

# The APLA Update

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## Lipovac Judgement Tops \$7.5 Million

**David Hirsch**

In what is believed to be the largest medical negligence verdict in Australian history Justice Terence Higgins of the ACT Supreme Court awarded 21 year old Tom Lipovac \$7,583,768.55 compensation as a result of the hypoxic brain damage he suffered at the age of 14 months.

The trial commenced in December 1994 and consumed some 40 hearing days over two years. The judgment on liability was handed down on 13 September 1996 at which time damages were provisionally assessed at \$5.71 million. After further evidence on funds management and home renovations and submissions on interest and other matters, Justice Higgins increased the award to over the \$7.5 million mark in a decision handed down on 17 January 1997.

Dr Peter Black, a member of United Medical Defence (formerly the NSW Medical Defence Union) was ordered to pay the plaintiff's costs and Sanderson orders were made with respect to the costs of the successful defendants drug manufacturer HA Milton Holdings of Adelaide, general practitioner Dr Tom Gavranic and the Australian Capital Territory which was Dr Gavranic's employer at the time. The total bill to UMD will easily exceed \$10 million after payment of the judgment, the other parties' costs and its own legal bill.

### The Facts

In August 1977 Tom Lipovac, then 14 months old, had a chest cold. He was taken to see his general practitioner, Dr Black, who recommended Panadol, steam to loosen the cough, Moxacin (an antibiotic) in case the illness was bacterial in origin, Maxalon in case of vomiting and Ventolin syrup for the dyspnoea. He also prescribed 100 mg of Aminophylline in suppository form to be taken twice daily "as needed for the wheeze".



*Tom Lipovac.*

Tom was given the Moxacin and Ventolin and then the Aminophylline. Twenty to thirty minutes later he collapsed, vomited and fell into unconsciousness. The on-call doctor, Dr Gavranic attended the house and formed the view that Tom was at the "tail end" of a prolonged convulsion. He made a note of "cyanosis" (the bluish colour which indicates a degree of hypoxia). He injected 75 mg of phenobarbitone (an anti-convulsant) and called an ambulance.

Tom's mother accompanied him to Royal Canberra Hospital where, part way through the trip, she said that Tom's lips and fingernails "went blue". At this point the ambulance officers activated the siren and flashing lights and sped off to the hospital. Tom was resuscitated in casualty and taken to intensive care with marked respiratory depression. X-rays demonstrated pneumonia, probably from aspirating vomit or mucus.

Tom's behaviour changed from that night onward. He



started having epileptic seizures. He later developed an eating disorder and is now fed through a tube inserted directly into his stomach. He needs 24-hour care and modifications to his home. He has the mental age of a two or three year old. His life expectancy was agreed, for the purposes of the litigation, to be to age 60.

### The Argument

The Plaintiff's case was that the administration of Aminophylline either alone or in combination with Phenobarbitone, caused or contributed to cause hypoxic brain damage.

The case against HA Milton Holdings, the manufacturer of the Aminophylline suppository, was based on insufficient product literature. The claim was brought in negligence and under section 52 of the Trade Practices Act.

Justice Higgins found that the literature was woefully inadequate and the company was therefore negligent. But he also found that Dr Black did not rely on this literature in prescribing the Aminophylline so causation was not proven.

Against Dr Black it was alleged that Aminophylline was not the appropriate treatment for Tom's mild to moderate breathing problems and, in any case, 100 mg was an excessive dose.

Justice Higgins agreed.

The case against Dr Gavranic was that the Phenobarbitone was not indicated because his diagnosis of a seizure was incorrect. It was argued that Tom's "turn" after being given the Aminophylline was a recognised instance of Aminophylline toxicity (side effects include pallor, obtunded consciousness, vomiting, twitching) but it fell short of a seizure which is usually (but not always) associated with higher doses of Aminophylline. Tom's parents denied seeing overt convulsions.

Justice Higgins accepted Dr Gavranic's "learned observations" over those of Tom's parents. He found that Tom's "turn" was most probably an Aminophylline-induced seizure. Since Phenobarbitone was at the time an appropriate drug for controlling seizures Dr Gavranic was found not negligent.

### The Backlash

The Lipovac case joins the distinguished company of the O'Shea case, the Kalikorenos case and *Woods v Lowns* as being yet another example offered by the medical defence organisations of "litigation

madness". United Medical Defence Chairman Dr Richard Tjiong has cited the Lipovac case as being another instance of judges doing "social justice" out of sympathy for the Plaintiff rather than "proper legal justice". It was also suggested that Justice Higgins did not give proper weight to defence expert evidence and deferred to the Plaintiff's expert evidence.

