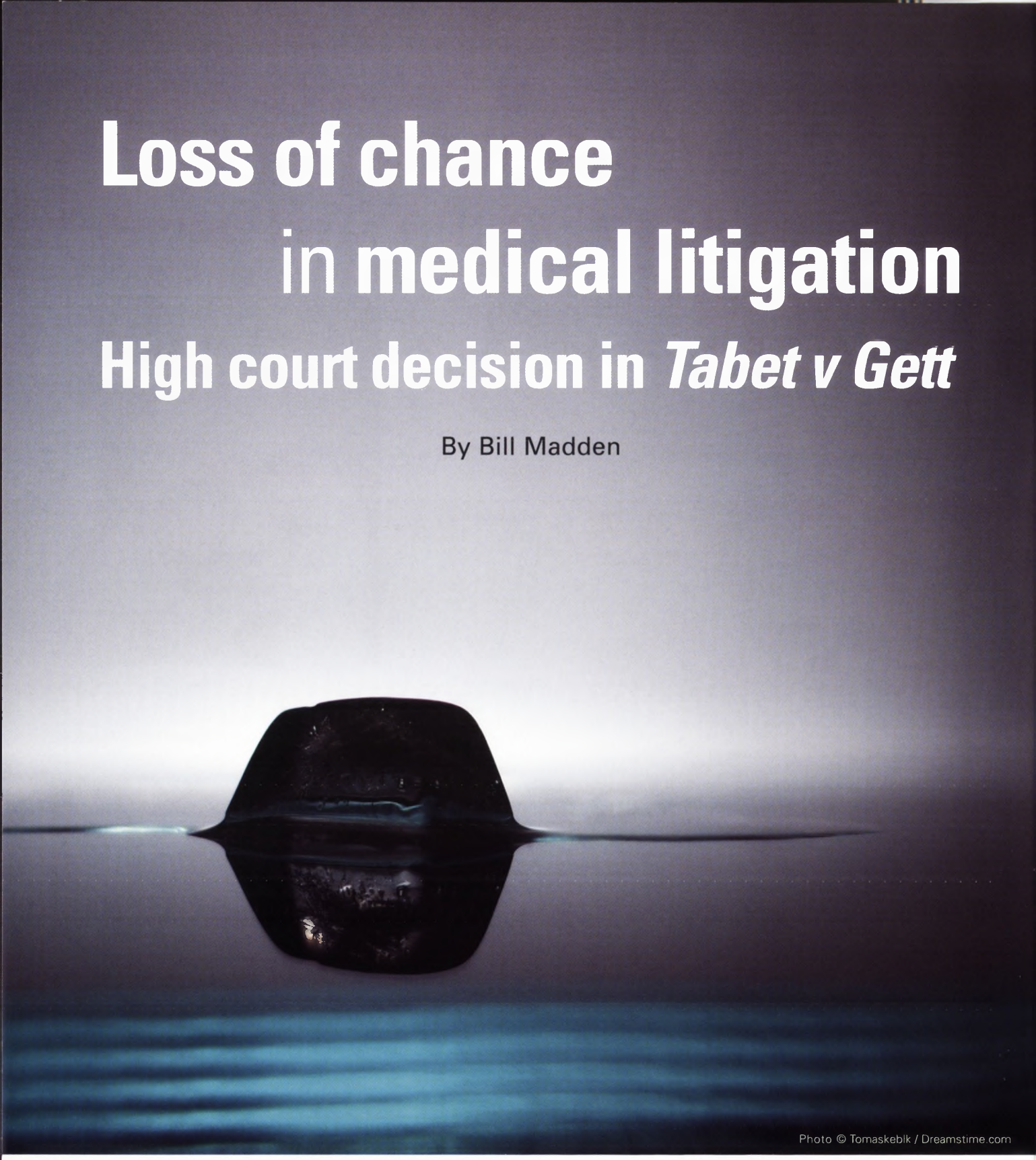
Loss of chance in medical litigation

High court decision in *Tabet v Gett*

By Bill Madden



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The wisdom of allowing compensation for loss of chance in a medical negligence context has been a significant question, described by Lord Nicholls in *Gregg v Scott* [2005] 2 AC 176 as one 'which has divided courts and commentators throughout the common law world', that division deriving 'essentially from different perceptions of what constitutes injustice in a common form type of medical negligence case'.[1]

In Australia, it was not until the judgment in *Tabet v Gett* [2010] HCA 12 was handed down on 21 April 2010 that any substantive comment was available from the High Court. It now appears, subject perhaps to some limited exceptions, that damages for the loss of a less than even chance of a better medical outcome are not available in Australia.

