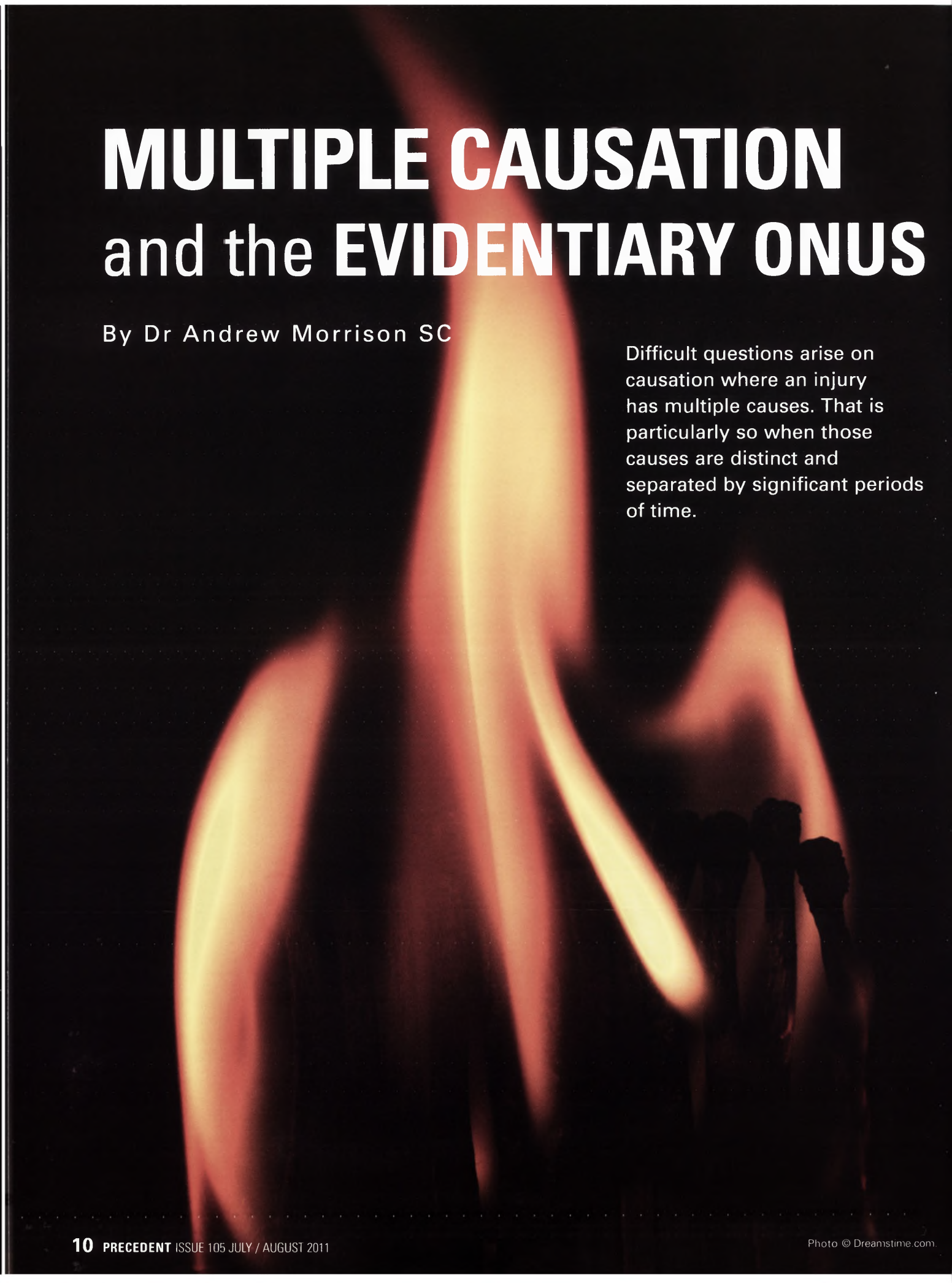
MULTIPLE CAUSATION and the EVIDENTIARY ONUS

By Dr Andrew Morrison SC



Difficult questions arise on causation where an injury has multiple causes. That is particularly so when those causes are distinct and separated by significant periods of time.

