

FACTUAL CAUSATION AND THE EFFECT OF SECTION 5D(3) OF THE CIVIL LIABILITY ACT IN PROFESSIONAL NEGLIGENCE LITIGATION

A. Introduction

1. The *Civil Liability Act* 2002 (NSW) brought about substantive and procedural changes to civil litigation in New South Wales and in particular, to personal injury actions. The *Civil Liability Act* also introduced a number of changes to the substantive law as regards professional negligence actions.
2. The focus of this paper is the changes to the law of causation and in particular, factual causation brought about through Section 5D(3) of the *Civil Liability Act*. Section 5D(3) applies not only to professional negligence actions. It applies generally to claims for damages for harm resulting from negligence, including where the claim is framed in tort, contract or under statute, as Section 5A makes clear.¹
3. Whilst Section 5D(3) applies generally to ‘negligence’ claims, it has particular relevance to professional negligence actions. Most, but not all, of the decisions in which Section 5D(3) has been applied and construed to date, have involved claims against medical practitioners or solicitors. Why this is so is readily understandable. It has been held that “a ‘profession’ in the present use of the language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled ... by the intellectual skill of the operator ...”² In that sense, the provision of advice is frequently at the heart of professional work, particularly for solicitors, accountants, auditors, valuers and doctors . For that reason, professional negligence claims often involve allegations of negligent advice being given, leading to a plaintiff suffering a loss. In such a factual matrix, the question of what the plaintiff would have done, had non-negligent advice been given, frequently arises.

¹ Subject though to civil liability that is excluded from the operation of Part 1A by Section 3B.

² *Commissioners of Inland Revenue v Maxse* [1919] 1 KB 647, at 657, per Scrutton LJ.

4. In this paper, I propose to review Section 5D(3) against the background of the recommendations that led to its introduction and also to consider a number of issues which have arisen in the practical application of the section.

B. Section 5D(3) and the Review of the Law of Negligence Final Report

5. Section 5D of the *Civil Liability Act* reads as follows:-

- (1) *A determination that negligence caused particular harm comprises the following elements:*
 - (a) *that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and*
 - (b) *that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").*
- (2) *In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.*
- (3) *If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*
 - (a) *the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and*
 - (b) *any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*

- (4) *For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.*
6. Section 5D(3) was drafted in a slightly different form to what was recommended in the *Review of the Law of Negligence Final Report*. It is helpful to trace the origins of Section 5D(3) through the *Review of the Law of Negligence Final Report* and the recommendations it made. A number of the Judges who have construed the section have gone back to the *Review of the Law of Negligence Final Report* to seek assistance and indeed, such an approach is specifically countenanced by the *Interpretation Act 1987 (NSW)*, Section 34(1)(a) and Section 34(2).
7. Recommendation 29(c) – (h) of the *Review of the Law of Negligence Final Report* in respect of factual causation was as follows:-
- (c) *The basic test of ‘factual causation’ (the ‘but for’ test) is whether the negligence was a necessary condition of the harm.*
- (d) *In appropriate cases, proof that the negligence materially contributed to the harm or the risk of the harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied.*
- (e) *Although it is relevant to proof of factual causation, the issue of whether the case is an appropriate one for the purposes of (d) is normative.*
- (f) *For the purposes of deciding whether the case is an appropriate one (as required in (d)), amongst the factors that it is relevant to consider are:*
- (i) *whether (and why) responsibility for the harm should be imposed on the negligent party, and*
- (ii) *whether (and why) the harm should be left to lie where it fell.*
- (g) (i) *For the purposes of sub-paragraph (ii) of this paragraph, the plaintiff’s own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible.*

- (ii) *Subject to sub-paragraph (i) of this paragraph, when, for the purposes of deciding whether allegedly negligent conduct was a factual cause of the harm, it is relevant to ask what the plaintiff would have done if the defendant had not been negligent, this question should be answered subjectively in the light of all relevant circumstances.*

Scope of liability

- (h) *For the purposes of determining the normative issue of the appropriate scope of liability for the harm, amongst the factors that it is relevant to consider are:*

- (i) *whether (and why) responsibility for the harm should be imposed on the negligent party; and*
- (ii) *whether (and why) the harm should be left to lie where it fell.*