The key question that had been put to the High Court was: Does the common law of negligence in Australia recognise a less than even chance of avoiding an adverse health outcome as an interest of value to a patient, the loss of which, by reason of a doctor's negligence, can be compensated as damage suffered by that patient?

THE TREATMENT OF REEMA TABET

Six-year-old Ms Reema Tabet had an undiagnosed tumour in her brain called a medulloblastoma. The medulloblastoma had (unknown to anyone) been present for some years.

Ms Tabet had come under the care of Dr Maurice Gett on 11 January 1991, with a resolving chicken pox rash and a history of headache and vomiting since at least 18 December 1990. Dr Gett was concerned that she may have meningitis and organised for her to be admitted to hospital on that day. On 13 January 1991, there was an incident at about 11.00am when Ms Tabet was observed by her father to be staring and unresponsive. She was later noted to be irritable and drowsy and complaining of headache. Her pupils were noted by nursing staff to be unequal and the right pupil was not reactive. Dr Gett was contacted and he ordered a lumbar puncture.

At trial[2] Studdert J, by reference to the expert evidence, held that in the circumstances an urgent CT scan should have been performed following the incident at 11.00am on 13 January, and that the failure to do so was a breach of Dr Gett's duty of care. Had the CT scan been done, the medulloblastoma would have been detected and treatment would have followed. However, that did not occur and it was not until the following day, on 14 January 1991, at about 11.45am, that Ms Tabet was observed to be staring and unresponsive with pupils deviating to the left. Dr Ouvrier, a neurologist, was called and he ordered a CT scan, which revealed the medulloblastoma.

Dr Maixner, the registrar in neurosurgery, conducted an examination shortly after the CT scan was completed and noted decerebrate posturing and extension of limbs. Dr Maixner inserted a CSF drain at about 3.10pm. Ms Tabet's condition improved with CSF drainage. Surgery to remove the tumour was conducted by Mr Johnson, a neurosurgeon, two days later.

The brain damage that occurred on 14 January 1991 was associated with increased intracranial pressure. The brain damage may have been avoided, or reduced, had some reasonable attempt been taken to relieve that pressure before the deterioration occurred. However, the increased >>

intracranial pressure was not the sole cause of the very substantial brain damage suffered by Ms Tabet. The tumour and hydrocephalus had to be considered as well as the surgery and subsequent radiotherapy. Studdert J attributed 25 per cent of Ms Tabet's overall damage to the deterioration she suffered on 14 January 1991.

Whichever treatment would have been undertaken, Ms Tabet was deprived of the chance of having such treatment by reason of Dr Gett's breach of duty. Even if there had been no breach and reasonable treatment had been provided, it was not *probable* that Ms Tabet would have avoided the relevant part of her brain damage. Rather, the trial judge found that she was deprived of a less than even chance of a better outcome. That chance lost was quantified at 40 per cent (of 25 per cent of the overall damage).

THE NSW COURT OF APPEAL: *GETT v TABET*[3]

The Court of Appeal took a different view to the trial judge's quantification of the chance lost at 40 per cent (of the 25 per cent overall damage).

However, more importantly, the Court of Appeal ultimately decided (contrary to the earlier key decision of *Rufo v Hosking* (2004) 61 NSWLR 678) that a less than even chance of avoiding an adverse health outcome should not be compensable under the law, pending of course the consideration of that issue by the High Court. A review of the pathway leading to the decision in *Gett v Tabet* follows.

