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IN THIS EDITION

The operation of the proportionate liability regime clarified by the High Court

It has been more than 12 years since the introduction of the proportionate liability regime for property damage and economic loss claims in Australia and the first time the High Court was called on to pass judgement on the provisions that regulate the regime was in 2013 in the case of *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10*. In that case the High Court was seen to have broadened the scope of the regime. Last month the High Court was once again called on to consider the proportionate liability regime, this time in connection with the proportionate liability provisions in the Corporations Act, and in the case of *Selig v Wealthsure Pty Ltd [2015] HCA 18* with a more restrictive determination this time around although on a very different issue.

In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10* the High Court was called on to consider claims by a mortgage lender against its lawyers that prepared loan documents for the lenders and claims against fraudsters who benefited from the loans after the lender was unable to recoup the money advanced pursuant to the loan documents.

The majority of the High Court in a 3 to 2 decision allowed an appeal from the New South Wales Court of Appeal which had held that negligent solicitors had caused a loss to a lender that was different to the loss which fraudsters had caused to the lender in the same transaction with the result that the proportionate liability regime did not apply and the lawyers were liable for the entire loss. The High Court majority overturned that finding and in doing so clarified the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* ("the Act") and has confirmed that the proportionate liability regime has wide application where concurrent wrongdoers act independent of each other and cause the same loss.

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The following important statements of principle emerged from the majority decision:

- the task of the court under Part 4 of the NSW Civil Liability Act is to apportion responsibility between defendants where a defendant can show that it is a "concurrent wrongdoer";
- a "concurrent wrongdoer" is a defendant who can show that there are others whose acts or omissions caused the damage the plaintiff claims, whether jointly with that defendant's acts or omissions or independently of those acts or omissions;
- section 34(2) of the Act (which defines "concurrent wrongdoer" for the purpose of Part 4 of the Act) requires the court to consider firstly, what is the damage or loss that is the subject of the claim, and secondly, is there a person other than the defendant, whose acts or omissions also caused that damage or loss;
- identification of the damage or loss the subject of the claim must occur before the question of causation of the loss is answered. Identification of the damage correctly will usually assist in proper determination of its cause;
- as between concurrent wrongdoers, it is difficult to see that the damage they have caused could be other than the same damage for the purpose of section 34(2) of the Act;
- section 5D(1) of the Act sets out the general principles which apply in determining whether negligence caused the particular harm ("harm" in section 5 includes damage to property and economic loss which flows from a failure to exercise reasonable care and skill);
- two elements under section 5D must be established to obtain a finding that negligence caused particular harm, being, firstly, the negligence was a necessary condition of the occurrence (factual causation); and secondly, that it is appropriate for the negligent party's liability to extend to the harm so caused (scope of liability);
- Part 4 of the Act does not require that one wrongdoer's actions contribute to another wrongdoer's actions in order to cause the same damage. The issue is whether each of them separately materially contributed to the damage;
- a wrongdoer's actions may be independent of another wrongdoer's actions, or be successive to those actions, yet may cause the same damage, and one wrongdoer may be liable only for part of the damage for which the other wrongdoer is liable;
- the plaintiff is the party which must establish that a defendant caused or materially contributed to his or her loss or damage, and to do so needs to prove that a wrongdoer's actions were one cause;
- the relevant enquiry is whether a particular breach of duty or contract was a cause of harm – in other words, that the breach materially contributed to the loss;
- "material contribution" is made out if the act or omission played some part in contributing to the loss; and
- "damage", being loss the subject of the claim as distinct from the remedy, damages, is the injury and other foreseeable consequences which the plaintiff suffered as a result of a defendant's acts or omissions. In this case, damage to the Lender was its inability to recover amounts advanced.

The High Court confirmed that when considering the potential application of the proportionate liability regime it is necessary to consider the nature of the loss and then, whether there are any other additional people whose acts or omissions caused the loss or damage.

However the High Court in Selig v Wealthsure Pty Ltd has held that if the same loss is caused by both apportionable and non-apportionable claims, proportionate liability does not apply to the non-apportionable claims.

Mr and Mrs Selig invested in company based on advice from an authorised representative of Wealthsure Pty Ltd. The investment scheme was no more than a 'Ponzi scheme' and Neovest became insolvent and the Seligs lost their investment.

The Seligs sought damages alleging various causes of action, including actions under the Corporations Act which included:

- an action under s 1041H for misleading and deceptive conduct in relation to financial product/service;
- an action under s 1041E for false or misleading statements in relation to financial product/service;
- a claim for breach of duty of care.

The question for the High Court was whether Div 2A of the Corporations Act which identifies apportionable claims applied so that the loss and damage was to be apportioned between all defendants in respect of all of those claims or whether Div 2A is limited in its application to the claims based on contraventions of s 1041H.

The issue arose under the proportionate liability regime in the Corporations Act, as a consequence of the wording of s1041L(2) and the High Court concluded that a proper reading of the provisions led to the conclusion that only a claim under s1041H was an apportionable claim. This reversed a decision of the Full Federal Court that determined where there are two or more causes of action, one of which is apportionable and others which are not, they are to be treated as a single apportionable claim provided that

they give rise to the same loss and damage. Their Honours had said it is the loss and damage that is critical, not the cause in rejecting that interpretation has confirmed it is the claim that is relevant not the loss.

Interestingly this issue will arise in claims under the proportionate liability regimes in the *Australian Securities and Investments Commission Act 2001 (Cth)* (s12GP(2)) and the *Competition and Consumer Act 2010 (Cth)* (s87CB(2)) and under s34(2) of the *Civil Liability Act 2002 (NSW).*

The end result of the decision in Selig is that proportionate liability will not apply to a claim for a non non-apportionable claim, even if the same conduct also gives rise to an apportionable claim.

Plaintiff's will no doubt look to alternative causes of action to avoid the application of the proportionate liability regime and its limiting consequences particularly where an uninsured defendant is involved in a claim.

If there is a viable non apportionable claim it will not be necessary to sue all potential defendants in order to recover the totality of a loss and if all defendants are sued a plaintiff will be able to choose the defendant from which any judgement is recovered.

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The significance of a claimant's pre-existing disabilities when assessing loss of earning capacity

When a claimant is injured in circumstances giving rise to a cause of action in negligence which is governed by the *Civil Liability Act* ("CLA") the Court is required to give proper consideration to any evidence of significant pre-accident disabilities that would have affected the claimant's loss of earning capacity without the impact of the subject accident.

The NSW Court of Appeal is often called upon to consider this issue if the defendant is not satisfied that the primary judge has given proper consideration to such evidence, or has failed to comply with Section 13 of the CLA.

A recent example of this was illustrated in *Coles Supermarkets Australia Pty Ltd v Fardous.*

Abrahim Fardous slipped and fell at the Coles supermarket at Burwood on 10 July 2010. He injured his back and sued Coles for damages in negligence. His case proceeded to hearing before Sorby DCJ in the District Court who found in his favour on liability and awarded damages in the amount of $345,965.

Coles had conceded, before the primary judge, that the July 2010 accident had destroyed any residual earning capacity which Fardous may have had. The issue was whether or not he in fact had a residual earning capacity and, if so, what that was and how his claims for past and future economic loss ought to be assessed.

The primary judge calculated both past and future economic loss on the basis that Fardous had a residual earning capacity of 20 hours per week at $20 per hour and that it had been lost in consequence of the July 2010 accident.

Coles appealed in respect of His Honour's assessments of past and future economic loss as well as future out of pocket expenses.

Coles did not succeed in respect of the challenge to his Honour's assessment of future out of pocket expenses.

However, the appeal was successful in relation to past and future economic loss.

The pivotal issue upon which the Appeal Court's decision turned was whether or not Fardous had any pre-existing earning capacity as at 10 July 2010 in light of an earlier work accident on 27 September 2007 in which he sustained an L3/4 spinal injury that warranted surgery.

Macfarlan JA, with whom Emmett JA and Simpson J agreed, wrote the leading judgment in which his Honour reviewed the substantial amount of medical evidence which demonstrated the significant disabilities and treatment which Fardous had following the earlier work accident.

His Honour found that the medical opinions pre-dating the July 2010 accident suggested Fardous had at least a theoretical capacity to work for up to 20 hours per week in a relatively sedentary occupation.

However, His Honour found that the primary judge had erred by proceeding on the basis that it was certain that this theoretical capacity to work would have been productive of income given the evidence did not indicate the certainty of this occurring, and a balance of probabilities approach was not appropriate.

Macfarlan JA helpfully outlined the relevant principles, beginning with a reference to Section 13 CLA which provides:

"Future economic loss – claimant's prospects and adjustments

(1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.

(2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury."

(3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

His Honour outlined the following principles that were summarised in an earlier decision of the Court in *Morvatjou v Moradkhani* and by reference to the 1965 decision of the High Court in *Purkess v Crittenden*:

"A plaintiff in Mr Fardous' position must prove 'the extent of his or her pre-accident earning capacity, the extent to which that capacity would have been productive of income had the accident not happened, and the extent to which the compensable injuries have diminished his or her ability to exercise the pre-accident earning capacity.