8. As the panel who drafted the *Review of the Law of Negligence Final Report* recognised, an issue arises in some, but not all, cases of negligence as to what the injured person would have done if the tortfeasor had not been negligent. The panel noted that different approaches to determining what the injured plaintiff would have done had the tortfeasor defendant not been negligent had been adopted in different jurisdictions. In Australia, the common law to that point adopted the subjective approach of asking what the plaintiff would have done if the defendant had not been negligent: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, *Rosenberg v Percival* (2001) 205 CLR 434 and *Chappel v Hart* (1998) 195 CLR 232.
9. The panel noted that in other jurisdictions, an objective approach was taken, whereby the Court asked what the reasonable person in the plaintiff's position would have done if the defendant had not been negligent. As the panel pointed out, Canadian law adopts a modified version of the objective approach, under which the question to be answered is what the reasonable person in the plaintiff's position and with the plaintiff's beliefs and fears would have done: *Reibl v Hughes* [1980] 2 SCR 880, at 928 and *Arndt v Smith* [1997] 2 SCR 539.

10. The panel ultimately indicated its strong preference for the subjective approach. It stated:-

“Our view is that the arguments against the objective test are much stronger than those in its favour, and that Australian law is right to adopt the subjective test. On the other hand, the Panel is also of the view that the question of what the plaintiff would have done if the defendant had not been negligent should be decided on the basis of the circumstances of the case and without regard to the plaintiff’s own testimony about what they would have done. The enormous difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge’s view of the plaintiff’s credibility is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. We therefore recommend that in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible.”

11. It is to be noted that there are some differences between the panel’s recommendation 29(g) and the wording of Section 5D(3). First, whilst the introductory words and sub-section (a) are largely the same, sub-section (b) is different, in that it refers to any “statement made by the person after suffering the harm”, rather than the “plaintiff’s own testimony”. As will be noted below, that created some scope for argument as to what was sought to be excluded under Section 5D(3), which lawyers, perhaps unsurprisingly, were quick to try and exploit.
12. Secondly, Section 5D(3)(b) refers only to statements made by the person **after** suffering the harm. However, that would seem to be distinction without a difference, in that a plaintiff could hardly have given a prospective indication of what he or she would have done if the defendant had not been negligent.
13. Thirdly, Section 5D(3)(b) provides an exception to the exclusion of the injured plaintiff’s hindsight evidence, in that it does not exclude statements that are against the plaintiff’s own interest. That was not included in the recommendation of the panel, it would seem because the panel took the view that “*once the harm has been suffered, it is unrealistic to expect the plaintiff to testify that he or she would have had the operation*

(or not used the safety device) even if he or she had been given the relevant information". That is, the panel seemed to discount the possibility of the injured giving evidence that was against his or her interests. That approach is consistent with what has been expressed in other cases. In *Rosenberg v Percival*, Kirby J stated, at 485:-

"Allowing that the patient concerned is sufficiently disappointed with the outcome of some healthcare procedure that he or she has ventured upon expensive, time-consuming and stressful litigation to obtain redress, it is scarcely believable that such a patient would destroy the case by equivocating in evidence over such a matter."

14. As a general proposition, the panel's view is undoubtedly correct. To put the concept in slightly different terms, if a punter has lost a significant sum of money on a horse, in circumstances where the bookmaker knew that the horse had been unwell in the days leading up to the race and arguably should have passed this information on but didn't, it is hardly realistic to expect the punter to say that even if he had been provided that information, he would have still placed the bet. Human nature simply does not work that way.
15. However, as I will indicate below, instances do sometimes occur in professional negligence claims where plaintiffs make admissions against their interests on factual causation after they have suffered harm, but usually before they begin to seriously contemplate bringing a claim, (or, being more cynical, before they consult lawyers) . There are some potential complexities in the approach taken in Section 5D(3)(b) of excluding self serving retrospective evidence from injured plaintiff's, but not excluding evidence which is against the injured plaintiff's interests. That issue will be discussed further below.

C. What "Statements" does Section 5D(3) apply to?

16. In a number of professional negligence actions, plaintiffs have sought to limit the operation of Section 5D(3), by arguing that it only applies to exclude evidence of out of court statements, as opposed to evidence given in court: *KT v PLG & Anor* [2006] NSWSC 919, at [42] – [44] and *LK v Parkinson* [2009] NSWDC 47, at [4]. In my view, such arguments have quite properly been given short shrift. Whilst the term "statement" can have a number of different meanings and is therefore arguably unclear

and as her Honour Simpson J noted in *KT v PLG*, its use in Section 5D(3)(b) is somewhat unusual, it nonetheless lends itself to a commonsense, straightforward construction. That is, that the legislature intended through the use of the word “statement” that anything the plaintiff said or stated after suffering the injury about what he or she would have done but for the negligence, should be excluded.