EARLIER APPROACHES TO LOSS OF CHANCE IN AUSTRALIA

High Court

Prior *obiter* comment by the High Court appears in medical cases that ultimately were not decided on the basis of loss of chance, such as *Chappel v Hart* (1998) 195 CLR 232.[4]

In *Naxakis v Western General Hospital*, Gaudron J (while noting that it was not necessary to decide the point), rejected the notion (at least in the circumstances applicable in *Naxakis*), that a plaintiff can recover damages on the basis that what had been lost was a chance of successful treatment.[5] Callinan J expressed the opposite view, and concluded that there was room for operation of what he described as the loss of chance rule, although he noted that there may be some problems with its application in medical negligence cases.[6]

Western Australia

In Australia, the first clear appellate confirmation of an award of damages for loss of chance in a medical negligence context was in WA, with the Full Court decision, *Board of Management of Royal Perth Hospital v Frost* (WA SC FC, 26 February 1997, unreported). The plaintiff was awarded damages, notwithstanding that administration of thrombolytic therapy may have only reduced heart muscle damage, following his presentation to hospital with chest pain. The patient had lost a valuable chance of getting some treatment that may have improved his position.

Victoria

The second appellate court consideration of loss of chance in a medical negligence context arose some four years later, in the better-known decision, *Gavalas v Singh* (2001) 3 VR 404. There, the appellate court unanimously returned the matter for retrial, holding that there was inadequate allowance made in the judgment for the chance that if a diagnosis of a brain tumour had been made 10 weeks earlier, hence allowing earlier surgical intervention, it would have led to a better outcome for the plaintiff.

New South Wales

In *Rufo v Hosking* (2004) 61 NSWLR 678, the NSW Court of Appeal allowed for and constructed general principles for recognition and valuation of loss of chance of a better medical outcome. The claim concerned adverse results from negligent treatment that made the side-effects inherent in the treatment worse or – put in loss of chance parlance – the plaintiff lost the chance of a better medical outcome.

Decisions in NSW after *Rufo v Hosking* but before *Gett v Tabet* evidence no apparent difficulty in applying or distinguishing *Rufo*, nor in evaluating and critiquing the decision.[7] In *Halverson v Dobler*, the plaintiff succeeded in establishing that he had a 65 per cent chance of avoiding a catastrophic outcome if the defendant had acted reasonably and ordered necessary investigations to diagnose his condition. (McClellan CJ at CL held that ordinary principles of causation applied, given that the chance was more than 50 per cent, and he awarded the plaintiff 100 per cent of his damages.)

THE ARGUMENTS FOR COMPENSATING FOR LOSS OF CHANCE

The key submission put to the High Court for Ms Tabet was that consideration of her interest in the careful performance by Dr Gett of his professional work while treating her in hospital, intuitively and as a matter of fundamental principle, suggests that Ms Tabet lost something that should sound in common law damages as a result of that negligence.

Well-regarded legal academics have argued that protection of the vulnerable should be recognised as a core concern of tort law, perhaps its golden thread.[8] It is difficult to contemplate a state of vulnerability more in need of protection than that of a person with a condition that is life-threatening and with an only moderate to poor prognosis.

It was, therefore, argued that it would be misleading and wrong to regard such a patient's interests as comprising only the probability of being cured or avoiding injury. The patient's interest is to have the prospect of alleviating her illness or condition protected or enhanced. This interest must inform the judicial decision on, among other things, the content of a medical practitioner's duty of care. If, by failure to apply reasonable skill and care on the part of the medical practitioner, that interest is lost or damaged, compensation should follow.

In such cases, what constitutes the content and scope of the doctor's duty is protection of the chance to ameliorate the

condition, or to enhance the chance of cure or alleviation. If the medical practitioner does not deploy a reasonable standard of care but nonetheless no legal compensatory remedy can ever follow, this would virtually gut the doctor's duty of any content at all.

INTERNATIONAL COMPARISONS

In 'Loss of a Chance in European Private Law "All or Nothing" or Partial Liability in Cases of Uncertain Causation', Kadner Graziano surveys the current state of the adoption or otherwise of law on loss of chance in European jurisdictions.[9]

France shows judicial support for loss of chance compensation dating back to as early as 1965.[10] Under the current proposal for reform of the *French Civil Code*, article 1346 of the Code would provide that the loss of a chance is a compensable injury distinct from the advantage that the realisation of the opportunity would have brought about.[11]

In Spain, Italy and Ireland, the concept has been adopted with slight modifications or in only certain categories of cases.[12] The courts in Italy have adopted loss of chance including in relation to medical negligence.[13]

In at least 12 European jurisdictions,[14] according to Kadner Graziano, the concept of loss of a chance is still either unknown or has been rejected. In Scotland, distinction is made between different categories of cases, with the result that the principle is well-established in solicitors' negligence cases but, at least in 1953, was rejected in a medical case in *Kenyon v Bell* [1953] SC 125.