In the absence of an issue about a plaintiff's pre-existing condition emerging from the plaintiff's case, the defendant has an onus to adduce evidence to raise it. The legal onus nevertheless rests on 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'".

It was held that no issue arose in the present case about the defendant not discharging its evidentiary onus because there was ample material in the evidence led by both parties regarding the effect of the 2007 accident on Fardous.

The Court of Appeal's focus was on whether the theoretical earning capacity to which Macfarlan JA referred would, but for the July 2010 accident, have been productive of income. His Honour referred to the principles enunciated by the High Court in the 1990 decision of *Malec v JC Hutton Pty Limited* and state:

"…[this] is a hypothetical question requiring consideration of what would or might have happened in the period up to and after the hearing at first instance if that accident had not occurred.

That question is to be answered by determining the degree of probability or possibility that the earning capacity would have been productive of income.

The issue is not one of whether an event has or has not occurred. Such an issue would have to be determined on the balance of probabilities and 'if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain…'"

Macfarlan JA went on to say:

"Application of [Section 13 CLA] to the present case requires a statement of the court's 'assumptions' (that is, findings) about the extent to which, but for the July 2010 accident, any earning capacity that Mr Fardous had at the date of the accident would have been productive of income thereafter.

This involves a statement of the 'percentage possibility' of income of a certain level being earned.

As with the assessment of earning capacity remaining after an accident that is the subject of the proceedings, there needs to be a 'practical assessment' of the likelihood of the plaintiff having obtained employment."

His Honour then held that the correct approach required a finding that it was by no means certain that Fardous would, but for the July 2010 accident, have ever resumed significant gainful employment. However, his condition was improving as at that accident and the medical evidence supported a conclusion that he had a significant prospect of obtaining employment of 20 hours per week at the rate of $20 per hour.

Macfarlan JA assessed the prospect of this occurring at 65% and that the awards for past and future economic loss should be reduced to reflect this percentage in addition to the normal allowance of 15% for vicissitudes.

What this important decision of the NSW Court of Appeal highlights is the correct way in which a Court is to apply Section 13 CLA.

A Court is not to apply a "balance of probabilities" test when assessing the "most likely future circumstances but for the injury". Rather, the Court must apply an appropriate percentage reflecting the degree to which any pre-accident earning capacity would have been productive of income, had the accident not occurred, after conducting a practical assessment of the evidence.

The Court's decision also emphasises that if a percentage is applied in those circumstances, the Court must reduce the awards for past and future

economic loss to accord with that percentage and that such a reduction is to be applied in addition to the standard 15% reduction for vicissitudes.

The decision is therefore very important for liability insurers when calculating appropriate reserves to account for damages being awarded in respect of past and future economic loss where the medical evidence demonstrates significant pre-accident disabilities and how those heads of damages can be further reduced when Section 13 CLA is correctly applied.

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Out of time, but not out of luck. Limitation periods in personal injury claims

The Courts often take a generous approach to personal injury plaintiffs when proceedings have been brought outside of the applicable limitation period.

Pursuant to Section 50C of the Limitation Act 1969 (NSW), the relevant limitation period for bringing personal injury actions is three years from the date the cause of action was "discoverable" by the prospective plaintiff. When it comes to "discoverability", Section 50D provides:

> *(1) For the purposes of this Division, a cause of action is "discoverable" by a person on the first date that the person knows or ought to know of each of the following facts:*
>
> *(a) the fact that the injury or death concerned has occurred,*
>
> *(b) the fact that the injury or death was caused by the fault of the defendant,*
>
> *(c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.*
>
> *(2)A person "ought to know" of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact.*
>
> *(3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.*

In the recent decision of *Steven Galea v AMP Capital Investors Limited and Glad Cleaning Services Pty Ltd [2015] NSWDC 65*, the District Court of NSW considered the Court of Appeal authorities in respect of the application of s50D. In Galea both defendants jointly filed a notice of motion to be heard prior to the substantive hearing to determine whether the plaintiff's claim was statute barred as against one or both of the defendants.

On 29 January 2008 Mr Galea fell over in the Macquarie Shopping Centre after slipping on soft drink and suffered injury.

He initially instructed lawyers 'TOC' who pursued a worker's compensation claim on his behalf. At an undisclosed later time after the closure of TOC, he consulted the firm Cohen and Crass. Personal injury proceedings were eventually commenced against AMP (the manager of Macquarie Shopping Centre) and Glad (cleaning subcontractors) on 16 September 2011 and 6 November 2012, respectively.

Mr Galea conceded at hearing that he knew his injuries had occurred as at the date of the accident, as stipulated in the s50D(1)(a). However, in respect of the s50D(1)(b) and (c) Mr Galea argued that he did not know, and ought not to have known that the injuries he suffered were caused by the fault of each of the relevant defendants, and that the injury was sufficiently serious to justify bringing an action. It was argued that the question of "fault" of each of the defendants was not within Mr Galea's knowledge at any time prior to commencing proceedings, particularly in the absence of relevant legal advice to that effect.

Evidence given at hearing suggested that at best, Mr Galea's legal advice from TOC was lax. There was considerable delay in obtaining a copy of CCTV footage of the accident as Mr Galea's solicitor was reluctant to attend the insurer's office to view the footage (despite having requested a copy of the footage for some months). The question of whether Glad could be pursued as a defendant seemingly was not properly investigated by TOC at an early stage. Affidavit and oral evidence given at hearing indicated that the communication between Mr Galea and TOC in respect of Mr Galea's rights to pursue a public liability claim generally was very poor.

The defendants alleged that each cause of action had been "discoverable" under s50D for longer than the three years stipulated by s50C.

It was argued in relation to the s50D(1)(b) limb that Mr Galea knew of the fault of AMP as at the day of the accident. The evidence demonstrated after Galea had fallen he spoke with a Macquarie Shopping Centre security guard, and had attempted to obtain contact details of a nearby shop employee who had allegedly witnessed him fall. On 5 February 2008, five days after the accident, Mr Galea telephoned Macquarie Shopping Centre to report the injury.

In relation to Glad, the cleaning subcontractor, it was argued that Mr Galea ought to have known that his injuries had been caused by the fault of Glad, from 17 September 2008. On that date, Mr Galea's previously instructed solicitor from TOC had made a file note of speaking to a representative of Emersons (albeit it was not noted in what capacity Emersons was involved with Glad) regarding CCTV footage of the accident held by AMP's insurer, Claims Management Australasia. The file note on that date read "Glad cleaning is in-charge". The solicitor deposed at hearing that he did not recall either making the file note, or discussing it with Mr Galea. Mr Galea deposed that the name Glad Cleaning had never been mentioned to him at any stage by his solicitors.

Both defendants also submitted regarding the s50D(1)(c) limb that Mr Galea knew the injury was sufficiently serious to justify bringing an action by no later than 21 July 2008. On that date, Mr Galea underwent an arthroscopic procedure as a result of the left knee injury sustained in the fall.

In determining whether the three limbs of s50D(1) were satisfied so as to bar Mr Galea from pursuing a claim against both or either one of the defendants, Judge Letherbarrow considered the facts in the context of a subjective test of Mr Galea's own knowledge. There was consideration of Mr Galea's presentation at hearing, which did tend to suggest that although truthful, he was of "limited intelligence".

Bearing that in mind, Judge Letherbarrow was not satisfied that Mr Galea knew or ought to have known that either AMP or Glad were 'at fault'. Mr Galea took all reasonable steps to instruct and provide information to his solicitors, and could not have made an informed decision (even if it had been the case that he was in possession of the CCTV footage and all relevant material himself) as to the relative fault of the defendants, absent any 'proper' legal advice.

In the case of Glad, Mr Galea could not have even known of the existence of Glad, and that it was subcontracted to AMP. It was not a reasonable step, for example, for Mr Galea to make enquiries of his solicitors such as "why aren't we suing the cleaner", as Mr Galea was not aware of the subcontractor's relationship with AMP.

Judge Letherbarrow also considered the s50d(1)(c) limb. The authorities are clear that bringing a personal injury claim requires proper legal advice, to justify whether to bring the claim is in a prospective plaintiff's best interests. In the case of Mr Galea, and in the context of his ongoing workers compensation claim, he did not receive any such advice from TOC. Again, there was a finding that he took all reasonable steps, as stipulated under s50D(2), to instruct and cooperate with his solicitors, who failed to take steps and make the relevant enquiries as to the appropriateness of such an action, and bringing the action in a timely manner.

It is clear that the authorities indicate that the wording of s50D itself presents a partially subjective test, despite the fact that there is a requirement under that section to ascertain 'reasonable steps'. Mr Galea's reliance on his solicitors was the key factor in Judge Letherbarrow concluding that there was no knowledge on the part of Mr Galea, actual or assumed, that either AMP or Glad were 'at fault' and that his injuries were sufficiently serious to bring a personal injury action.