MARCH V STRAMARE

In *March v E & MH Stramare Pty Ltd*, there were successive negligent acts by different persons. The second defendant had parked his truck (with parking and hazard lights illuminated) projecting into the lane into which the plaintiff was travelling. The plaintiff was intoxicated, which substantially reduced his ability to control his vehicle. He struck the parked truck and suffered injury. At first instance, Perry J found the second defendant liable but reduced the plaintiff's damages by 70 per cent for contributory negligence. The Full Court of the Supreme Court of South Australia upheld the second defendant's appeal, on the basis that his negligence was not causative and that the real cause was the negligence of the plaintiff. The majority applied the doctrine of 'last opportunity' to reach this conclusion.

The High Court upheld the plaintiff's appeal.[1] Mason CJ pointed out:[2]

> 'A person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage.'

He expressly rejected the doctrine of 'last opportunity'.[3] In his view, 'courts readily recognise that there are concurrent and successive causes of damage' so that liability will be apportioned between the wrongdoers.[4] All the plaintiff need establish is that his or her injuries were 'caused or materially contributed to' by the 'defendant's wrongful conduct'.[5]

The cause of a particular occurrence 'is a question of fact' that 'must be determined by applying common sense to the facts of each particular case'.[6]

The 'but for' test gives rise to the difficulty that where there are two or more acts or events that would each be sufficient to bring about the plaintiff's injury, this 'gives the result, contrary to common sense, that neither is a cause'.[7] Nor does it give a satisfactory answer as to when a superseding cause is said to break the chain of causation. That is particularly so when the defendant's wrongful conduct has generated the very risk of injury said to be the superseding cause or *novus actus interveniens* (the intervening act or event).[8]

Justice Deane, although subscribing to the now rejected proximity test, also rejected the 'but for' test.[9] However, Toohey and Gaudron JJ agreed with Mason CJ.

Justice McHugh found the 'but for' test still useful, but ultimately adopted the 'scope of the risk' test. His Honour would have held the injuries suffered by the plaintiff to be within the scope of the risk created by the breach of the second defendant's duty to other road-users.[10]

The approach taken by Mason CJ has been applied on numerous occasions since. For example, in *Bendix Mintex Pty Ltd v Barnes*,[11] foreseeability and causation were at issue in a dust diseases case.[12] It was emphasised that it is 'sufficient for a plaintiff to establish that his or her injuries were "caused or were materially contributed to" by the defendant's wrongful conduct'.[13]

SUBSEQUENT ACTS OF NEGLIGENCE

The further removed the subsequent contributory act of negligence is from the original act, the more difficult the questions that arise. In *Mahony v J Kruschich (Demolitions) Pty Ltd*,[14] the plaintiff sued his employer for personal injury. The employer joined his treating practitioner, Dr Mahony, alleging that the doctor's negligence caused or contributed to the plaintiff's injuries and incapacities.

In the High Court, the judgment of Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ held that the subsequent negligence does not always break the chain of causation.[15] Where the line should be drawn is 'very much a matter of fact and degree'.[16] The original injury can be regarded as carrying some risk that medical treatment might be negligently given or 'it may be the very kind of thing which is likely to happen as a result of the first tortfeasor's negligence'.[17]

> 'Medical negligence in the treatment of an injury may well be a reasonably foreseeable result of the act or omission by which that injury was inflicted, and then no clear line can be drawn to limit the original tortfeasor's liability to exclude the consequences of medical negligence.'[18]

The position might be otherwise where the original injury did not carry the risk of poor medical treatment.[19]

Roads and Traffic Authority v Royal (albeit in the dissenting judgment of Kirby J)[20] helpfully set out the following summary:[21]

> '[81]...causation is essentially a question of fact ...
> [82]...the burden of proving causation-in-fact, whether at trial or on a review of factual findings on an appeal by way of re-hearing, is on the claimant ...
> [83]...the "but for" test may be useful in defining the outer limits of liability where causation is contested, it is "not a comprehensive and exclusive criterion"... and ... may be tempered by the making of value judgements and the infusion of policy considerations.
> [85]...where...several acts or omissions... are alleged to be causes in fact... The search is not necessarily for "the" cause ... If, ... a conclusion is reached that two or more causes have played a part in causing the damage, legal liability will attach so long as a nominated cause is held to have "materially contributed" to that result...
> [86] ...the law recognized the possibility of multiple causes. So long as they can be classified as contributing "materially" to the occurrence of the damage, it is open to the judicial decision-maker to find causation-in-fact on that basis.
> [87]...it may sometimes be the case that legal liability will nevertheless be denied because the decision-maker... [finds]...a *novus actus interviens*...
> [88]...the way in which individual decision makers ought to reason to their conclusions ... cannot be expressed in terms of imperative rules of universal application...
> [89]...where the decision-maker concludes that causation-in-fact has been established, but that more than one cause has materially contributed, rights will then arise in accordance with the contribution statute [in NSW, the *Law Reform (Miscellaneous Provisions) Act* (1946)]
> [90]... the amount of the contribution recoverable... shall be such as may be found by the court to be just and >>

equitable having regard to that person's responsibility for the damage…'

