By Tina Cockburn

What the plaintiff would have done in informed consent cases

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> Both at common law[1] and under the various civil liability acts,[2] 'in deciding liability for breach of duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation'.

For plaintiffs in medical negligence claims founded on negligent failure to provide sufficient information (informed consent cases),[3] this onus involves persuading the court to make a favourable determination as to what the particular patient would have done (from a subjective perspective) in the hypothetical situation of the defendant not being negligent (that is, in the event that the medical practitioner had provided sufficient information to the patient).[4]

Meeting this evidentiary burden has always presented a key challenge to litigation success for plaintiffs, in that the plaintiff's testimony to establish causation has the benefit of hindsight, as it is given after the injury has been

suffered. This explains the judicial caution in accepting such evidence.[5] Given such concerns with 'hindsight bias', the Negligence Review[6] recommended that the plaintiff's own evidence as to what s/he would have done in the hypothetical situation should be disregarded.[7] Recommendation 29(g)(i) of the Negligence Review provides:

> '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.'[8]

This recommendation was enacted in essentially uniform language in NSW, Queensland, Tasmania and WA.[9] For example, the *Civil Liability Act* 2002 (NSW) s5D(3) provides:

> '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.'

Although inferences favourable to plaintiffs have previously been drawn from the surrounding circumstances in the absence of the plaintiff's own testimony,[10] there was initial concern that the civil liability evidence exclusion provisions would adversely impact on the ability of plaintiffs to prove causation in informed consent cases as compared with the position at common law. However, recent cases that have considered the construction of the civil liability evidence exclusion provisions indicate that the plaintiff's position under the civil liability legislation will not differ greatly to that under the common law.

COMMON LAW

There is much judicial concern as to the impact of hindsight bias on the plaintiff's testimony as to what s/he would have done. As such, in deciding informed consent cases at common law the courts have found it necessary to look beyond the plaintiff's own testimony towards more objective evidence in order to assess whether to accept the plaintiff's testimony.[11] For example, in *Rosenberg v Percival*,[12] Gleeson CJ considered the following factors to be relevant:

(a) the seriousness of the plaintiff's need for corrective surgery;
(b) the plaintiff's willingness to undergo the risks of general anaesthetic (with which she was familiar);
(c) the plaintiff's failure to ask specific questions about risk; and
(d) the fact that the risk possibility was very slight.[13]

Additional factors were identified by McHugh J, such as the plaintiff's character and personality; the plaintiff's professional nursing experience, PhD in nursing and employment as a senior lecturer in nursing; her knowledge that surgical operations carry inherent risks of harm; the plaintiff's worsening medical condition and her consultations with several specialists to find a remedy; evidence that the procedure was a common operation and most likely to produce the best result; and her willingness to submit to subsequent medical procedures.[14]

The plaintiff's history of response to medical advice has also been considered relevant. For example, in *Richards v Rahilly*,[15] which concerned an alleged failure to discuss the use of a particular drug, Vigabatrin, to treat a child with epilepsy seizure, it was considered significant, when assessing whether to accept evidence that had such treatment been offered it would have been accepted, that the child's parents had previously consistently followed recommendations by the treating medical practitioner.[16]

Other factors that may assist the court in determining what the plaintiff would have done include religious or other firmly held convictions; social or domestic considerations; and assertions made in the immediate aftermath of the operation, in a context other than that of a possible claim for damages.[17] Religious beliefs were a significant consideration in the decision to reject the plaintiff's testimony in *Jones v North West Strategic Health Authority*.[18] In that case, the alternative delivery option of caesarean section was not mentioned and a child was delivered by vaginal birth, resulting in cerebral palsy. The plaintiff's principled objection to blood transfusions as a practising Jehovah's witness was a significant consideration in the court's rejection of her testimony that she would have opted for a caesarean >>

(which would have involved a much higher risk of blood transfusion).[19]

CIVIL LIABILITY LEGISLATION

The NSW evidence exclusion provision has now been judicially considered on several occasions.

The word 'statement' in s5D(3)(b) was construed narrowly in *KT v PLG*[20] so as to exclude only the plaintiff's 'direct evidence' assertion as to what she would have done,[21] and not 'evidence of the surrounding circumstances, which permit an inference to be drawn about what she would have done'.[22] On this interpretation, the plaintiff's testimony is excluded only to the extent that it responds directly to the hypothetical question as to what s/he would have done in the particular situation, and not, for example, what s/he might do in similar situations, or what s/he has done in the past when making medical and other decisions.[23]

The civil liability evidence exclusion provision was considered by the NSW Court of Appeal in *Elbourne v Gibbs*,[24] which concerned liability for negligent failure to warn of the risks of a hernia operation. Basten JA referred to the following factors as relevant in assessing what the plaintiff would have done:

(a) the remoteness of the risk;
(b) the patient's desire for treatment;
(c) previous and later procedures undertaken;
(d) the degree of faith in the medical practitioner;
(e) the knowledge of the patient; and
(f) the need for treatment and alternatives available.[25]