Where personal injury plaintiffs have honestly relied on their solicitors to properly investigate and prosecute all causes of action available to them, there may be an avenue to overcome the Limitation Act hurdle. Galea shows that this applies in circumstances where solicitors have not properly advised their clients.

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Unfair Contract Term Laws: Where are we up to?

In our July 2010 edition of GD News we reported on the commencement of the new unfair contract terms legislative regime which commenced 1 July 2010 in respect of all consumer contracts entered into on or after that date.

The provisions were part of the overall review of consumer protection laws that were enacted at federal level and which culminated with the passing of the Australian Consumer Law ("ACL") as part of the Competition and Consumer Act 2010 (Cth) ("CCA") which commenced 1 January 2011.

The Federal Government has now committed to extend the consumer unfair contract term protections to small businesses, and has released draft legislation it proposes to pass to extend the operation of the unfair contract terms legislation.

The amendments will extend the existing consumer unfair contract term protections to low-value commercial contracts.

Courts will be able to declare void an unfair term of a standard form small business contract. It is hoped that this will reduce the incentive to include and enforce unfair terms in small business contracts and will provide a remedy for small businesses when those terms are included in a contract.

The impact of the introduction of the unfair contract term protections on small business contracts is best assessed by a review of the impact that the legislation has had on consumer contracts to date.

The legislative regime regarding unfair contract terms for consumer contracts has been in place for more than four years. In that time, the Australian Competition and Consumer Commission ("ACCC") has reported on the outcome of its industry review regarding the implementation of the unfair contract term laws and how it has affected certain industries (report dated March 2013) and the laws have begun to receive judicial interpretation in decisions of the Courts and Tribunals both at federal and state level.

In this article, we review the results of the ACCC's industry review report and some of the decisions of the Courts and Tribunals to see if there are any trends emerging in how the laws are being interpreted and applied.

Recap on the unfair contract term laws

The laws provide that a term of a consumer contract is void if it is unfair and the contract is a standard form contract.

Section 23(3) CCA defines a "consumer contract" to be a contract for the supply of goods or services or the sale or grant of an interest in land to an individual who acquires it wholly or predominantly for personal, domestic or household use or consumption.

The intended used of the goods is the determining issue.

In determining whether a contract is a standard form contract, a Court may take into account such matters as it thinks relevant, but must take into account the following:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;
- any other matter prescribed by the regulations created pursuant to the legislation.

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

By Section 24(1) CCA, a term of a consumer contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term of a consumer contract is unfair a court may take into account such matters as it thinks relevant, but must take into account:

- the extent to which the term is transparent;
- the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term

The CCA provides for consumers to commence private actions to enforce their rights or to recover loss or damage incurred for specific breaches of the CCA.

Under the CCA, a party to a standard form consumer contract can apply to the Court for a declaration that a term of such a contract is unfair. If the Court finds the term to be unfair, it can make a declaration that the term is void.

Ultimately, only a Court can determine whether a term in a standard form consumer contract is unfair. However, there is also scope in some instances for unfair contract term disputes to be resolved through alternative dispute resolution.

ACCC Industry Review – Report Dated March 2013

In March 2013 the ACCC published its paper *"Unfair Contract Terms: Industry Review Outcomes"* which can be found at:

https://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf

Following the implementation of the ACL, the ACCC reviewed standard form contracts in the airline,

telecommunications and vehicle rental industries, identifying contract terms which posed problems under both general consumer protection law and the new unfair contract terms provisions.

The ACCC reviewed a number of standard form contracts used by prominent travel agents, and it led a national project with Consumer Affairs Victoria ("CAV") to review standard form consumer contracts commonly used by online traders and also in the fitness industry.

The initial compliance review phase of the ACCC's approach to addressing unfair standard form contract terms has concluded. The process is said, in the report, to have enabled the ACCC to identify problematic contract terms and related practices in the above sectors whose contracts were reviewed.

The following are examples of changes implemented as a result of the ACCC's review:

- Of 11 telecommunications standard form contracts, six included terms that purported to allow the business to vary the contract unilaterally. TPG amended its standard form contract to remove a problematic term relating to subscription fees. Four other telecommunications businesses amended their terms so that balancing mechanisms were provided to make the operation of those terms fairer to the consumer.
- Some of the standard form contracts of some prominent travel agencies were ambiguous and did not clearly explain the agency arrangements that applied between the travel agency and the provider of the travel service (such as the airlines or hotels) and also did not make clear which party was liable for any failure to supply the travel services to the consumer. One such travel agency has clarified that it will accept liability where it is at fault through its own actions. The ACCC continues to pursue this concern with other travel agencies.
- The ACCC identified problematic termination clauses that sought to hold consumers to a contract after the installation of solar panels had started, even if the business had failed to deliver on "essential" elements of the contract. Under some of these terms, a consumer could only seek redress by pursuing common law damages rather than having the option to simply end the contract.
- ACCC and CAV analysis found that consumers who entered into long term standard forms of contract with fitness centres, tended to raise concerns about early termination fees, not fully appreciating either the duration of the contract or the practical effect of exit and termination clauses until they sought to end the agreement. Following direct engagement with fitness centres, some but not all have implemented changes to ensure that the consumer is made aware, before entering into the contract, of the exact duration of the contract and the effect of exit and termination clauses.
- Another issue raised was the often unnecessary and burdensome obstacles imposed on consumers to exercise their rights to terminate these contracts such as the onerous requirement of needing to attend in person at the fitness centre to meet face-to-face with staff before the consumer is entitled to bring the contract to an end. Many businesses have now amended their contracts to remove such problematic terms.
- In the online sector, some broadly drafted terms sought to exempt the business from liability for errors or inaccuracies they would otherwise be responsible for, while making the consumer responsible for ensuring information provided to them was correct. The ACCC and CAV engaged directly with businesses operating online and each business contacted chose to amend the problematic clauses to provide more balance.
- Some terms in the telecommunications industry purported to require the consumer to pay for all charges and use of their service, regardless of whether they authorised that use or not. The ACCC raised these concerns with four major telecommunications businesses. Three out of the four chose to amend or delete their terms to provide greater transparency to consumers including guidance for consumers about how to mitigate against the risk of unauthorised use of the services. One business made it clear that consumer liability did not extend to charges incurred as a result of a mistake on the part of the business.
- The ACCC also raised concerns with many of the major hire car companies examined during the review. The report states that none of the businesses adequately addressed the concerns raised.
- As a result of a complaint received from Choice, the ACCC examined a standard form contract used by a travel agency which sought to remove a consumer's credit card chargeback rights when buying the travel services through the agency. As a result of direct engagement by the ACCC, this travel agency agreed to delete these provisions from the standard form contracts meaning that all consumers buying travel services through this agency now have the benefit of the credit card chargeback facility fully restored. It was noted that Flight Centre had already amended its standard form contracts to remove these provisions in August 2012.

Overall, the report states that ACCC was generally pleased with the response from businesses with whom the ACCC engaged in raising consumer concerns regarding the unfair contract terms that required revision.

The ACCC has moved into an enforcement phase and is considering what actions might be necessary, particularly in terms of the vehicle rental industry, to deal with specific provisions still in use which the ACCC regards as operating unfairly.

Decisions of the courts and tribunals regarding the unfair contract terms legislation.

The following are some examples of the courts and tribunals both at federal and state level interpreting the new unfair contract term legislative provisions.

Refund of airline fare purchased online

In *Kucharski v Air Pacific Ltd* the NSW CTTT as it then was (now NCAT) heard an application by a consumer for the immediate refund of moneys paid for two return fare airline tickets from Melbourne to Nadi (Fiji) that were booked with Air Pacific Ltd ("APL") online.

The tickets were for Mr Kucharski and his father. However, his father was unable to obtain travel insurance and so Kucharski cancelled the tickets the day after they were purchased. He was told by APL that the refund would be processed within four weeks.

About six weeks later, Kucharski received a sum that was approximately one-quarter the amount paid. He was informed that the tickets were not refundable.

The CTTT held that:

- The relevant term regarding cancellation and refunds was not prominently displayed in APL's document "Bula Saver Fare".
- There was no apparent reference to "cancellation/refunds" in APL's printed terms and conditions of carriage.
- The reference to non-refundability ("non endnon ref") on the e-tickets was not clearly legible or legibly expressed.

Accordingly, there was an imbalance in the parties' rights and obligations under the standard form contract in relation to passenger cancellation of bookings.

Whilst the relevant term regarding cancellation did not prevent a passenger from terminating the contract, such termination or cancellation *for any reason* other than the death of the passenger or a close family member resulted in the forfeiture of the fares.

The term was held unfair and declared void. APL was ordered to refund the balance of the total fare to Kucharski.