17. In my view, there would have been more scope for argument if the section had retained the word “testimony”, as per recommendation 29(g) of the *Review of the Law of Negligence Final Report*. I believe there would have been a credible argument available that if the section had referred to excluding “the plaintiff’s own testimony”, that it could have been construed so as to only render inadmissible the plaintiff’s in court evidence.
18. In my view, there is no good reason in commonsense or logic to allow plaintiffs to give self serving in court evidence about what they would have done but for a defendant’s negligence, but to exclude statements to similar effect made out of court. That is particularly so given that the current position in most jurisdictions is that plaintiffs give their oral evidence by way of statement or affidavit made well in advance of the hearing. Whilst it might be argued that it is only out of court statements that need to be excluded, given that Judges are adept at assessing witnesses giving evidence before them and making factual findings, I believe that such an argument ignores the underlying rationale of Section 5D(3). That is, the panel believed that the evidence should be excluded because of its inherent unreliability once the risk is realised and the plaintiff suffers the harm. In that sense, it would not matter whether it was a statement from a plaintiff made six months after the injury was suffered or at a trial in the Supreme Court some four years later. In either case, because it would be inevitably affected by hindsight and bias, it should be excluded.

D. Does Section 5D(3) apply to evidence a Plaintiff May Seek to Adduce to Qualify an Earlier Statement Against His or Her Interests?

19. This issue has arisen in some professional negligence proceedings I am currently involved in, but are yet to proceed to final hearing. The issue arose in the context of an interlocutory judgment of his Honour Davies J on an application by the plaintiffs for a

separate trial on liability issues: *McDonnell v Northern Sydney & Central Coast Area Health Service* [2010] NSWSC 376.

20. In *McDonnell*, the plaintiffs brought an action against the defendant seeking to recover the costs associated with raising their daughter Bethany, who suffered from Down Syndrome. The first plaintiff, who was Bethany's mother, underwent a nuchal translucency ultrasound scan when she was pregnant and it was mistakenly reported to her as indicating that there was a low risk of Down Syndrome, when in fact the risk was high. Thus, in order for the plaintiffs to succeed, the first plaintiff needed to demonstrate that had she been properly informed of the true risk of Down Syndrome, she would have undergone further testing in order to confirm the diagnosis and she would then have terminated the pregnancy.
21. The difficulty for the plaintiffs was that in the days after Bethany's birth, the first plaintiff made a couple of statements to hospital staff members to the effect that while she would have liked to have known about the diagnosis of Down Syndrome earlier, so that she could have prepared, it would have made no difference to her decision as to whether to proceed with the pregnancy: *McDonnell*, at [4]. The first plaintiff did not dispute the accuracy of the entries made by the hospital staff, recording those statements. Rather, she and her husband, the second plaintiff, indicated that at the final hearing, they intend to give evidence themselves and rely on statistical evidence, in order to qualify and explain what the first plaintiff said in the days after Bethany's birth and in order to satisfy the court that in fact, had the proper advice been given as to the true risk of Down Syndrome, the pregnancy would have been terminated.
22. In the course of the interlocutory application before Davies J, his Honour noted that it was not clear how far the plaintiffs would be permitted to go in endeavouring to explain away what was recorded in the hospital notes, having regard to the effect of Section 5D(3): *McDonnell*, at [18]. His Honour noted in particular the difficulty in seeking to rely upon statements they had made to their psychiatrists (as they had both brought 'nervous shock' claims in the proceedings) to the effect that had they known about the true risk of Down Syndrome, they would have not continued with the pregnancy.
23. In my view, both of the questions his Honour posed are capable of fairly clear cut answers. Dealing first with the evidence that the plaintiffs themselves will be permitted

to give when the matter comes to trial, there is no doubt that they will not be permitted to say had they been told of the true risk of Down Syndrome, they would have sought and obtained a termination of pregnancy. Such evidence is undeniably prohibited by Section 5D(3). However, I do not believe that there is anything in Section 5D(3) that would prevent the plaintiffs:

- (i) giving evidence as to the first plaintiff's state of mind and the pressures that she was under at the time she made the statements to the hospital staff members that are recorded in the notes, with a view to trying to persuade the court that what she said at the time was not reliable; or
- (ii) giving more general evidence about their family circumstances and religious beliefs at the time of the subject pregnancy, again with a view to trying to persuade the court not to accept what was contained in the hospital notes.

