Federal court upholds Lipovac decision

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On 4 June 1998, a unanimous Federal Court (Miles, Heerey and Madgwick JJ) upheld the decision of ACT Supreme Court Judge Terence Higgins awarding over $7.3 million in damages to Tom Lipovac.

The Lipovac case has received considerable - and predictable - attention in the medical press. It was said by Dr Black's medical defence organisation, United Medical Protection (UMP), that Judge Higgins ignored the expert evidence, ignored the law and decided the case on the basis of sympathy for Tom's plight. The verdict was also said to be much too high and that the Lipovac case signalled a further escalation in insurance costs and the "litigation crisis".

Case summary

The Judge found that the 100mg suppository of Aminophylline prescribed by Dr Black "caused or contributed to cause" a "turn" 20-30 minutes later and a chain of events leading to hypoxic brain damage.

When locum general practitioner Dr Gavranic came to the Lipovac home some 20 minutes after Tom collapsed, he administered 75mg of intramuscular Phenobarbitone. He assumed that Tom had had a febrile convulsion because, as he told the Court, "common things happen commonly".

Roughly 30 minutes after the Phenobarbitone was given Tom suffered severe cyanosis en route to the hospital before being resuscitated in the emergency department some 10 to 15 minutes later. X-rays confirmed aspiration pneumonia.

The case for the defence was that Tom's brain damage was due to a prolonged (20-minute) febrile convulsion. It was impossible, according to Dr Black's chief witness, for the Aminophylline to have "caused or contributed to" the brain damage. That witness was an American pharmacist.

In upholding Judge Higgins' decision, the Federal Court emphasised the following:

1. Dr Black's American expert was a consultant to a US Aminophylline manufacturer and held stock options in the company and may not have been objective;
2. Opinions in favour of a connection between the Aminophylline and the brain damage were provided by Emeritus Professor John Beveridge (paediatrician) and Prof Richard Day (clinical pharmacologist) of Sydney called on behalf of the plaintiff;
3. Several defence experts would not rule out a connection between the Aminophylline and the chain of events leading to the brain damage;
4. Not one general practitioner who gave evidence in the case - including those called by Dr Black - ever prescribed Aminophylline suppositories for children or knew anyone who did;
5. The plaintiff's damages calculation was not successfully challenged by the defence and in some respects the amounts awarded may have been low.

Appeal to the High Court

Not surprisingly, UMP believes that the three Federal Court judges got it wrong, too. An application has been filed seeking leave to the High Court.

The first part of the application asserts that the Federal Court erred in applying the well settled principles in the High Court decision in *Abalos v APC* (1990) 171 CLR 167 to the *Lipovac* case. That case stands for the proposition that an appeal court ought not to interfere with the findings of a trial judge where these were made in whole or in part on the assessment of the credibility and demeanour of witnesses.

UMP says that the evidence of its chief witness, who the trial judge considered "an advocate for aminophylline", ought to have been preferred.

UMP also maintains that Australia should introduce a rigorous test of scientific reliability before accepting or giving weight to scientific evidence. It is seeking to have the High Court follow the trend in the US begun with *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 113 S Ct 2786. That case has been relied upon to restrict the kind of evidence that goes to juries in "toxic tort" cases in an effort to eliminate "junk science" from the courtroom.

In Lipovac UMP argues that the question of whether aminophylline was responsible for Tom's "turn" ought to have been decided on the basis of pharmacological evidence only. But there was plenty of expert evidence, which the Federal Court said the trial judge was entitled to accept, that a connection between aminophylline and the "turn" was established on clinical grounds. Considering the sequence of events and the known propensity for aminophylline to cause a whole spectrum of toxic reactions in children the clinical opinion that aminophylline was probably responsible was open to the trial judge to accept. One would think it would be difficult to characterise medical expert evidence based on clinical grounds as "junk science" but this appears to be what UMP wants to do.

UMP also disputes the finding of negligence against Dr Black for having prescribed the aminophylline in the first place. The defence relied on its American pharmacology expert and others well-versed in hospital medicine to say that aminophylline was appropriate. But no general practitioner gave such evidence. All of the general practitioners called were wary of aminophylline generally and never gave aminophylline suppositories to children because they were worried about the well-known toxic effects.

There is a terrific irony in this. UMP has stridently objected to courts accepting the evidence of specialists in cases involving the standard of care of general practi

tioners. But in this case UMP would have the courts defer to the opinions of specialists over general practitioners. The Federal Court followed its own unreported decision in *Koziol v Anasson* (18 August 1997, unreported) and held that the trial judge was correct in preferring the evidence of the general practitioners in this case.

Help from ATLA

It is worth mentioning that the *Lipovac* case would never have seen the light of day were in not for the assistance offered by ATLA. Not only did ATLA supply critical medical information about the dangers of aminophylline, it also provided hints on how to cross-examine Dr Black's chief witness - who often gave pro-aminophylline evidence in similar cases in the US - about his involvement in the aminophylline industry. The importance of plaintiffs' lawyers working together cannot be overstressed.

Conclusion

The repercussions of the *Lipovac* case are already being felt. At over $7.3 million it is believed to be the highest medical negligence award ever in Australia. It has set the benchmark for brain damage claims at a new level. I am told that another medical negligence claim involving a brain-damaged child settled out of court in Victoria recently for more than $6 million.

Hopefully, and perhaps more importantly, *Lipovac* will send the message to the defence that these cases should be settled rather than fought. The total bill to UMP - which was ordered to pay not only the plaintiff's costs of a 40-day trial but also those of the successful co-defendants - will easily exceed $10 million. The plaintiff offered to settle for $2.2 million long before the trial began. At that time the co-defendants would have been willing to contribute to a settlement but UMP elected to battle on. And they still do.

I will report further with the outcome of the leave application to the High Court. ■

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APLA Membership at 31 August 1998

NSW	504
Queensland	319
Victoria	227
South Australia	70
Western Australia	35
ACT	19
Northern Territory	16
Tasmania	12
International	50
TOTAL	1,252