Refund of moneys used to purchase dining table through an online auction facility

In *Malam v Graysonline, Rumbles Removals and Storage*, the NSW CTTT (as it then was) heard an application by a consumer for the refund of moneys paid for the purchase of a Tuscany square 8 seater wicker dining table that Mr Malam successfully bid for online.

In order to bid on Grays Online, Malam was required to go through a registration process, which involved agreeing to Grays' User Agreement, a 13 page document. Malam admitted he did not read the agreement but simply pressed "yes".

His winning bid for the table was $709.00. He also accepted he was required to pay a 15% buyer's premium giving a total cost of $815.35.

Subsequent to the successful bid, Malam received notice from Grays, which included a term that stated it accepted no responsibility for transit damage to the item once it had been collected from the warehouse. Further, that refunds and exchanges were not given under any circumstances.

Malam then contracted with the second respondent. Rumbles Removals and Storage ("RRS") to collect the table and paid $395.00 for this service. Upon delivery to Malam, the glass on top of the table was shattered and the frame of the table was bent. Black footprints were also noted outside of the large flat box that contained the table.

The issue in dispute concerned the terms of the User Agreement and the Notice signed by Malam.

The CTTT held that the User Agreement was a standard form contract within the meaning of the ACL. Further, that the particular clauses within the agreement relating to the return of the goods or refund were part of a 13 page agreement provided online, the structure of which was confusing. Some clauses, it was held, were considered to be inconsistent with other clauses appearing in the same document.

Accordingly, the terms relating to the return of the goods or refund of moneys paid were considered to be unfair terms and therefore void. The effect of this finding was that Malam was entitled to the benefit of the consumer guarantee as to acceptable quality which had been breached.

Grays was ordered to refund the purchase price, including the 15% buyer's premium, to Malam. The claim against RRS seeking a refund of the $395.00 paid for the delivery of the table to Malam was unsuccessful.

Federal Court holds the unfairness of a contract term "incontrovertible"

In a recent decision of the Federal Court of Australia (22 April 2015), Justice North held in *ACCC v ACN 117 372 915 Pty Limited (formerly Advanced Medical Institute Pty Limited) & 6 Ors* that a contract between two of the respondents collectively described in the judgment as "NRM" (NRM Corporation Pty Ltd and NRM Trading Pty Ltd) and its patients concerning

termination and refunds was unfair within the meaning of Section 24 ACL and ordered a refund to certain patients of moneys paid under contracts with NRM.

The judgment is lengthy and involves numerous disputes. It details the evidence given over 33 days of hearing and the detailed submissions relied on by the ACCC and the medical practitioners and practices that offered services for male sexual dysfunction including erectile dysfunction ("ED") and premature ejaculation ("PE").

This includes the many experts who gave evidence regarding the efficacy or otherwise of the medication offered to patients of NRM who agreed to pay for 12 months or 18 month programs for PE.

Relevantly, doctors who worked at NRM offered treatment programs over the telephone which involved the patients entering into contracts with NRM for the prescription of medications and treatment for PE.

However, the telephone calls were often from sales staff on commission who were held out as clinical coordinators which gave the impression they were qualified medical practitioners, when they were not.

Some patients attended a clinic rather than accept the program over the telephone.

All were required to sign a written contract. However, some of the patients who entered into the program by telephone were not offered the written terms until three months of medication had been shipped to them.

Justice North considered the case of seven NRM patients who entered into 12 month programs and four patients into 18 month programs. All patients sought treatment for PE.

Payment was by direct debit or credit card. Most paid a deposit towards the full price, or agreed to pay a weekly or monthly amount.

The evidence revealed that a 12 month program would cost $2,100 and an 18 month program would cost $4,500.

When a prescribed medication did not entirely work there was no refund available for the moneys already paid. An administration fee would also be charged although how it was calculated was not entirely clear.

Justice North considered the termination and refunds clause in the NRM contracts with the above patients. The company from which NRM purchased the business (AMI) had previously issued contract terms that included a 48 hour cooling off period. NRM did not continue the practice.

Six NRM patients tried to cancel their contracts within a day of making the agreement with NRM but their requests were refused.

One patient who developed a rash who wished to opt out of the contract was denied.

Others were refused their request to terminate on the ground their request was not submitted in writing when the contract made no specific reference to this requirement.

Justice North held that NRM failed to rebut the presumption that this was a standard form contract and that the term was not reasonably necessary to protect the legitimate interests of NRM.

Justice North also had no difficulty in finding the contract term unfair by applying the following test implemented by Lord Bingham in a decision of the House of Lords in 2001 in *Director General of Fair Trading v First National Bank plc:*

> *"The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour.*
>
> *This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty."*

His Honour Justice North found that the NRM term lacked transparency to a significant extent. The basis on which the administration fee was calculated was not disclosed to the patient at all. The method of calculation of the cost of the medication was not disclosed to the patient at all. The patient was not provided with a written copy of the refund term until after the contract was entered into, save in the case of patients who attended a clinic.

His Honour concluded:

> *"When regard is had to the contract as a whole, the unfairness of the term becomes incontrovertible. The contract provided for the supply of medications which were not regarded by the medical profession as the usual forms of treatment and there was no cogent evidence that they were effective to treat ED or PE. In those circumstances it was unfair to hold the patient to the agreement on penalty of payment of fees, the method of calculation of which was unknown, imposed in order to cancel the treatment."*

Conclusion

Although it is relatively early days since the unfair contract term legislation was enacted, the clear trend

emerging from the case law is that the protection of the consumer is paramount.

Terms which are contained within lengthy written contracts that are confusing, difficult to understand for the lay person, or inconsistent with other provisions within the agreement, will be declared void for unfairness.

The Courts are also having little difficulty applying the presumption of a standard form contract when the respondent fails to provide evidence to rebut the presumption.

The net cast by the proposed amendments and their application to small business is wide indeed. Many millions of contract entered into each year would fall within the definitions of a small business contract and a standard form contract.

Although the intent of reducing unfairness has merit, it is likely that the legislation will throw up a new area of uncertainty and dispute for small businesses.

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Do building consultants owe prospective property buyers a duty of care?

Historically, the legal authorities in respect of the provision of negligent advice by building experts causing personal injury (or "physical loss") were often focused on the element of reliance on the advice as a fundamental requirement. In cases of damage resulting from negligent advice being restricted to pure economic loss, however, the Courts have been reluctant to expand the scope of a building expert's responsibility on the grounds of public policy, even where there is an element of reliance – citing this as too weighty a burden on building professionals. That view is reflected in the recent Court of Appeal decision *Delaney v Winn [2015] NSWCA 124*, which considered the ambit of the duty of care owed by building consultants in respect of the provision of advice to prospective buyers of a property where the buyers rely on that advice when making their decision to purchase the property.

The Delaneys brought a claim for damages and equitable compensation against their building inspector on the basis of breach of contract, and breach of a "contractual duty of care" after they purchased a property in September 2006 and sold the property at a loss at a later time after the property proved to be in poor condition.

Prior to purchase, as is common the purchasers arranged a property inspection which was undertaken by an entity trading as "Graphic". Graphic procured the services of "Facility Solutions" to undertake the building report component, which was completed following a building inspection undertaken by Mr Winn, a director and employee of Facility Solutions. The understanding was that the building inspection would be undertaken as a 'standard report', in accordance with the applicable Australian Standards.

Evidence was led that the process for preparation of the building report was for Mr Winn to undertake the visual inspection of the property and dictate his notes into a proforma building report prepared by Graphic that conformed with Australian Standards. The report was then finalised by Graphic. Mr Winn was not given the opportunity to review or sign the completed report.

On the coversheet of the report prepared for the Delaneys, the completed report noted that the property was "generally in good condition". No issues were identified that required immediate attention or rectification.

There was a standard clause at the end of the report which noted that the report:

> *"… is a reasonable attempt to identify any obvious or significant defects apparent at the time of the inspection. Whether or not a defect is considered significant or not, depends, to a large extent, upon the age and type of the building inspected. … It is not a structural report. Should you require any advice of a structural nature you should contact a Structural Engineer."*

Several weeks after the report was completed, Mr Winn attended a site inspection with and at the request of one of the Delaneys and provided advice in relation to building issues. There was evidence led that Mr Winn was provided with a copy of the finalised report on that occasion, but at hearing he could not recall if he had read the finalised report at the inspection.

The Delaneys alleged that a number of cracks had been present in the walls of the property during the building inspection and subsequent inspection, in addition to other alleged latent defects. In April 2007, following heavy rain in the area, the cracks began to expand.

The Delaneys argued the true facts were that: among other defects, the house had cracks in all areas and in every single wall; there had been repairs made in order to sell the property and damage had been patched to make it "look all right"; there were amateurish repairs

to major cracking in the foundation wall; there was no provision for drainage away from the house at all; and there were defects in the paving that directed stormwater onto the footings and walls. In the outline of oral submissions handed up on the appeal, the appellants' claim was described as including allegations of "under-reporting, understatement & failure to alert to defects that would cause the property to deteriorate".