The position argued for by Ms Tabet is consistent with recent American precedent adopted in the majority of states there. In *Matsuyama v Birnbaum* 890 NE 2d 819 (Mass 2008), the patient died of stomach cancer, which had not been investigated or diagnosed for four years. Expert evidence supported a 37.5 per cent chance of survival but for the delayed treatment and, as the plaintiff died, damages were awarded to his widow and child based on that percentage of the full value of their claim. The highest courts of at least 20 states and the District of Columbia have adopted the loss of chance doctrine. Ten states' courts of last resort have, in contrast, refused to adopt the loss of chance doctrine.

In England, although *Gregg v Scott* [2005] 2 AC 176 is cited as supporting the proposition that the causal effects of clinical negligence should be assessed on the balance of probabilities alone, there were significant disparities in the House of Lords' reasoning and approach, such that no clear principle emerged.[15] There is a view of general uncertainty in the majority's rejection of the claim.[16]

Although Lord Phillips formed part of the majority in dismissing the appeal, he did so because the facts did not provide a suitable vehicle, noting that there may be a case for permitting recovery of damages proportionate to the increase in the chance of the adverse outcome,[17] once the adverse outcome, which the exercise of due care might have avoided, has occurred.[18]

Gregg v Scott is perhaps best understood as a decision refusing compensation for the increased risk of avoiding harm in the future, rather than the lost chance of avoiding harm that has occurred.[19] The increased risk of avoiding a future result is not the same thing as the lost chance of avoiding a result that has occurred. The argument that the claim was not for a pure loss of chance but rather for a loss consequent upon the infringement of a right generated by the assumption of a responsibility was not made before the House of Lords.

OUTCOME OF *TABET v GETT*

Six members of the High Court sat for the hearing of the appeal, French CJ being absent.

The evidence

Heydon J did not find it necessary to address the issue of principle – the availability of compensation for loss of a chance in the medical negligence context – as he was of the view that the evidence in this case did not permit an inference to be drawn that the plaintiff had in fact lost some chance of a better outcome which ranged between speculative and some effect.[20] Gummow ACJ expressed similar concerns as to the state of the evidence, saying that it provided a basis for no more than speculation as to the quantification of the loss of a chance of a better outcome.[21] The comments of Kieffel J did not go quite that far. However, she did express the view that the evidence did not support a finding that any chance of a better outcome was as high as 40 per cent, as had been found by the trial judge.[22] >>

The principle

Turning then to the substantive issue of the availability of compensation for loss of a chance in the medical negligence context, all members of the Court, save for Heydon J, expressed negative views. Kiefel J noted that:

> 'The general standard of proof required by the common law and applied to causation is relatively low. It does not require certainty or precision. It requires that a judge be persuaded that something was probably a cause of the harm the plaintiff suffered.'[23]

She concluded:

> 'It would require strong policy considerations to alter the present requirement of proof of causation. None are evident. The argument that there should be compensation where breach of duty is proved simply denies proof of damage as necessary to an action in negligence ... The requirement of causation is not overcome by redefining the mere possibility, that such damage as did occur might not eventuate, as a chance and then saying that it is lost when the damage actually occurs. Such a claim could only succeed if the standard of proof were lowered, which would require a fundamental change to the law of negligence. The appellant suffered dreadful injury, but the circumstances of this case do not provide a strong ground for considering such change. It would involve holding the respondent liable for damage which he almost certainly did not cause.'[24]

Crennan J agreed, stating:

> 'Policy considerations which tell against altering the present requirement of proof of causation in cases of medical negligence include the prospect of thereby encouraging defensive medicine, the impact of that on the Medicare system and private medical insurance schemes and the impact of any change to the basis of liability on professional liability insurance of medical practitioners. From the present vantage point, the alteration to the common law urged by the appellant is radical, and not incremental, and is therefore the kind of change to the common law which is, generally speaking, the business of Parliament.'[25]