In reply to these allegations, consider this:

1. There were strong warnings in standard paediatric texts since the late 1960s and also in the Medical Journal of Australia as late as 1977 against the use of Aminophylline suppositories for small children. If used at all, the recommended dose was between 3 and 5 mg/kg to avoid toxic side effects. Dr Black did not weigh Tom but estimated his weight to be around 12 kg. His mother thought he weighed 10 kg. He was not weighed in the hospital. On any reckoning the dose given to Tom was above the recommended maximum in the medical literature.
2. Dr Black admitted that he was unfamiliar with the literature and could not recall reading much if anything about Aminophylline since he qualified as a doctor in the mid 1960s. The only literature he did have which he might have consulted was a hospital emergency handbook. This referred to giving Aminophylline suppositories to arrest an acute asthma attack. That handbook was, in 1977, 13 years out of date!
3. Dr Black's solicitors specifically directed one of their paediatric experts to say nothing in his report about whether the dose of Aminophylline was excessive.
4. Dr Black's general practitioner expert wrote that his expertise was insufficient to pronounce on the question of proper dosage. This is a remarkable proposition in a case where a GP is called to give evidence to support another GP alleged to have given an excessive dose of a drug.
5. The Plaintiff's general practice experts said that reasonably informed GPs exercising ordinary skill and care in Canberra in 1977 were not giving Aminophylline suppositories to young children at all because of the well-known risk of toxic effects. In fact, no GP called by any party could recall ever prescribing Aminophylline suppositories for children or knew of a doctor who did. The consensus opinion amongst the GP experts was that if a patient was ill enough to need Aminophylline, the patient should be sent to hospital.

6. On causation Dr Black's solicitors argued that absorption of Aminophylline from suppositories was notoriously slow and could not therefore have provoked Tom's turn twenty to thirty minutes after the suppository was given. But the product literature from HA Milton (which was silent as to proper dosage and warnings) stated that their product was a "rapid absorption" formula with relief in 5 to 10 minutes.
7. Dr Black's solicitors called an American Aminophylline expert to support the proposition that it was impossible for any Aminophylline suppository to reach therapeutic levels let alone toxic levels in less than a matter of hours. It emerged in cross-examination that he had not been shown the HA Milton product literature.
8. It also emerged in cross-examination that Dr Black's American Aminophylline expert was a consultant to Aminophylline manufacturers in the US, was a shareholder in a US Aminophylline manufacturing company and was a regular defence witness in other cases involving Aminophylline. (We have our contacts in ATLA to thank for this information.) Justice Higgins was concerned that this expert was really "an advocate" for Aminophylline.

The Plaintiff called only four expert witnesses. The defence called fifteen. But far from accepting the Plaintiff's experts and rejecting those of the defence, Justice Higgins rejected the hypothesis of the Plaintiff's principal paediatric expert (that Phenobarbitone played a role in the hypoxia) and accepted the evidence of many of the defence experts.

Those defence experts said that toxic levels of Aminophylline could have been reached with rapid absorption of the drug and could have provoked a seizure causing brain damage. Justice Higgins was particularly impressed by the comments of one defence expert who said:

*"The troubling feature is the clear history in the scientific literature attesting to the ability of [Aminophylline] to produce CNS injury of the very nature that this patient appears to suffer."*

Dr Black had already admitted in a Notice to Admit Facts and in his Answers to Interrogatories that Tom's brain damage occurred on the night in question. His theory was that Tom had had a febrile convulsion and that this caused the brain damage. In fact, the expert evidence was that febrile convulsions are almost always benign (unless they continue for an hour or more) and occur with very high fevers (Tom had a low grade fever) at the beginning of an illness (Tom had been ill for three days). Justice Higgins found that Tom's seizure was not a febrile convulsion.

## Indemnity Costs

The Plaintiff offered to settle the claim for \$2.2 million in October 1994, two months before the trial began. The offer was rejected and (the usual) counter-offer of a dismissal with each party bearing their own costs was put by Dr Black.

Justice Higgins found the Plaintiff's offer very reasonable but found that, in the circumstances of such a complicated case, Dr Black's refusal to accept the offer was not proven to be unreasonable. It was significant, he said, that there were two other defendants and it was not known whether they – or Dr Black – were responsible for not accepting the Plaintiff's offer.

## Appeal to the Federal Court

Dr Black's solicitors lodged an appeal to the Federal Court from Justice Higgins judgment of 13 September 1996. The Notice of Appeal runs some 24 pages and includes an appeal against virtually every finding made at trial. We anticipate a further appeal on quantum. For our part we are considering an appeal on the question of indemnity costs.

*David Hirsch, a partner at Cashman & Partners, is the solicitor for Tom Lipovac.*

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