The Delaneys ultimately sold the property for approximately $43,000.00 less than the original purchase price.

At trial, the Delaneys argued that Mr Winn had failed to disclose in his report the significance of a number of cracks in the walls of the property, and the inadequacy of some of the temporary "repairs" of the cracking that had been undertaken prior to purchase. It was alleged that in those circumstances it had not been open to Mr Winn to conclude that the condition of the property had been "good". The Delaneys had relied on Mr Winn's report in their consideration of whether to purchase the property at the selling price. The Delaneys claimed they would not have purchased the property if Mr Winn had provided the proper advice.

Justice Finnane of the District Court found that there was no breach of contract – as there had been no contract between the Delaneys and Winn – as well as no "breach of contractual duty of care" – better described as "negligent misstatement". Mr Winn's duty of care owed to the Delaneys was simply to carry out an inspection in accordance with the Australian Standards. As Mr Winn had complied with the requirements of the Australian Standards, his Honour found that there had been no breach of the duty of care, and the claim was dismissed.

On appeal before Chief Justice Ward and Justices Emmett and Gleeson of the NSW Court of Appeal, it was argued by the Delaneys that Mr Winn owed a duty to take reasonable care in giving advice in one transaction that extended over both the provision of the report, and the provision of oral advice at the site meeting. It was suggested that by attending the site inspection with a copy of the report, Mr Winn had implicitly endorsed the contents of the report, and also breached his duty of care by failing to correct any inaccuracies that were in the building report.

The Court of Appeal's first problem with these allegations was that they had not been pleaded in the Statement of Claim, which had simply alleged breach of a contractual duty of care to conform to the Australian Standards. Leaving the issue of the case being properly pleaded aside, the Court of Appeal sought to address the scope of any such potential duty by a reasonably competent building consultant in the provision of a building report and any subsequent oral advice, by reference to the Australian Standard.

Relevant clauses of the Australian Standard stipulated that any building report purporting to conform to the Standard "should be seen as a reasonable attempt to identify any significant defects visible at the time of the inspection". "Significant" within the meaning of the Standard was referred to in the Standard as depending "to a large extent upon the age and type of building". The Standard required an inspection and assessment of the "general condition" of particular parts of the building exterior including masonry walls, for defects, including cracking…. and for differential or rotational movement".

Mr Winn had given evidence at hearing that it was typical for buildings of the type purchased by the Delaneys to have some cracking present, particularly in the location conditions. He deposed that he had evaluated the cracking at the time of the inspection, and considered it "superficial and minor". In addition, in his oral advice at the site meeting, Mr Winn had noted in respect of the cracking in the retaining wall of the property that a structural engineer might need to engage a geotechnical engineer for a further opinion. This same advice had also initially been dictated after the initial inspection (but for unknown reasons was not incorporated into the building report).

There was also some debate over the use of the word "good" in the context it was used in the building report. On behalf of Mr Winn it was argued that the use of the word simply confirmed that the property was "still standing", and nothing more. At hearing, the Delaneys relied on an expert report undertaken after the water damage in April 2007, which criticised Mr Winn's use of the term "good" as it suggested the property was above average when it was in fact "below average".

Ward J noted:

> *"the Australian Standard makes clear that a building report should not be seen as an "all-encompassing report dealing with a building from every aspect", but, rather, "should be seen as a reasonable attempt to identify any significant defects visible at the time of the inspection" (Australian Standard at 3.3). The significance of perceived defects was dependent on an assessment of matters such as the age and type of the building. Clearly a building inspector is required to carry out an evaluative exercise in that regard and it is reasonable to assume that there would be scope for reasonable minds to differ in the assessment of the significance of perceived defects."*

In this case the complaint was Mr Winn's assessment of the property as being in "good" condition was not reasonably open on the conditions that should have been observed by a competent inspector. The

Delaneys relied on a report of Mr Dickinson which they obtained to identify defects found after the 2007 event rather than an expert report that commented on what a building inspector should have identified when completing the pre-purchase report and Dickinson expressed the opinion that the defects he had discovered should have been discoverable by Mr Winn.

Ward J noted:

> *"The opinion as to whether the property was in good condition was an evaluative exercise, as was the attribution of significance to defects that were noted or as to the adequacy of particular matters such as surface water drainage. Mr Dickinson's view differed from that of Mr Winn. His Honour (the Trial Judge) obviously accepted that Mr Winn's opinion fell within the range of that which a reasonably competent building inspector might form bearing in mind that Mr Winn saw the property in dry conditions and before any water damage from the April 2007 rain had occurred. It cannot be said that his Honour's conclusion, though briefly stated, was not open on the evidence."*

The critical point was that the Delaneys' expert report was rejected as being an example of the kind of advice that should have been provided by Mr Winn to the Delaneys in a pre-purchase inspection report. The purpose of Dickinsons' report, in contrast to Mr Winn's report, had been to consider the appropriateness or otherwise of Mr Winn's report, and not to provide a standard building report prior to a sale. It was therefore not an Australian Standard report.

It was open to the Trial Judge to conclude that Mr Winn had acted with reasonable care by providing a report which conformed to Australian Standards and the Court of Appeal determined there had been no error by the Trial Judge.

Expert opinions do differ and evaluative judgements must be made by an expert. It is critical to understand the terms of the retainer of the expert to determine the duty of care owed. Here the expert was required to provide a report described by the Australian Standards as a "standard report" and the evidence demonstrated that the report provided met the Australian Standard.

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EMPLOYMENT ROUNDUP

How do you negotiate a WHS Enforceable Undertaking in NSW?

Part 11 of the *Work Health and Safety Act 2011* ("Act") introduced an alternative enforcement strategy to prosecutions for breaches of the Act. WorkCover can enter into an enforceable undertaking with a person or business that has breached the Act rather than prosecute them for the offence.

While undertakings are new to New South Wales they have been in use in Queensland since June 2003 and the New South Wales guidelines for undertakings are based along the lines of those in Queensland.

Section 222 of the Act provides that the Regulator (WorkCover) can accept an undertaking prior to or after a prosecution for an offence has been commenced.

Undertakings are not generally accepted where there has been an amputation of a limb, serious nervous system dysfunction or death. A party in these circumstances may apply for an exceptional circumstances dispensation however currently there are no recorded exceptional circumstances undertakings in New South Wales.

The process for negotiation of an enforceable undertaking is as follows:

- A prosecution is commenced or WorkCover notifies a business that it is of the view an offence has been committed.
- WorkCover may invite a business to come in and discuss the possibility of negotiating an undertaking or the business can contact WorkCover to indicate it would like to explore that possibility. The inspector who investigated the breach of the Act is not the representative for WorkCover in any negotiations of an enforceable undertaking.
- A meeting is held between the offender and WorkCover and the offender's lawyer can attend. At the meeting WorkCover outlines the process for negotiating the undertaking and what it is looking for from the offender.
- The offender is invited to advise whether it is prepared to enter into formal negotiations to agree an undertaking. If the offender is not prepared to negotiate a prosecution will proceed.
- The business then prepares a draft undertaking which it provides to WorkCover which is then the subject of further discussions and negotiations which eventually result in an undertaking acceptable to WorkCover representative.

- The draft undertaking is then submitted to a WorkCover panel for approval.

Negotiations to reach the final stages of a proposed undertaking take approximately six to nine months however the Courts are now clamping down on the time taken and the parties should ensure that the negotiation of the undertaking is completed within six months. Once the proposed undertaking is finalised it is put to a WorkCover panel which will assess the undertaking for acceptance. If it is not accepted it will usually be returned to the parties for revision.

Once an enforceable undertaking is accepted any prosecution commenced is withdrawn and person or business then carries on with the strategies outlined in the accepted undertaking.

The undertakings are expected to cover activities over a two to three year period and address commitments to safety and welfare. The Act provides significant penalties of $50,000.00 for an individual and $250,000.00 for a corporation, for a breach of any undertaking and where there is a breach the person or business may also be prosecuted for the original offence.

An acceptable undertaking must commit to strategies which promote safety, health and welfare in the workplace, industry and community. Significant upgrades on safety systems and procedures in light of the incident that caused the risk or injury are expected as well as a continuing commitment to enhance safety in the workplace.

Strategies that promote and enhance safety and welfare in the type of industry in which the offender's business is undertaken are also required. This can be undertaken through education and information provided to the client base of a business or industry associations. Some businesses that have entered into undertakings have financed research into better safety systems and methods of implementation.

WorkCover also expect that strategies promoting safety at the workplace throughout the community are implemented. These can include promotions through charities or other similar institutes. For example one recorded undertaking provides that the company will hold a promotion of safety awareness at a local rugby league venue on the day of a football match thus getting the message out to upward of 15,000 people. Direct donations to charities are not accepted as it is not possible to track the use of the funds or assess the outcome.

An undertaking can involve a significant commitment of labour and finances.