It is, of course, well established that a plaintiff does not have to prove foreseeability as to either the particular mechanism of injury or the type of injury. For example, *Versic v Connors*[22] – drowning when pinned against the curb following a motor accident) – and *Kavanagh v Akhtar*[23] – shoulder injury leading to inability to care for long hair, cutting the hair, leading to breakdown in marital relationship – held attributable. See also, for example, *Dunin v Harrison*,[24] where surgical negligence in repairing a fracture that was suffered in a transport accident was still held to be a result of the original tort. See also *Nairn v The Board of Management of Warren District Hospital*.[25]

In *Nguyen v Cosmopolitan Homes*,[26] it was noted that s5D of the *Civil Liability Act* 2002 (NSW) required that 'negligence was a necessary condition of the occurrence of the harm', which accords with the common law position.[27]

PRE-EXISTING EVENTS

In respect of damage from pre-existing events, the law takes a far more generous approach to the claims of a plaintiff. In *Watts v Rake*,[280] Dixon CJ said:[29]

'If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributing cause. If it be the case that at some future date the plaintiff would in any event have reached his present pitiable state, the defendant should be called upon to prove that satisfactorily and moreover to show the period at the close of which it would have occurred.'

In *Purkess v Crittenden*,[30] Barwick CJ, Kitto and Taylor JJ said of *Watts v Rake*:[31]

'We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case, that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant… [it] is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacities. On the contrary, it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence … which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence.'

In *Shorey v PT Ltd*,[32] Kirby J[33] said that this approach is settled law applicable to judicial reasoning, whether at first instance or re-hearing on appeal, when the issue concerns the effect on damages of multiple causes. All the plaintiff had to establish was that the tortious act was 'a cause', not 'the cause' of the loss. Another, more recent example of this approach is *Nominal Defendant v Clancy*,[34] where the defendant failed to discharge its onus in respect of an alleged pre-existing condition.

That, however, is to be distinguished from what was said by Gaudron J in *Bennett v Minister of Community Welfare*,[35] in regard to an effective change of onus if an injury occurs within an area of foreseeable risk, in regard to primary liability. That approach clearly no longer enjoys the support of the High Court.

ELAYOUBI V ZIPSER

The difficulties involved in multiple causation are well illustrated in *Elayoubi v Zipser*.[36] In 1978, the plaintiff's mother had a child delivered by classical caesarean section at the third defendant's Victorian hospital. She was not warned of the risks to herself or a child if she attempted vaginal delivery in future. In 1984, the first defendant, a visiting medical officer at Bankstown Hospital, became aware as part of the mother's ante-natal care that she had had a previous lower segment caesarean section and decided that she should have a trial of labour without enquiry of the Victorian hospital about the nature of the previous delivery. The second defendant (which was responsible for Bankstown Hospital) was also at fault. The plaintiff arrived there at about 10.30pm and a leisurely decision was made that she should have a non-urgent caesarean section. The child was not delivered until 12.28am and because the mother's uterus ruptured (the very thing which was a risk following a previous classical caesarean), the plaintiff was deprived of oxygen and was left suffering from spastic quadriplegia and intellectual disability.

At first instance,[37] Hislop J dismissed the claim. He accepted that each defendant was in some respect negligent, but the plaintiff failed because his Honour was not satisfied that the exercise of 'reasonable care' would have produced a different outcome.

However, the Court of Appeal upheld the plaintiff's appeal. It found that the surgeon of the third defendant should have known of the significance of the surgery and it was imperative that it be communicated to the plaintiff's mother. The information should have been recorded and enquiry would have disclosed it to the first defendant. Negligence by the third defendant would have contributed to materialisation of the risk, but would not have prevented the first defendant's negligence in failing to make the usual enquiry. The second defendant's failure to deal urgently with a caesarean in the circumstances, and the fact that it is likely that earlier surgery would have avoided injury, meant that the second defendant's failings also contributed.