24. The views I have expressed above are consistent with what the Court of Appeal said in *Neal v Ambulance Service of NSW* [2008] NSWCA 346, at [35] – [42]. As the Court of Appeal noted, the prohibition on evidence from the plaintiff provided by Section 5D(3) is actually quite limited in scope and does not prevent a plaintiff from giving evidence as to his or her circumstances leading up to and at the time of the harm being suffered.
25. I have also heard it suggested, not entirely facetiously, that the best means by which a plaintiff can deal with the prohibition on evidence contained in Section 5D(3) is to give evidence as to what he or she could have done but for the negligence, not what he or she would have done. As such evidence would seem to fall within Section 5D(3)(a), rather than (b), I believe that it would be admissible, though not necessarily of any great weight.
26. The second matter that his Honour Davies J pondered in *McDonnell*, was the ability of the plaintiffs to rely upon the histories they had given to their qualified psychiatrist, which on their faces, amounted to statements as to what they would have done but for the negligence. In my view, any such statements contained in psychiatrists' or other expert's reports would not be admissible as evidence of the underlying facts. That is, provided that the defendant took the objection under Section 5D(3), I believe that the trial Judge would either have to reject a psychiatrists' report, whether in whole or in part, or make a specific order under Section 136 of the *Evidence Act 1995* (NSW) so as

to limit the use to which the evidence could be put. As Davies J noted in *McDonnell* at [18], such limiting orders are frequently made in relation to histories given by plaintiffs to treating doctors: see *Stephen Odgers*, *Uniform Evidence Law – 8th Edition*, at 1.3.4330 and 1.3.14680.

27. It is worth emphasising at this point that it is incumbent upon counsel appearing for a defendant in any of the above situations to object when a plaintiff seeks to give self serving evidence on factual causation and to object when plaintiffs' counsel seeks to tender an expert report which contains a self serving history. There are a number of cases which indicate that objection is not always taken to evidence which should be excluded under Section 5D(3), so that it remains before the trial Judge: *Dominic v Riz* [2009] NSWCA 216 at [99] and *Vella v Permanent Mortgagees Pty Limited* [2008] NSWSC 505, at [491].
28. It is particularly important to remember that because of the way Section 60 of the *Evidence Act* works, evidence of out of court representations of fact admitted to explain the assumptions on which an opinion is based, may then, subject to Section 136, also be used to prove the existence of the asserted facts. In other words, if counsel for the defendant does not take the objection and seek, at a minimum, that a limiting order is made under Section 136, then the expert report can be used to prove the existence of the asserted facts: *Guthrie v Spence* [2009] NSWCA 369, at [75].

E. Does Section 5D(3) Render Certain Questions to Plaintiffs Objectionable?

29. The answer to the above question, on the basis of a sensible construction, must be no. That is because Section 5D(3) applies to “statements” by the plaintiff only. It does not deal with questions posed to the plaintiff in the course of the hearing at all. However, I am aware of at least one decision in which the court has ruled otherwise.
30. In *LK v Parkinson*, Goldring DCJ rejected the following question, which was put to the plaintiff by the defendant's counsel:

“If you were advised that there were surgical risks with tubal ligation, you would have chosen a Mirena inter (sic) uterine device.”

That was a question that went to the ultimate issue on factual causation and invited the plaintiff to give an answer which would have been adverse to her interests. Her claim was that she had not been warned of the risks of the Mirena intra-uterine device and had suffered certain of those risks after she had one inserted. Her case was that if she had been so warned, she would have undergone a tubal ligation instead.

