

Lack of legal aid discourages advances in negligence justice

APQ v Commonwealth Serum Laboratories Ltd & Commonwealth of Australia
Sean Millard, Rennick Briggs, Melbourne

In *APQ v Commonwealth Serum Laboratories Ltd & Commonwealth of Australia* (Supreme Court of Victoria), APQ was first treated with a fertility hormone manufactured from human pituitary glands in 1980 and, along with 2,100 recipients, remains at risk of contracting Creutzfeldt-Jakob Disease (CJD). APQ issued common law proceedings for the psychiatric injury she suffered when she learned that she was at risk of contracting CJD. On 2 April 1997, APQ accepted a proposal of settlement from the Defendants five days prior to her trial commencing on 7th April 1997.

APQ had applied for legal aid from the Commonwealth Attorney General's Department in May 1995 under the Cases of National Importance Scheme. APQ's circumstances clearly came within the ambit of that Scheme. However, that Department refused to make a decision on the application until after the Federal election in March 1996. Upon the Liberal Government being elected to office, the Scheme was reviewed and, eventually, new guidelines were released for the Scheme which is now known as the Public Interest and Test Case Scheme. These new guidelines specifically excluded common law actions against the Commonwealth from legal aid funding. In August

1996, APQ's application for aid was refused. An appeal was lodged, however we were notified on 20th December 1996 that it was rejected.

All avenues for funding of APQ's trial were explored but unsuccessful. Consequently, APQ was placed in an intolerable position of having insufficient funds to cover trial disbursements, such as daily court fees, transcript costs and jury fees which would total approximately \$170,000.00 during a 15 week trial. An application to the Prothonotary's Office of the Supreme Court for the waiver



of daily trial fees was unsuccessful on the grounds that APQ had assets in excess of liabilities, ie, unencumbered half share in a typical family home and car. A further application to the Trial Judge seeking an order that the Defendants pay the costs of the Plaintiff's transcript was still pending at the time of settlement but was unlikely to be successful. An application to the recently launched Victorian Law Aid was likewise unsuccessful.

APQ had a strong case on liability and injury and was prepared to be the "test case". APQ had previously been advised of the risks of an adverse cost order in the instance that she failed. At all times the Defendants had indicated their intention to

appeal an adverse result at trial to the High Court.

APQ accepted the settlement proposal which has now been extended to our other clients as follows:

1. The Commonwealth, in the event if APQ contracting CJD as a result of her treatment with hPG, will pay an amount of compensation to her or her legal representative.

2. Compensation is to be assessed in accordance with the principles of common law assessment of damages as at the date that APQ or her legal representative gives notice to the Commonwealth that she has been diagnosed as having contracted CJD.

3. The assessment of damages will not include any allowance by way

Continued on page 20...

Contents

Arbitrations: failure to call evidence ..	3
Contravention of Credit Act disclosure requirements	4
Medical negligence – failure to warn .	4
Structured Settlement and Interim Damages under Motor Accidents Act 1988	5
Summary of report on the inquiry into NSW Motor Accidents Scheme ...	8
Motor accident claims – interim payment of damages	10
No fault schemes and the Trade Practices Act	10
Legal Aid Inquiry submission	12
AMA Guides	23

lation including the following: enhanced rehabilitation services for injured workers; vocational services for injured workers unable to return to employment for the purposes of actually seeking alternative employment (we have suggested that Mr Kierath set up a separate department within his Ministry to deal with this); high medical fees and charges charged by medical service providers under the workers' compensation system (with the result that the current statutory limit of \$31,150 for medical benefits is easily exhausted).

I call on all APLA members particularly those in WA to contact me with suggestions for further refinements and improvements in the system such that we can improve the lot of the injured worker.

Please write to me at Friedman Lurie Singh, GPO BOX K862 Perth WA 6842 or by facsimile (09) 421 1953.

Sukhwant Singh is President of the WA branch of APLA.

Lack of legal aid

Continued from page 1

of compensation for any damages, costs or expenses paid or payable to the Plaintiff or her family pursuant to the Human Pituitary Hormones Trust Account Trust Fund. This Fund was announced by the former Minister for Health in 1994 to provide for medical costs, support and counselling in the instance that a recipient contracted CJD.

4. The Defendants agree to pay APQ's legal costs. The settlement result was not the objective of the litigation.

The litigation produced a result which provides some satisfaction in that our clients will not be required to establish liability if they contract CJD and such claims will proceed as an assessment of damages. The settlement proposal allows clients to avoid the consequences of the proceedings in the UK last year where the High Court held that if a hormone recipient contracted CJD, having been treated

either prior to or both before and after 1st July 1977, then common law damages were denied. However, if treated after 1st July 1977, then the UK Defendants had been negligent and damages were recoverable. We understand that both parties in that UK litigation have lodged appeals against various aspects of the judgment.

It was clear that the Commonwealth feared that a decision in favour of APQ would establish a precedent with consequences broader than just for CJD litigants.

Our clients who elect not to accept the settlement proposal are free to proceed with their litigation.

APLA's public support of our criticism of the inequitable position APQ was placed in without legal aid, assisted in flushing out the settlement proposal. When no legal aid is available and contentious issues such as liability for psychiatric injury are in question, advances by the law to accommodate modern problems will only continue to occur slowly and not without risk and cost to plaintiff lawyers.

APLA Exchange – can you help?

We act for a plaintiff who has a claim against a medical practitioner. The **Medical Defence Union** has indicated that they would be indemnifying the Doctor until recently when they advised that because the Doctor has died they will only indemnify to the value of the estate which they tell us is significant.

Any practitioners who have had a similar experience please contact Chris Wright at Murray Lyons & Co, on (070) 51 4477.

We represent a client who suffered severe burns when undiluted Dettol was applied to her skin. We have had the Dettol analysed, and the analysis is normal.

We would appreciate an exchange of information with anyone who has conducted a similar claim as we believe that the **Dettol** must have reacted with some other substance which was present, as it had

been used undiluted on our client before without adverse effects.

If any member can help would you please contact Jennifer Eastick or Ric Alexander, Cahills, DX 55014, Bendigo, Ph: (03) 5443 9344.

We request information on exposure of foetus to **Debendox**, a morning sickness pill prescribed to mothers during pregnancy in the early 1980's resulting in birth of children with defects such as blindness or deafness.

Contact Tiffany Laslett at Friedman Lurie Singh, GPO Box K862 Perth WA 6001.

Ph: (09) 325 6133, fax: (09) 421 1953

We would be interested in receiving any in-

formation in relation to the trial of **Betamethasone** and **TRH (ACTOBAT)**, which I understand took place in Australia between 1990 and 1993. I am particularly interested in whether there have been any published results.

Please contact Thomas Sherley at Hansons Solicitors, PO Box 356 Wollongong East, NSW 2520, DX 5152 Wollongong. Ph: (042) 264 266, fax: (042) 280 091



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