Safety awareness programs receive favourable encouragement from WorkCover who focus on the details of the program, the target audience and likely benefit to the community. Many businesses already have in place marketing strategies through various means of communication with their existing client base and the community and that commitment may in some cases be enough to satisfy what is expected from a business that provides an enforceable undertaking. A business can incorporate its existing marketing tools and strategy in its offering in the enforceable undertaking. After all industry and community involvement with a focus on safety can enhance the marketability of a business and is also beneficial for WorkCover.

Finally a person or business that enters into an enforceable undertaking is required to publish the fact that they have entered into an undertaking in a relevant local publication or industry publication approved by WorkCover. The full undertaking is also uploaded onto the WorkCover website and accessible to the public.

While WorkCover have stated that the priority with undertakings is to ensure quality of the outcomes rather than a financial commitment, the undertaking is not meant to provide an easy escape from penalty for more financially capable parties. WorkCover will compare the financial commitment against the defendant's financial capabilities.

On the upside, where an offender enters into an undertaking and completes it, no conviction will be recorded.

While an enforceable undertaking creates an obligation on a business to commit to an ongoing two to three year strategy in many cases that commitment will be far more palatable than a prosecution, conviction and fine.

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WORKERS COMPENSATION ROUNDUP

Permanent impairment assessments and pre-existing conditions

To bring a work injury damages claim an injured worker must have a degree of permanent impairment of 15% or greater and if an employer and worker cannot agree on the degree of permanent impairment the worker is referred to an approved medical

specialist ("AMS") to determine the issue and the determination is binding on each of them.

Pre-existing medical conditions must be taken into account in the assessment as Section 323 of the *Workplace Injury Management Act 1998* provides that when assessing the degree of permanent impairment resulting from an injury there is to be a deduction for any proportion of the impairment that is due to any pre-existing condition or abnormality.

However it is not always easy to determine whether there is a pre-existing medical condition and a deduction made for pre-existing conditions often leads to a challenge of the AMS's finding in an appeal to an Appeal Panel.

The recent decision of the NSW Supreme Court in *Ryder v Sundance Steakhouse [2015] NSWSC 526* clarifies that when assessing the contribution of the pre-existing condition it is incumbent on the AMS to look at the end result of the work injury and determine whether the pre-existing condition has made the degree of impairment any worse and only where the degree of impairment resulting from the work injury would not have been as great should a deduction for the pre-existing condition be made.

Ms Ryder sustained an injury to her back during the course of her employment as a shop assistant at Sundance on 18th November 2005.

An MRI scan dated 25 February 2006 revealed an L5/S1 disc lesion contacting both descending S1 nerve roots.

Ryder's condition deteriorated over time and in 2009 she underwent a L5/S1 discectomy surgery by way of micro-discectomy. A post surgery MRI revealed that at the L5/S1 level there was advanced degenerative disc disease and a small broad based central/left para-central disc protrusion associated with annular tear.

In 2012 Ms Ryder was assessed by Dr Cordato, neurologist as suffering a 15 per cent whole person impairment as a result of her injury. Dr Cordato said "there is no pre-existing degenerative condition of relevance".

The employer arranged for Ryder to be examined by Dr John Watson, who assessed a 15% whole person impairment then deducted a tenth for pre-existing changes.

As Ms Ryder and her employer did not agree on the degree of permanent impairment, Dr Home, an AMS, was appointed to determine the degree of impairment and he assessed a 15% whole person impairment and then deducted one tenth for pre-existing changes.

Ms Ryder challenged the AMS finding and filed an Appeal.

In accordance with applicable statutory guidelines, the Appeal Panel conducted a preliminary review of the matter and decided it was unnecessary to re-examine Ms Ryder or to convene an appeal assessment hearing. The decision of the appeal panel therefore proceeded as a review on the papers that had been before the AMS, the reasons of the AMS and the additional written submissions on appeal made by Ms Ryder and the employer through their legal representatives.

The main ground of appeal was that there was no evidence before the AMS justifying a deduction under s 323 1998 Act, and impugning the adequacy of the AMS's reasons.

Dr Home in reaching his determination provided the following reasoning:

> *"I have determined a 1/10th deduction in accordance with Section 323 to reflect the impact of underlying degenerative changes upon her condition. Review of diagnostic imaging reveals evidence of significant disc desiccation at L5/S1 that would precede the accident. This degeneration has contributed to the development of the disc protrusion and relevant surgical requirements."*

The Appeal Panel confirmed the AMS decision but it was noticeable that the Panel did not say that the MRI scan "done approximately 3 months after the appellant's injury" demonstrated, at that time, the existence of degenerative changes. Rather the Panel formed the "view that in all likelihood the appellant had an abnormal disc predating her injury".

Campbell J noted:

> *"Where the issue is whether any proportion of the permanent impairment resulting from the work injury is due to a pre-existing condition, it is not necessary that the condition, pre-injury, of itself, would have given rise to a rateable percentage impairment by application of the diagnosis-related evaluation of impairment prescribed by the WorkCover Guides."*

The Court confirmed section 323 is engaged if the pre-existing condition, or previous injury where applicable, is a concurrent necessary condition, with the work injury, of the degree of permanent impairment.

However Campbell J noted:

> *"What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that*

proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the degree of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the degree of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great."

In this case the Appeal Panel had not considered the right question. Campbell J noted:

"The whole reasoning process seems to be that there was desiccation shown in an MRI scan, in all likelihood it predated the injury; that was the disc that prolapsed when the injury happened; and therefore it is part and parcel of everything that follows, including the impairment. There was no consideration of whether the physiological change by prolapse of the disc, which occurred on lifting the heavy box of pumpkins, might have occurred anyway in a healthy disc; nor is there any consideration of whether the resulting prolapse was worse because of the pre-existing abnormality; nor is there any express consideration of the means by which the pre-existing abnormality in the disc as found by the Panel contributed causally to the level of impairment, as opposed to the occurrence of the injury. There is a failure to even refer to the different opinion of the parties' medical referees."

As the Appeal Panel had not dealt with the correct question the decision of the Panel could not stand.

But that was not the end of the matter.

Campbell J also found that there was no evidence that some portion of the permanent impairment resulting from Ms Ryder's work injury was due to the pre-existing abnormality of the L5/S1 disc although noted that the Panel if it had addressed the correct question could have provided an opinion which would then have been the evidence required after they had applied their expertise to the assessment of impairment caused by the pre-existing condition. But here the Panel assumed a proportion of the degree of impairment was due to the pre–existing condition. This was another reason there was a jurisdictional error by the Appeal Panel.

At the end of the day the Court remitted the case to a further Appeal Panel for the decision to be made in accordance with the law with the right issues addressed.

There are some clear principles that can be gleaned from this judgement and they are that:

- When the degree of permanent impairment of an injured worker is assessed Section 323 requires there to be a deduction for any proportion of the impairment that is due to any pre-existing condition.
- It is not enough to simply identify that there is a pre-existing condition, the assessment must also consider the actual impact of the pre-existing condition.
- It is not necessary that the pre-injury condition, of itself, must give rise to a rateable percentage impairment assessed under the WorkCover Guide on assessment of impairments it is necessary to look at the impact of the pre-existing condition.
- What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury.
- Only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the degree of impairment resulting from the work injury can a deduction for the pre-existing condition be applied.

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Work Induced Fatigue - Real & Substantial Connection in Journey Claims?

The requirement to work night shifts is not uncommon in a number of industries. The question that then arises is whether the fatigue caused by working such shifts is sufficient to entitle a worker to compensation when they are involved in an accident or injury on a journey home from work. This question was determined by President Keating in *Namoi Cotton Cooperative Limited v Stephen Easterman (as administrator of the Estate of Zara Easterman)* [2015] NSWWCCPD 29,

Traditionally a worker was covered under the Workers Compensation for periodic journeys to and from work. Section 10(3A) was introduced in the *Workers Compensation Act* to specifically exclude the majority of "journey claims" from workers compensation entitlements. Section 10(3A) specifies that compensation is payable only if there was a "real and substantial connection between employment and the injury".

In *Easterman, t*he deceased (Zara Lee Easterman) was on a journey between her employment and her home when she was involved in a fatal motor vehicle accident. A claim was brought by the administrator of the estate on the basis that the death occurred in compensable circumstances due to the accident being

caused by the deceased falling asleep at the wheel of as the result of fatigue. It was alleged the deceased was fatigued because she was relatively new to working night shifts and had worked 60 hours, all on night shifts, in the five days preceding the accident.

The accident occurred when the deceased, without warning turned 90 degrees' into the path of an oncoming truck. The truck driver was the only witness to the accident. The truck driver's evidence and that of the Police who investigated the scene was that there were no brake or other mechanical defects with the vehicle. In the Brief of Evidence submitted to the coroner by the Police it was submitted that the most likely reason for the accident was the deceased's vehicle veering onto the road due to fatigue caused by her working hours.

Arbitrator Caddies originally determined the claim and found there was a real and substantial connection between the deceased's employment and the accident.