Apart from challenging the allegations of negligence against each of them, the defendant also alleged that their own breach of duty alone was not causative of injury because without fault on the part of the others no injury

would have occurred. In the Court of Appeal, Basten JA considered multiple causation and noted that 'on one view the case could be analysed as involving independent acts of negligence, each of which gave rise to a risk, which risk in fact materialised'.[38] He noted the insufficiency of the 'but for' test[39] and quoted with approval the words of Lord Reid in *McGhee v National Coal Board*:[40]

> 'It has always been the law that a pursuer succeeds if he can show that fault of the defender caused, or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause an injury.'

However, his Honour also pointed out that this legal issue need not be resolved in this case because the court was satisfied that the first defendant would have obtained the critical information from the third defendant had an enquiry been made at the appropriate time.[41]

Judge of Appeal Basten (with whom Allsop P and Beazley JA agreed) was of the view that each act of negligence was a material contributor to the ultimate tragic outcome.[42]

> 'A contrary view is counter-intuitive. If the negligence of two tortfeasors each contributes to the indivisible harm suffered by the victim, each is liable for the harm suffered. If neither were negligent, no harm would have been caused. If either one were negligent and the other not, in each case the negligence would have caused the harm. But a conclusion that if both were negligent and the harm eventuated, neither was responsible for that harm, invites the question as to whether the reasoning process has gone awry. One basis for justifying the preferred approach is that the common law has "substituted the test of responsibility or fault for that of causation", as explained by Professor AL Goodhart, "Appeals on questions of fact" (1955) 71 LQR 402 at 413...
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> A normative element, requiring appropriate allocation of responsibility for tortious conduct should be accepted as part of the assessment of causal connection (potentially to an expansive or a restrictive effect). Though the *Civil Liability Act* 2002 (NSW) is not consistent in its terminology, it affirms the importance of the normative approach, requiring the court (in cases where it operates) to consider "whether or not and why responsibility for the harm should be imposed on the negligent party": s5D(4).'

The plaintiff succeeded on appeal against the defendants and the defendants' application for special leave to appeal to the High Court was refused.

CONCLUSION

Difficult issues arise in cases of multiple and successive causation. The commonsense approach of the common law does not reject the use of the 'but for' test, but eschews its use as determinative of causation. In cases like *Elayoubi*, it would produce unacceptable and ultimately illogical outcomes. Everyone is at fault, so no one is at fault! However, as to what happens in circumstances where it is arguable that the breach of duty of a subsequent tortfeasor is not causative because a previous tortfeasor's negligence meant the subsequent fault had no effect, is left for another day. If in *Elayoubi* the court had been satisfied that the Victorian hospital negligently did not record the classical caesarean, then it is arguable that the subsequent breach of duty in failing to enquire was not causative. Multiple causation continues to raise difficult questions for the law of torts. ■

Notes: **1** *March v E & MH Stramare Pty Ltd and Anor* (1991) 171 CLR 506. **2** Mason CJ at [5]. **3** At [11]. **4** At [13]. **5** At [16]. **6** At [17]. Mason CJ citing Lord Reid in *Stapley* at p681. **7** At [22], referring to *Winfield and Jolowicz on Tort*, 13th ed. (1989), p134. **8** At [27]. **9** Deane J at [6]. **10** McHugh J at [536] **11** (1997) 42 NSWLR 307 (NSWCA). **12** At (1), referring to 335D. **13** At (4), referring to 311D. **14** (1985) 156 CLR 522. **15** At [6]. **16** *Ibid.* **17** At [7]. **18** *Ibid.* **19** At 8. **20** (2009) 82 ALJR 870. **21** At [81]-[90]. **22** [1969] 1 NSWR 481. **23** (1998) 45 NSWLR 588 (NSWCA). **24** (2002) 8 VR 596. **25** (2006) 46 SR (WA) 322. **26** [2008] NSWCA 246. **27** At [70] per McDougall J with McColl and Bell JJA agreeing. **28** (1960) 108 CLR 158. **29** At 160. **30** (1965) 114 CLR 164. **31** (1960) 108 CLR 158, at 168-9. **32** (2003) 77 ALJR 1104. **33** At 47. **34** [2007] NSWCA 349. **35** (1992) 176 CLR 408. **36** [2008] NSWCA 335. **37** *Elayoubi BHNF Kolled v Zipser* [2007] NSWSC 587. **38** At [52]. **39** At [53]. **40** [1972] UKHL 7 at 4. **41** At [54]. **42** At [57].

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