Section 5D(3)(b) *Civil Liability Act* 2002 (NSW) was again considered by the Court of Appeal in the leading case of *Neal v Ambulance Service of New South Wales*,[26] which concerned whether ambulance officers were liable to the plaintiff by failing to advise that he needed to be conveyed to hospital. The plaintiff did not discharge the evidentiary onus to establish causation because there was no persuasive evidence that he would have agreed to go to the hospital or, that if taken unwillingly, he would have submitted to medical assessment.[27] Given the statutory prohibition on the plaintiff's evidence, Basten JA[28] considered that evidence of the following matters might now be considered relevant in assessing what course the plaintiff might have taken:

'(a) conduct of the plaintiff at or about the relevant time;
(b) evidence of the plaintiff as to how he or she might have felt about particular matters;
(c) evidence of others in a position to assess the conduct of the plaintiff and his or her apparent feelings or motivations; and
(d) other matters which might have influenced the plaintiff.'

As to the practical effect of s5D(3)(b), his Honour commented:

> 'Properly understood, the prohibition on evidence from the plaintiff about what he or she would have done is of quite limited scope. Thus, the plaintiff cannot say, "If I had been taken to hospital I would have agreed to medical assessment and treatment." Indeed, as the *Negligence Review* recognised, such evidence would be largely worthless. However, the plaintiff might have explained such evidence along the following lines: *"I recall on the trip to the police station that I began to feel less well; my state of inebriation was also diminishing; I began to worry about the pain in my head ..."*
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> That evidence (entirely hypothetical in the present case) would not be inadmissible. If accepted, it might provide a powerful reason for discounting any inference as to future conduct drawn from the past refusal of treatment. It would constitute evidence as to the plaintiff's position, beliefs and fears.'[29]

The role of objective factors in making an assessment as to what an individual plaintiff's subjective response would have been if properly warned was affirmed by Basten JA, as follows:

> 'Because an inference would need to be drawn from that evidence, no doubt the court would take into account the likely response of a reasonable person in such circumstances. That is consistent with the Act requiring that the matter be determined "subjectively in the light of all relevant circumstances".'[30]

This approach of considering objective factors, including the likely response of a reasonable person, may leave the way open for the admission of statistical evidence[31] to assist in justifying an inference as to what the plaintiff may have done. For example, an assertion by a woman that she would have terminated a pregnancy if told that antenatal investigations indicated that her child would suffer Down syndrome may possibly be supported by statistical evidence as to the percentage of women who elect termination in such circumstances.[32] Conversely, where the statistical evidence is such that it shows that most people would proceed anyway, absent other factors which support the assertion, it may be difficult for a plaintiff to overcome this evidence.[33]

CONCLUSION

In informed consent cases, the plaintiff must establish causation by admissible evidence that supports a positive inference as to what s/he would have subjectively done in the hypothetical situation of no negligence. Given the limited probative value of the plaintiff's own testimony at common law due to the perceived hindsight bias, and recent decisions that have limited the scope and practical significance of the legislative provisions which prohibit the plaintiff's testimony, the position will not differ greatly as between those jurisdictions with the civil liability legislation evidence exclusion and those without.[34]

Accordingly, it would seem that a broad range of evidence may be led by or on behalf of the plaintiff in informed consent cases as to what s/he would have done, despite the legislative prohibition on the plaintiff's own testimony. For example, the plaintiff's express testimony may remain admissible in relation to what s/he would do generally, possibly even in similar situations, though not the exact hypothetical situation under consideration, as well as statements outlining his or her actions, words, views, beliefs and feelings about matters, including medical decisions,

which provide objective support of a positive inference. In addition, as the evidence exclusion provisions exclude only the evidence of 'the person suffering the harm', there remains scope for the admission of evidence about what would have been done from persons other than the plaintiff, such as a parent of a minor or the plaintiff's partner, medical practitioner and/or other professional advisers.

Further, evidence of surrounding subjective and objective factors, including statistical evidence, in support of the plaintiff's assertion as to what s/he would have done would appear to be of increasing importance. ■

This article draws from Tina Cockburn and Bill Madden 'Proof of Causation in Informed Consent Cases: Evidence of What the Plaintiff Would Have Done' and other joint published and unpublished work of Tina Cockburn and Bill Madden, National Practice Group Leader Medical Law, Slater & Gordon, whose contribution and assistance is acknowledged with thanks. The views expressed in this article are those of Tina Cockburn.