Namoi Cotton appealed the decision and relied upon the statements obtained from a number of co-workers that the deceased was showing no objective signs of fatigue at her place of employment prior to ceasing duties for that day. It was also submitted that, despite having 60 hours (in five 12 hour night shifts) in the preceding five days, the deceased did not complete the sixth shift. Although she started work at 7.00 pm, she was sent home at 9.30 pm due to a mechanical breakdown at the site.

President Keating rejected those submissions and focussed on evidence that on three occasions in the week before the accident that the deceased parents observed the deceased was showing objective signs of fatigue including yawning, leaning on the couch and falling asleep in the car after work. The Arbitrator and subsequently President Keating accepted that the deceased was still trying to acclimatise to her new role working night shift. The deceased had only been carrying out her night shift work for under a month at the time of the accident.

Despite the evidence of the deceased's co-workers, both the Arbitrator and President Keating concluded a number of objective facts were a more reliable guide to whether the deceased had suffered from fatigue and fell asleep at the wheel of the vehicle rather than any other speculative proposition. The objective facts were:

(a) the deceased had worked for 60 hours (on night shift) in the five days immediately preceding the accident over five shifts and commenced her last 12 hour shift on the night of the accident;

(b) the absence of any braking on the roadway;

(c) the absence of any attempts to take any corrective measure when a collision with a large vehicle travelling in the opposite direction was imminent;

(d) the absence of any hesitation in the way the deceased's vehicle moved before the collision; and

(e) the absence of any jerking movement of the vehicle which would be consistent with a sneezing fit or temporary interference with the deceased's control of the vehicle.

President Keating also rejected the suggestion of Namoi Cotton that the Arbitrator had reversed the onus of proof. In other words, the Arbitrator correctly found on the balance of probabilities that it was more probable than not that the deceased fell asleep at the wheel due to work related fatigue.

Although it was not subject to an appeal, Easterman was consistent with another recent Arbitrator's decision involving a fatigue related accident. In *Kathleen Kay v Woolworths Limited* (2014) Arbitrator Geoffrey Phillips SC determined a worker who had been required to work on night shift and was not accustomed to doing so, was entitled to compensation after suffering a motor vehicle accident whilst on the way home from work. Like *Easterman* the finding was that sleep deprivation caused fatigue and was a significant causal factor in the motor vehicle accident.

These two decisions make it clear the Workers Compensation Commission is prepared to award compensation for in a journey claim when the injury or accident is caused by work induced fatigue. It will be interesting to see whether in future claims the Commission is also prepared to determine whether there is a real and substantial connection to employment involving accidents where workers have been routinely working nightshifts rather than "acclimatising" to a new nightshift role.

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CTP ROUNDUP

The "foolhardy" actions of a pedestrian

Ilievski v Zhou is a refreshing reminder that personal responsibility is a real factor for pedestrians as they are responsible for their own safety on the roadway.

This Victorian Supreme Court case involved a pedestrian, Mr Ilievski, running across Grimshaw Street in Watsonia, Victoria directly into oncoming traffic. Mr Ilievski was struck by a vehicle driven by Ms Zhou.

Mr Ilievski represented himself at trial. Although his Honour Judge Forrest commented that Mr Ilievski did a satisfactory job in presenting his evidence he found that he was not a credible witness. In fact his Honour commented that "…Mr Ilievski's evidence was riddled with untruths and exaggeration…".

Mr Ilievski was evasive in relation to almost every aspect of the claim during cross-examination. He made false allegations and failed to disclose information relating to his pre-existing hip condition, his longstanding opiate dependency and his employment history. His Honour accepted that Mr Ilievski was an intelligent man who entirely understood the implications of the false evidence he gave.

In his recount of the accident Mr Ilievski alleged that he safely crossed the left lane of Grimshaw Street. However, as he began to cross the right lane he saw Ms Zhou's vehicle heading directly into his path at speed and the collision was unavoidable.

His Honour accepted the evidence provided by independent witnesses, Dr Watmuff and Mr Schenk. Both witnesses were travelling west along Grimshaw Street in the left hand lane. They observed Mr Ilievski jogging along a footpath by the roadway. He was wearing earphones and seemed oblivious to the traffic. Mr Ilievski jogged across the path of Dr Watmuff's car and both Dr Watmuff and Mr Schenk could see that Mr Ilievski intended to jog into the right lane in which Ms Zhou was travelling. Neither witnesses actually observed the point of impact, however Dr Watmuff saw Mr Ilievski's body fly over Ms Zhous's vehicle. Both witnesses stopped their vehicles at the scene of the accident and dialled the Emergency Services.

There was evidence to indicate that Ms Zhou did not reduce her speed upon sighting Mr Ilievski at the side of the road. Dr Watmuff gave evidence that he reduced his speed upon sighting Mr Ilievski. In this context his Honour was required to consider whether a prudent driver in Ms Zhou's position would have reduced his or her speed upon sighting Mr Ilievski at the side of the road.

His Honour accepted that Ms Zhou was travelling at a speed of approximately 50 kilometres per hour prior to the collision and concluded that a reasonable driver would not be expected to reduce his or her speed from 50 kilometres per hour merely by reason of the presence of an adult jogger on the kerb of a roadway. The Court noted it was reasonable to conclude that an adult jogger would not cross directly into a line of traffic. Furthermore, his Honour noted that a prudent driver would be conscious that sudden braking may result in potential accidents for other drivers on the roadway.

His Honour contrasted this situation to one where the pedestrian is a child and the possibility of that child crossing the road in an unsafe manner is much greater. In that situation a prudent driver should contemplate reducing his or her speed.

In any event his Honour commented that if Ms Zhou had reduced her speed it may not have made any difference to the injuries sustained by Mr Ilievski. There was no evidence to indicate that if Ms Zhou was travelling at a slower speed Mr Ilievski would not have struck the windscreen of her vehicle and landed on the roadway.

His Honour ultimately concluded that Mr Ilievski was wholly responsible for the collision. His Honour went so far as to refer to Mr Ilievski's actions as "stupid" and "foolhardy". Mr Ilievski's claim was dismissed.

Pedestrians must take care when they are near the road and a driver acting reasonably does not need to contemplate every possible action of a pedestrian in the vicinity of a roadway.

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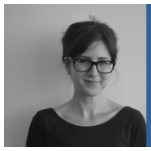

No "comingling" of claims for care of the plaintiff and others

In a claim for damages arising from a motor accident, the Court of Appeal has criticised a plaintiff's approach in "comingling" claims for gratuitous assistance to reach the temporal thresholds where there are two distinct heads of damages governed separately by Section 15B of the *Civil Liability Act* ("CLA") and Section 141B *Motor Vehicle Accidents Compensation Act* ("MACA").

The decision in *White v Benjamin* [2015] NSW CA 75 also provides guidance on the evidentiary basis for any further discount for vicissitudes for future economic loss and highlights the importance of considering all probabilities in the assessment of damages.

Mrs White, was injured in a motor vehicle accident in 2008. At the time of the accident, Mrs White had completed pre-nursing qualifications and was about to undertake nursing training. She worked part-time on weekends as a nursing assistant at a retirement village and continued to do so after the accident.

In May 2009 Mrs White gave notice to the retirement village of her resignation. The reasons given were "health" and "moving out of the area". Mrs White and her two children followed her husband to Canada where Mr White already had a job lined up.

In 2011 Mrs White and her family returned to Australia because Mr White, a podiatrist, purchased a practice in Coffs Harbour. Mrs White then worked for her husband part time as a bookkeeper.

With respect to her past economic loss, Mrs White's case at trial was that but for the motor vehicle accident, they would have remained in Sydney where her mother lived and was able to provide child care while she undertook nursing training.

The trial judge rejected that claim. Curtis DCJ considered Mrs White would have gone to Canada whether or not the accident occurred and would not have undertaken work there which required more than her residual earning capacity after the accident. Mrs White had not established what loss she suffered in Canada.

On Appeal, Mrs White challenged the finding on the basis that there was no evidence that part-time work was available to her in Canada. This point was met with disapproval in the Court of Appeal which maintained that the plaintiff bore the onus of proving her loss:

"It is nonsense to suggest that some burden lay on the respondent to demonstrate that such work was available to her in Canada. Particularly is that so where the plaintiff's case was that, but for the accident, she would not have gone to Canada and would have worked in Australia."

In assessing past economic loss, the Court is required to consider a "counterfactual hypothesis" as described in *Malec v JC Hutton Pty Ltd* [1990] HCA 20. Past losses are a matter of fact and therefore it was open to the trial judge to find, on the balance of probabilities that uninjured, Mrs White would not have worked fulltime in Canada.

Although Mrs White failed on her claim for past economic loss, there was a small victory in relation to future economic loss. The Court of Appeal set aside a 25% deduction for vicissitudes in favour of the conventional 15%, finding that the trial judge relied on stereotyping and an error in principle.