31. Counsel for the plaintiff objected to the question on the basis, inter alia, that the effect of Section 5D(3)(b) was unclear and that the asking and answering of the question in the terms put by the defendant's counsel created a danger of unfair prejudice, such that the question should be rejected under Section 135 of the *Evidence Act*.
32. His Honour rejected the question under Section 135 on the basis that it would be unfairly prejudicial to the plaintiff to allow it to be put. In doing so, his Honour referred to what he characterised as the anomalous effect of Section 5D(3), in that it allowed a question on factual causation to be put, but then disallowed the admission of the answer unless it was contrary to the interests of the plaintiff. In other words, what seemed to concern Goldring DCJ was that Section 5D(3) gave defence counsel a free kick.
33. Goldring DCJ's decision was an interlocutory one and ultimately, the matter settled. However, my view is that his rejection of the question defence counsel sought to put was plainly wrong. There are a number of reasons why this is so.
34. First, His Honour's inability to discern the underlying purpose of Section 5D(3) and his conclusion that it was an "absurdity" belies a lack of understanding of the vice it was aimed at addressing. That is, the section was aimed at preventing the admission of retrospective and self serving evidence on factual causation, which was assumed to be inherently unreliable, and only admitting evidence which was against the plaintiff's interests, on the basis that it could be assumed to be reliable. Thus understood, the question that defence counsel sought to ask in *LK v Parkinson* was entirely proper and may have resulted in relevant and admissible evidence being elicited. The fact that the plaintiff's counsel thought it was necessary to object suggests this to be so.
35. The second significant difficulty I have with Goldring DCJ's decision in *LK v Parkinson*, is his rejection of the question under Section 135 of the *Evidence Act*, on the basis that it would be unfairly prejudicial to the plaintiff to allow the question to be put.

It is difficult to understand how Section 135 could be used to reject the question, given that it refers in terms to a refusal to “admit evidence in circumstances where its probative value is substantially outweighed by the danger that the evidence might ... be unfairly prejudicial to a party”. Until the court had actually heard the plaintiff’s answer, so that there was some evidence that was being sought to be admitted, I find it very difficult to understand how Section 135 could have applied at all. Put another way, his Honour was in no position to conduct the weighing exercise required under Section 135 until he actually heard the evidence.

36. Further, it has been held that evidence is not unfairly prejudicial to a party merely because it tends to damage the case of the party or to support the case of an opponent: *Ainsworth v Burden* [2005] NSWCA 174, at [99]. In circumstances where defence counsel’s question was clearly aimed at securing a concession against the plaintiff’s interests which would have been relevant in the proceedings, I do not believe that it can properly be said that what was being sought was unfairly prejudicial to the plaintiff.
37. Finally, as his Honour Goldring DCJ was sitting alone without a jury, there is a very real issue as to whether it was appropriate to exclude evidence under Section 135 on the basis that it might be unfairly prejudicial to the plaintiff. Stephen Odgers SC has indicated that “where the trial is by a Judge sitting without a jury, it will be an unusual Judge or Magistrate who is prepared to concede that a danger exists that he or she might be “unfairly prejudiced” by the evidence”.³ Dealing with one of the other limbs of Section 135, Campbell J has commented that “*there is something bizarre in submitting to a judge sitting alone that he or she should reject evidence on the ground that it might mislead or confuse him. I propose to trust myself as far as that is concerned*”: *Re GHI (a Protected Person)* [2005] NSWSC 466, at [8].
38. Whilst Goldring DCJ did not reject the question in *LK v Parkinson* on any other basis, I have given consideration as to whether there might have been some other means by which he could or should have properly rejected the question. In particular, I have had regard to the authorities on Sections 11 and 26 of the *Evidence Act*, which set out in general terms the court’s power to control the conduct of proceedings and the questioning of witnesses and Section 41 of the *Evidence Act*, which deals with

³ *Stephen Hodges*, Uniform Evidence Law – 8th Edition, at [1.3.14560].

improper questions. In my view, it is very unlikely that defence counsel's question could properly have been rejected under any of those sections.

39. In conclusion, I do not believe that Section 5D(3) applies so as to render objectionable questions put to the plaintiff on factual causation, even what might be regarded as the ultimate question on factual causation. Similarly, given the legislative intention evident in Section 5D(3), I do not believe that in the ordinary course, such questions should be rejected on other grounds under the *Evidence Act*.

F. Does Section 5D(3) Apply to Prohibit Evidence from Persons other than the Plaintiff who Suffered Injury?

40. My view is that the unequivocal answer to this question is no. That is, where someone other than the plaintiff has suffered the harm, but who was involved in the events in respect of which the claim has been brought, seeks to give evidence about what he or she would have done or told the plaintiff to do, there is nothing in Section 5D(3) which would render such evidence inadmissible: *Livingstone v Mitchell* [2007] NSWSC 1477, at [40] – [47] and *Frisbo Holdings v Austin Australia* [2010] NSWSC 155, at [29] – [38]. In *Livingstone* (which was affirmed on appeal), the evidence which was allowed was evidence from the plaintiffs' son, who had been heavily involved in the purchase of the subject property and had provided considerable advice to his parents about what they should do. In *Frisbo Holdings*, the court permitted evidence from the injured plaintiff, after he had settled his claim with one defendant who was then seeking, in separate proceedings, to recover against another defendant.
41. Thus, depending on the specific factual circumstances of a case, persons other than the plaintiff may be permitted to give self serving retrospective evidence which is not caught by Section 5D(3). Even so, it still needs to borne in mind that according to longstanding common law authority, such evidence is likely to be viewed carefully and given very limited weight even if it is admitted: *Rosenberg v Percival* [2001] 205 CLR 434, at 441-442, 449, 445-486 and 504-505.