Notes: **1** Cf *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, pp420-1 (Gaudron J); *Rosenberg v Percival* (2001) 205 CLR 434, p461 (Gummow J); *Chappel v Hart* (1998) 195 CLR 232, p240 (Gaudron J), p257 (Gummow J), p273 (Kirby J); *Naxakis v Western General Hospital* (1999) 197 CLR 269, p279 (Gaudron J). For a discussion see *Review of the Law of Negligence Report*, available at http://revofneg.treasury.gov.au/content/review2.asp (the Negligence Review) at [7.34]-[7.36]. **2** *Civil Law (Wrongs) Act* 2002 (ACT) s46; *Civil Liability Act* 2002 (NSW) s5E; *Civil Liability Act* 2003 (Qld) s12; *Civil Liability Act* 2003 (SA) s35; *Civil Liability Act* 2002 (Tas) s14; *Wrongs Act* 1958 (Vic) s52; *Civil Liability Act* 2002 (WA) s5D. The common law applies in the NT. **3** The leading case is *Rogers v Whitaker* (1992) 175 CLR 479. **4** *Civil Liability Act* 2002 (NSW) s5D(3); *Civil Liability Act* 2003 (Qld) s11(3); *Civil Liability Act* 2002 (Tas) s13(3); *Civil Liability Act* 2002 (WA) s5C(3). In the ACT, NT, SA and Victoria the common law applies: *Chappel v Hart* (1998) 195 CLR 232, at [9] (Gaudron J); *Rogers v Whitaker* (1992) 175 CLR 479, p492; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, p433. **5** *Chappel v Hart* (1998) 195 CLR 232 (McHugh J); *Hoyts Pty Ltd v Burns* (2003) 201 ALR 470, at [54] (Kirby J). **6** *Review of the Law of Negligence Report*, http://revofneg.treasury.gov.au/content/review2.asp. **7** *Ibid*, at [7.38], [7.40]. **8** Recommendation 29(g)(ii) provides: '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.' **9** *Civil Liability Act* 2002 (NSW) s5D(3); *Civil Liability Act* 2003 (Qld) s11(3); *Civil Liability Act* 2002 (Tas) s13(3); *Civil Liability Act* 2002 (WA) s5C(3). In the ACT, NT, SA and Victoria the common law applies. **10** *State of Victoria v Subramanian* [2008] VSC 9, at [57] (Cavanough J). **11** *Micallef v Minister for Health of The State of Western Australia* [2006] WASCA 98, at [64] (McLure J). As to relevant factors see: Thomas Addison, 'Negligent Failure to Inform: Developments in the Law since *Rogers v Whitaker*' (2003) 10 *TLJ* 11; Bill Madden and Tina Cockburn 'What the Plaintiff Would Have Done' (2006) 14 (10) *AHLB* 116; Bill Madden and Tina Cockburn 'Failure to Warn – Is It About Me, You or Everyone Else?' (2009) April *NSWLSJ* 74. **12** (2001) 205 CLR 434. **13** *Ibid*, at [17]. **14** *Ibid*, at [33]. See also [91] (Gummow J). **15** [2005] NSWSC 352. **16** *Ibid*, at [258]. **17** *Smith v Barking, Havering and Brentwood Health Authority* (1994) 5 *Med LR* 285, p289 (Hutchinson J). **18** [2010] EWHC 178 (QB). **19** *Ibid*, at [56], [71] (Nicol J). **20** [2006] NSWSC 919. **21** *Ibid*, at [43] (Simpson J). **22** *Ibid*, at [44]. Ultimately nothing turned on this construction as the defendant's negligence was in failing to appreciate the length of the pregnancy rather than failing to warn: at [45]. **23** See also J Gleeson and G Evans, 'The Question that Plaintiff's Counsel Cannot Ask' (2004-2005) *Summer Bar News* 36, pp36-7. **24** [2006] NSWCA 127. **25** *Ibid*, at [81]. His Honour drew from Addison, above n 11, pp165-95. For a discussion see Bill Madden and Janine McIlwraith, *Australian Medical Liability* (Lexis Nexis, 2008) at [10.14]–[10.15]. **26** [2008] NSWCA 346. **27** *Ibid*, at [48]-[49]. **28** Tobias JA at [1] and Handley AJA at [67] agreed. **29** *Ibid*, [40]-[42]. **30** *Ibid*, [42]. **31** See, generally, *Seltsam Pty Limited v McGuiness* [2000] NSWCA 29, at [79] (Spigelman CJ). Cf *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153, at [134]-[137] (Ipp JA) regarding the risk of applying epidemiological or statistical evidence that tends to quantify possibilities mathematically or in a mechanical way, as it may be overstating the position to say that the statistical fact that a particular proposition is true of the majority of persons can of itself amount to legal proof on the balance of probabilities that the proposition is true of any given individual. See also *Amaca Pty Ltd v Ellis* [2010] HCA 5. **32** See, for example, Joan Morris and Eva Alberman, 'Trends in Down's Syndrome Live Births and Antenatal Diagnoses in England and Wales From 1989 to 2008: Analysis of Data From the National Down Syndrome Cytogenetic Register' (2009) *BMJ* 339:b3794, available at http://www.bmj.com/cgi/content/full/339/oct26_3/b3794 (which concluded that 92 per cent of women terminate when they receive an antenatal diagnosis of Down's syndrome). **33** *Secretary, Department of Natural Resources & Energy v Harper* [2000] VSCA 36, at [51]. For example, see L Skene, L Williams and P Niselle, 'Elective Cosmetic Procedures: Are Patients Deterred by the Risks?' (2001) 2(2) *Medicine Today* 103 (which concluded that only 25/245 patients did not proceed with surgery following information about risks of breast reductions). **34** See also Gleeson and Evans, above n23, p38.

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