Curtis DCJ *stated*:

> *"A number of circumstances militate towards a significant discount in the present case. Upon the probabilities Mrs White uninjured would have been 46 years old when she commenced her nursing training. It would not be surprising if, her husband being securely employed, she changed her mind about embarking upon such a strenuous career. The family have shown a propensity to move location, and it may not be assumed that Mr and Mrs White would certainly remain in one location for the amount of time necessary for her to complete her training. Even after her graduation, if Mr White's practice flourished, Mrs White may have chosen to retire earlier than her 67th year. In addition to the usual discount of 15% against the possibilities or disabling injury it is appropriate to provide a further 10% discount for these additional circumstances."*

The Court of Appeal found that Mrs White's age was not a sound basis for doubting her future intentions. Her commitment to her own career should not have been assumed to be subject to the financial success or other wise of her husband's business.

Mrs White failed to successfully challenge the trial judge's rejection of her claim for gratuitous care. Although the trial judge erred by assessing damages under Section 15B of the CLA (general gratuitous attendant care services) instead of Section 141B of the MACA, the Court of Appeal noted that both Section 15B of the CLA (damages for loss of capacity to provide domestic services) and Section 141B of MACA (attendant care services) apply and impose temporal thresholds on any award for the losses, being the requirement of services for at least six hours per week during six consecutive months at a minimum.

Evidence was given in the District Court that Mrs White's husband undertook 1.5-2 hours per day performing household tasks normally performed by her. The claim was for seven hours per week. Once the tasks performed by Mr White were separated into services to Mrs White and assistance with care of her dependent children, it was apparent that neither claim reached the six hour per week threshold.

The Court of Appeal referred to *Allianz Australia Insurance Ltd v Ward*[2010] NSWSC 720 where Hidden J stated:

> *"These are distinct, albeit related, heads of damage, each governed by statute. Mr Ward's claim in respect of gratuitous care afforded to himself was subject to s 128 [now s 141B] of the [Motor Accidents Compensation Act], dealing with compensation for the value of 'attendant care services'. ... His claim for loss of capacity to provide services to his children was subject to s 15B(2) of the Civil Liability Act 2002, which is concerned with an award to a claimant in respect of loss of capacity to provide gratuitous domestic services to his or her dependants."*
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> *"Claims under them must be separately assessed, with an eye to the limitations upon an award imposed by each provision. That includes the 6 hour/6month threshold, which must be applied to*

each claim. The statutory requirements are not met by the application of that test in some global way to the two claims, viewed in combination."

For future commercial services the Court of Appeal accepted there was an error in the trial judge's application of the test derived from Miller v Galderisi [2009] NSWCA 353. Although reasons were not given, it appeared that the trial judge was not satisfied Mrs White established that a need for commercial assistance would arise after gratuitous assistance ceased. Indeed, Mr White did not give evidence about the use of commercial assistance.

The Court of Appeal again referred to Malec, reminding us that the authorities require a "form of speculation guided by knowledge of the plaintiff's past and expectations, derived from general experience, as to the future" in order to assess a claim for damages.

Mr White was self-employed and busy. His wife was unable to do heavy chores- services which are readily available and availed of by those who can afford them. Therefore, the Court of Appeal accepted that Mrs White would require commercial assistance with cleaning and washing for three hours per week.

The decision highlights some useful principles and tests with respect to the assessment of damages in motor vehicle claims. It is a reminder that the statutory thresholds for entitlement to Section 15B damages of the CLA and Section 141B damages of the MACA apply independently for each head of damage and cannot necessarily be combined for all received assistance. The case also shows that the Court of Appeal is reluctant, but not afraid to interfere with a discretionary assessment where the finding relied on stereotyping or was made without a strong evidentiary basis.

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To call or not to call – that is the question

In the recent decision of *Cupac v Cannone [2015] NSWCA 114,* the NSW Court of Appeal has examined some of the difficulties that face trial judges when parties rely on wildly divergent medical reports without calling the authors of those reports for cross-examination.

Bore Cupac, a formwork labourer, was injured in a motor vehicle accident on 13 February 2007. He alleged injuries to his neck, lower back and right shoulder.

At trial the parties the parties tendered their medico legal reports without any of the authors being cross-examined.

While it was common ground Mr Cupac was not entitled to compensation for non-economic loss, the parties were very much at odds as to quantum in relation to other heads of damage, in particular past and future economic loss. Mr Cupac claimed over $1 million, while the insurer considered the claim to be worth less than the $77,000 of worker's compensation Mr Cupac had already received. Ultimately Judge Elkaim assessed damages in the sum of $266,361.82 (including $183,050.00 for past economic loss and $66,600.00 for future economic loss).

Mr Cupac appealed, arguing that the trial judge had erred by not providing adequate reasons for his determination of past and future economic loss, and that there was no factual basis for his determination that the appellant had a residual earning capacity which had increased over time from 2 January 2008.

Justice Sackville (Justices Macfarlan and Meagher agreeing) was quick to point out that in not calling any medical witnesses the parties had imposed an extremely difficult task on the trial judge.

The Court found that Judge Elkaim had diligently examined the merits of the competing medical opinions in a case where, as the trial judge noted, doctors had fallen mostly within two camps; those who said there was a lot wrong with Mr Cupac, and those who said there was nothing wrong with him although there may have been for a short time.

Upon examining the medical evidence, Judge Elkaim had noted that only one doctor, Dr Dixon, had considered the appellant required surgery. All other medical opinions suggested soft tissue injury only and it was noted there had been minimal treatment other than continued medication. The judge did not accept that the only improvement in Mr Cupac's condition had been 5-10% in the first 6 months as indicated by some of the doctors who had been engaged by Mr Cupac.

Further, the evidence showed that Mr Cupac was not particularly interested in rehabilitation, had made only limited attempts at looking for alternative employment and had exaggerated his symptoms to doctors. Doctors supporting Mr Cupac had however found some objective signs of at least partial continuing incapacity.

Based the medical evidence, Judge Elkaim considered it appropriate to take a middle road approach. He considered that soft tissue injury had been established and that Mr Cupac had continued to have a diminished earning capacity over time, although that diminution had gradually decreased to the point where Mr

Cupac's continuing incapacity was $150.00 per week. Judge Elkaim recognised that it was very difficult to calculate gradually reducing lack of capacity and there was "no scientific, or even pseudo-scientific, formula" to be applied to assess past economic loss. The Judge proceeded to calculate past and then future economic loss as best he could.

On appeal, Justice Sackville noted that Mr Cupac's principal complaint appeared to be that the trial judge had failed to explain why he had not accepted the evidence of Dr Dixon, the single doctor who considered Cupac required surgery. Cupac also complained the judge had not adequately explained why he had decided to take a "middle ground" approach when the parties' submissions were at opposite ends of the spectrum.

Justice Sackville noted the requirement of a trial judge to give reasons to enable a proper understanding of the basis on which a decision had been reached. In this regard, the Court found Judge Elkaim's explanation as to why he had determined Cupac suffered only soft tissue injury went considerably beyond simply expressing a preference for one of two competing opinions, and in particular took into account his finding (which was not contested) that Cupac exaggerated his symptoms to doctors.

Further, the Court of Appeal found that in saying he was taking a middle road position, Judge Elkaim was not merely striking a compromise between the parties, but rather taking into account his finding that Cupac suffered soft tissue injuries which persisted longer than some doctors had expected, however nowhere near as long as Cupac claimed.

In respect of the approaches adopted by Judge Elkaim in determining past and future economic loss, the Court of Appeal considered the judge's reasoning process in this regard was clear and that in light of the limited evidence available, he had done his best in assessing Cupac's past loss of earning capacity and then projecting that loss (if anything rather generously to Cupac) into the future in order to calculate future economic loss.

The appeal was dismissed.

In the course of the judgment, the Court of Appeal highlighted that in cases such as this where conflicting medical reports are tendered without the cross-examination of their authors, it is the party bearing the onus of proof who takes the most risk. This is because where there is no rational basis for preferring one opinion over another, the party bearing that onus is more likely to fail.

The decision in Cupac emphasises the difficulties faced by a trial judge when parties do not require medical witnesses for cross-examination and the difficulty that confronts a superior courts when findings on the evidence at trial are challenged.

Often in a case of divergent medical opinion the insurer will have the opportunity to have its medico legal experts provide a supplementary report commenting upon the deficiencies in the opinions of the plaintiff's experts, but this will not always be a sufficient substitute for cross-examination of the plaintiff's experts. This is particularly so in cases such as Cupac, where the insurer seeks to rely upon medico-legal opinion that the plaintiff is exaggerating their symptoms.

The problem in this case was further compounded by the plaintiff giving evidence through an interpreter, which the trial judge noted made it difficult to form any reliable assessment of Mr Cupac's demeanour.

The case serves as a valuable reminder that whilst it may be expedient for the parties to tender medical reports and not call witnesses where there is a conflict in the evidence the Court will be faced with the difficulty of resolving the conflicts without hearing from the witnesses and if you don't call your witnesses you will run the risk that your witnesses will not be accepted.

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