Hayne and Bell JJ wrote jointly that:

> 'to accept that the appellant's loss of a chance of a better medical outcome was a form of actionable damage would shift the balance hitherto struck in the law of negligence between the competing interests of claimants and defendants. That step should not be taken. The respondent should not be held liable where what is said to have been lost was the possibility (as distinct from probability) that the brain damage suffered by the appellant would have been less severe than it was.'[26]

Gummow ACJ asserted that:

> 'in personal injury cases the law of negligence as understood in the common law of Australia does not entertain an action for recovery when the damage, for which compensation is awarded consequent upon breach of duty, is characterised as the loss of a chance of a better outcome of the character found by the trial judge in this case.'[27]

REMAINING QUESTIONS?

Some comments in the judgments leave open questions for later comment by lawyers, academics and the courts.

It may be argued that the position in medical claims pleaded as breach of contract will somehow give rise to a different result. However, as mentioned by Gummow ACJ,[28] the damages in such a case may only be nominal damages for loss of the 'promised' opportunity.

Hayne and Bell JJ refer to other fact situations, differing from that in *Tabet v Gett*. However, at the same time indicating that:

> 'the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage (in the sense of detrimental difference). The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.'[29] ■

This article follows a paper presented by Julia Lonergan, 12th Floor Selborne/Wentworth Chambers, and Bill Madden to IIR Medico-Legal Congress in March 2010, written before the delivery of judgment by the High Court. The article is drawn in great part from materials prepared for the hearing of the appeal *Tabet v Gabett* before the High Court. The substantial contributions of Mr Bret Walker SC, Ms Jennifer Chambers, Ms Denise Aydin and Ms Thanh Le are gratefully acknowledged. Any comments on the effect of the High Court decision are those of the writer alone.

Notes: **1** At 180[1]. **2** *Tabet v Mansour* [2007] NSWSC 36. **3** [2009] NSWCA 76; (2009) 54 ALR 504. **4** See Gaudron J generally, and Kirby J at 274-5 and in *Naxakis v Western General Hospital* (1999) 197CLR 269. **5** At 278-81. **6** At 312-3. **7** See *Halverson v Dobler* [2006] NSWSC 1307 at [194]-[203], [206]-[225] per McClellan CJ at CL. **8** Professor Jane Stapleton, 'The Golden Thread at the Heart of Tort Law – Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 1. **9** Thomas Kadner Graziano, 'Loss of a Chance in European Private Law "All or Nothing" or Partial Liability in Cases of Uncertain Causation' (2008) 16 *European Rev Priv L* 1009. **10** Lara Khoury, *Uncertain Causation in Medical Liability* (2006) p97. **11** 'Le perte d'une chance constitue un prejudice réparable distinct de l'advantage qu'aurait procure cette chance sielle s'était réalisée.' Kadner Graziano, above n 9, p1012. **12** Kadner Graziano, above n 9, pp1024-6. **13** Corte di Cassazione, 4 March 2004. Winiger et al (eds), *Digest of European Tort Law* [10.9.1]-[10.9.9] per M Graziadei& D Migliasso. **14** Germany, Austria, Switzerland, Greece, Hungary, the Czech Republic, Slovenia, Estonia, Denmark, Sweden, Norway and Finland. **15** Cf Michael Jones, *Medical Negligence* (4th ed, 2008) p504. **16** See Professor Jane Stapleton, 'Loss of the Chance of Cure from Cancer' (2005) 68(6) MLR 996. **17** *Gregg v Scott* [2005] 2 AC 176 at [190]. **18** *Ibid*, at [188]. **19** Robert Stevens, *Torts and Rights* (2007) p46. **20** *Tabet v Gett* [2010] HCA 12 at [92]. **21** *Ibid*, at [45]. **22** *Ibid*, at [118]. **23** *Ibid*, at [145]. **24** *Ibid*, at [151]-[152]. **25** *Ibid*, at [102]. **26** *Ibid*, at [68]. **27** *Ibid*, at [46]. **28** *Ibid*, at [48]. **29** *Ibid*, at [69].

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