Legal clarification of "loss of chance of a better outcome" in Australia

To the Editor: Bhatia and Tibballs[1] claim that the High Court ruling in *Tabet v Gett*[2] that removed "loss of chance" as a possible course of action by patients is "to the advantage of doctors". They end with a note of regret and hope that this means of litigation might be revived.

However, the authors fail to convey the complexities of the case. The patient, a 6-year-old girl, presented on 11 January 1991 after a recent severe varicella infection, and a diagnosis of encephalitis was considered. On 13 January, there was an episode where she stared and was unresponsive and her right pupil transiently dilated. There was no papilloedema or other evidence of raised intracranial pressure. A lumbar puncture was performed. Twenty-four hours later, she had a seizure. A computed tomography (CT) scan showed a medulloblastoma. It was estimated this had been present for 2 years, and it was associated with hydrocephalus and cerebrospinal fluid seeding.

Bhatia and Tibballs implicate the lumbar puncture, but the original trial judge rejected the claim that the lumbar puncture was responsible for any brain damage, and this was never challenged. However, Dr Gett was found negligent in ordering a CT scan on 14 January rather than 13 January. In making this decision the trial judge had to take into account many opinions, including those of the then neurosurgery registrar, who appeared for the plaintiff, and the neurosurgery consultant, who appeared for the defence.

In *Gett v Tabet*,[3] the judges on appeal described the process that led to the "loss of chance" position as "plainly wrong". In the subsequent High Court review,[2] all six judges agreed. They concluded: "It would involve holding the respondent liable for damage which he almost certainly did not cause". A plaintiff lawyer might regard this decision as "to the advantage of doctors", but thankfully there is more sense in the legal fraternity.

More than 20 years have passed and in both recent judgments, costs have been awarded against the patient's family. This case provides a compelling argument for a universal disability insurance scheme.

Padraic J Grattan-Smith Paediatric Neurologist

Southern Neurology, Sydney, NSW.
pgrattan-smith@iinet.net.au

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1 Bhatia N, Tibballs J. Legal clarification of "loss of chance of a better outcome" in Australia. *Med J Aust* 2012; 196: 167-168.
2 *Tabet v Gett* [2010] HCA 12.
3 *Gett v Tabet* [2009] NSWCA 76. ❑