G. Some Suggestions as to Cross-Examining Plaintiffs on Factual Causation Issues Having Regard to Section 5D(3)

42. I make these suggestions based on my own experience in running professional negligence claims, my discussions with senior colleagues and my review of the authorities to date. However, I acknowledge that different cross-examiners adopt different techniques and different factual scenarios call for different approaches.
43. It might be thought that because of the protection Section 5D(3) gives defence counsel when asking questions as to factual causation, it might be worth asking the plaintiff the ultimate question. That is, in a failure to warn claim in respect of surgery, the cross-examiner could ask the plaintiff “*even if you had been told of the risk of death, you were so keen to have the operation you would have gone ahead anyway wouldn't you?*” Having regard to the views I have expressed above, if the answer were against the plaintiff's interests, then it would be prima facie admissible and would provide fairly telling evidence against the plaintiff's case. On the other hand, if the plaintiff gave the expected self serving evidence, it could be properly objected to and should be rejected.
44. However, my view is that it is generally wiser and tactically more astute to ask questions as to the relevant surrounding circumstances, without asking the ultimate factual causation issue. That approach has certainly worked for me and for others: *Hamze v Bradstreet* [2007] 54, at [99], *Livingstone v Mitchell* at [57] – [73] and [76] – [86] and *Wallace v Ramsay Health Care Limited* [2010] NSWSC 518, at [70] – [96]. In view of the focus of Section 5D(3)(a) on the plaintiff's relevant circumstances, subjectively determined, I believe that it is prudent to limit the questions to those surrounding circumstances and stop short of asking the ultimate question.
45. The danger in asking the ultimate question on factual causation is that even if the plaintiff gives a self serving answer which is ultimately rejected, it still allows the plaintiff to give what will no doubt be a passionate exposition as to why he or she would have acted differently if only the defendant had not been negligent. Whilst I do not for a moment suggest that trial Judges are unable to reject such evidence and place no weight on it, there are nonetheless considerable dangers in my view in even allowing the words to be spoken. Because determining what an injured plaintiff would have done absent negligence on the part of the defendant inevitably calls for a difficult and

very subjective assessment, there is always the risk of some subconscious effect if the plaintiff can give retrospective evidence as to why things would have been different absent negligence. I maintain that in the ordinary course, it is far better to keep the plaintiff to the underlying facts which will ultimately permit the Judge to determine what he or she would have done. Of course, with every general rule, there are always exceptions.

46. It is worth noting at this point that beyond the plaintiff saying 'I would have done the same thing' or 'I would have acted differently' if the defendant had not been negligent, there is in fact a third alternative. That is, the plaintiff could say that if he or she had been warned of the relevant risks of a surgical procedure, he or she could not say now what he or she would have done. It might perhaps be suggested that such evidence should still be rejected under Section 5D(3) on the basis that it is not, strictly speaking, against the plaintiff's interests, but is neutral to them. However, because the plaintiff bears the ultimate onus on causation, I believe that evidence that he or she could not say what he or she would have done but for the defendant's negligence should properly be characterised as being evidence against the plaintiff's interests and therefore admissible.

Conclusions

47. Arising out of the above, I suggest that a number of basic principles may be stated as regards Section 5D(3):-
- (i) it applies so as to render inadmissible in Court and out of Court statements;
 - (ii) the prohibition on evidence from a plaintiff that it creates is of fairly limited scope, so that it does not render inadmissible evidence given to qualify an earlier statement against a plaintiff's interests or general evidence as to circumstances;
 - (iii) it does not apply to render objectionable questions on factual causation put to the plaintiff by defence counsel;
 - (iv) it does not apply so as to render inadmissible evidence on factual causation from persons other than the plaintiff who suffered the harm;

- (v) it is usually better to limit cross-examination to surrounding circumstances, rather than asking the ultimate question on factual causation.

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