco companies for the treatment costs of tobacco-related illnesses, despite so much of the healthcare budget being spent on such illnesses. The health budget needs every cent it can get.

If the person's right to sue is excluded by legislation then governments pay the treatment costs and cannot recover them. Demand does not decrease, so it is the taxpayers who suffer with higher taxes or decreased services.

The same applies to Centrelink. Without the right to claim compensation, Centrelink benefits will be all that many injured people will receive and once again the taxpayer will be the loser.

> "If insurers are genuinely aggrieved at having to pay damages from the minimal premiums taken from negligent companies 30 and 40 years ago, sue the companies for recovery."

NO-FAULT SCHEMES

One of the by-products of the campaign for tort reform has been a renewed push for a no-fault national accident insurance scheme, an idea first proposed and rejected about 30 years ago after the Woodhouse Inquiry, and revisited every time there is a push for further restrictions upon people's rights to sue

Doctors are big on it (until they understand that the criminal law must replace the common law as a regulator of their conduct), so are workers' compensation authorities.

The New Zealand scheme is thrown up as an example of how it could work, ignoring the billions in unfunded liabilities, the gradual reduction in benefits, the explosion in workplace injuries that accompanied it and the human cost to a society where a child electrocuted by a roadside generator receives nothing for horrific scarring and lifelong trauma, and an elderly man, permanently paralysed after falling down unlit stairs in a public place, received NZ$14,000 in criminal reparation.[1]

The one thing that is missing from a universal no-fault government scheme is insurance companies. Push this tort reform barrow too far and there will be no more insurance markets in personal injuries. The momentum you have generated for a no-fault scheme is ▶

accelerating. It may already be too late with several federal government ministers warming to the idea.

LOSS OF THE COMMON LAW AS A REGULATORY MECHANISM

A few weeks ago, Kraft and McDonald's announced they were changing the way they do business. Consumers were going to be better informed, products were going to be healthier, portions smaller. All in all, a great result for individual consumers and a benefit to society generally. And what was it that drove these changes? It was the perceived threat of common law damages claims.

It is the same reason we don't have asbestos in our workplaces any more, why drugs are put through rigorous testing and review before humans can consume them, why churches are facing up to issues of sexual abuse of children, why Australian mining companies in third world nations are suddenly giving some thought to the environments in which they work, why our children play in playgrounds where they fall on woodchips or rubber rather than tar and cement, why doctors have to tell you about some of the risks you face before they operate on you.

Without the common law as an incentive for change, all you have left are the blunt and cumbersome instruments of government control and the criminal law.

ASBESTOS

I want to conclude by saying something about asbestos claims.

Let me declare an interest. I have acted for the victims of negligent asbestos exposure for 20 years as a solicitor and as a barrister. I consider the epidemic of disease, pain, suffering and loss that such exposure has precipitated to be one of the most shameful things in this country's history. The general damages sufferers receive is small compensation for what they and their families must endure.

Allianz Insurance is the insurer for some of James Hardie's asbestos liabilities. The ICA has written a submission on the insurer's behalf, which calls on governments to legislate for, *inter alia*, a no-fault scheme for asbestos sufferers, exclusion of some heads of damages and caps on damages for general damages and gratuitous attendant care.

The submission is obviously self-interested. It is based on erroneous factual and legal assumptions, and is misleading and tendentious. It does the ICA no credit at all to be associated with it.

Most galling is the suggestion in the submission that the proposed changes should be made for the benefit of the sufferers themselves.

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The fight to achieve justice for the victims of asbestos disease was one of the hardest fought in Australian legal history. In the face of denials of the most appalling negligence, long and difficult trials had to be run. One of them remains the longest civil case in Western Australia and one of the longest ever in Australia, at 132 days. Many of the plaintiffs died before such epic fights could be concluded.

Where were the insurance companies then? Where were the calls for support for the sufferers of asbestos-related disease? Where were the demands for a no-fault scheme in which liability would be admitted?

I'll tell you where the insurers were then. Standing shoulder to shoulder with companies like CSR and Hardies, fighting tooth and nail to defend what was ultimately proven to be indefensible.

Let me offer a suggestion. If insurers are genuinely aggrieved at having to pay damages from the minimal premiums taken from negligent companies 30 and 40 years ago, sue the companies for recovery. Don't try and take the damages from the asbestos sufferers as Allianz and the ICA propose. After all, the companies have been proven to have known since 1922 of the risks to which they were exposing people.

I will conclude by reading to you a letter written to *The Australian* newspaper by the wife of a young man dying of mesothelioma in the hope that it will give you an insight into the human perspective of this issue.

'With the lack of oxygen as the mesothelioma strangled his left lung, [Garry] found it hard to speak. He became nauseous, his hair fell out, he coughed constantly, spitting up white frothy fluid and lost weight until he looked skeletal.

'I remember every detail of Garry's last five hours with us and they continue to haunt me and cause me great pain and grief...The [last] morning he was making strange noises and the nurse told me he was "running out of puff"...I sat next to him and cried my heart out, even though I knew this moment was inevitable, I was not prepared when it happened. At one stage he looked at me, and tears rolled out of his beautiful eyes. As I sat close to him I was completely saturated by his urine when his bladder emptied and I was distraught to see my once proud and handsome husband had been robbed of all his dignity by this horror of a disease.' PL

Endnote: 1 *Otago Daily Times*, 4 July 2003.