FACTUAL CAUSATION and the effect of s5D(3) of the *Civil Liability Act* in professional negligence litigation

By Jason Downing

The *Civil Liability Act* 2002 (NSW) (CLA) brought about substantive and procedural changes to civil litigation in NSW and, in particular, to personal injury actions. The CLA also introduced a number of changes to the substantive law as regards professional negligence actions.

This article focuses on the changes to the law of causation – particularly factual causation – brought about by s5D(3) of the CLA.[1] Section 5D(3) applies not only to professional negligence actions but to claims for damages for harm resulting from negligence, including where the claim is framed in tort, contract or under statute.[2]

While s5D(3) applies generally to 'negligence' claims, it has particular relevance to professional negligence actions, as the authorities bear out. The provision of advice is frequently at the heart of professional work, particularly for solicitors, accountants, auditors, valuers and doctors. Professional negligence claims therefore frequently involve allegations of negligent advice being given, leading to a plaintiff suffering a loss. The question of what the plaintiff would have done, had non-negligent advice been given, thus arises.

This article reviews s5D(3) against the background of the recommendations that led to its introduction and also considers a number of issues that have arisen in the practical application of the section.

SECTION 5D(3) AND THE IPP REVIEW

Section 5D(3) was drafted in a slightly different form to that recommended in the *Review of the Law of Negligence Final Report* (the Ipp Report).[3]

A number of the judges who have construed the section have gone back to the Ipp Report to seek assistance and, indeed, such an approach is specifically countenanced by the *Interpretation Act* 1987 (NSW).[4] Recommendation 29(c)-(g) of the Ipp Report dealt specifically with factual causation.

As the Panel that drafted the Ipp Report recognised, an issue that arises in some, but not all, cases of negligence concerns what the injured person would have done had the tortfeasor not been negligent. Different approaches to determining that issue have been adopted in different jurisdictions.

In Australia, the common law adopted the *subjective* approach of asking what the plaintiff would have done had the defendant not been negligent.[5] In other jurisdictions, an *objective* approach was taken, whereby the court asked what the reasonable person in the plaintiff's position would have done had the defendant not been negligent. 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.[6]

The Panel ultimately decided in favour of the *subjective* approach, but emphasised that because of the enormous difficulty of counteracting hindsight bias and disturbing factual causation findings on appeal, the issue of what an injured plaintiff would have done 'but for' the negligence should be decided on the basis of the circumstances of the case, and without regard to the plaintiff's own testimony about what s/he would have done.

There are some differences between the Panel's recommendation 29(g) and the wording of s5D(3). First, s5D(3)(b) refers to 'any statement made by the person after suffering the harm', rather than the 'plaintiff's own testimony', creating scope for argument as to exclusions arising under s5D(3), which lawyers, perhaps unsurprisingly, were quick to try and exploit.

Secondly, sub-section (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 exception was not a recommendation of the Panel, because it 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 plaintiff giving evidence that was against his or her own interests.

That approach is consistent with what has been expressed in the authorities. In *Rosenberg v Percival*, Kirby J stated, at 155:

> '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 conceivable that such a patient would destroy the case by equivocating in evidence over such a matter.'

As a general proposition, the Panel's view is undoubtedly correct. After all, if a punter has lost 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, the punter is hardly likely to say that even if he had been provided with that information, he would still have placed the bet.

However, there are professional negligence claims where plaintiffs make admissions against their interests on factual causation after they have suffered harm, but usually before they begin seriously to contemplate bringing a claim. There are some potential complexities in the approach taken in s5D(3)(b) of excluding self-serving retrospective evidence from injured plaintiffs, but not excluding evidence that runs counter to the injured plaintiff's interests.

TO WHICH 'STATEMENTS' DOES S5D(3) APPLY?

In a number of professional negligence actions, plaintiffs have sought to limit the operation of s5D(3) by arguing that it applies only to exclude evidence of out-of-court statements, as opposed to evidence given in court.[7] Such arguments have quite properly been given short shrift.

The term 'statement' can have a number of different meanings and is therefore arguably unclear. However, her Honour Simpson J noted in *KT v PLG*, that although 'statement' in s5D(3)(b) is somewhat unusual, it nonetheless lends itself to a commonsense construction. That is, that the legislature intended through the use of the word that anything the plaintiff said or stated after suffering the injury about what s/he would have done but for the negligence, should be excluded.

It is neither commonsense nor logical to allow plaintiffs to give self-serving in-court evidence about what they would >>

> The section was aimed at ... only admitting evidence against the plaintiff's interests, on the basis it could be assumed to be reliable.

have done but for a defendant's negligence, but exclude statements to similar effect made out of court. That is particularly so given that in most jurisdictions plaintiffs give their oral evidence by way of statement or affidavit well in advance of the hearing.

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; however, this ignores the underlying rationale of s5D(3). That is, that 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 four years later. In either case, because it would be inevitably affected by hindsight and bias, it should be excluded.

DOES S5D(3) APPLY TO EVIDENCE A PLAINTIFF MAY SEEK TO ADDUCE TO QUALIFY AN EARLIER STATEMENT AGAINST HIS OR HER INTERESTS?

In *McDonnell v Northern Sydney & Central Coast Area Health Service*,[8] 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, Bethany's mother, underwent a nuchal translucency ultrasound scan when she was pregnant and was mistakenly told 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.

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.[9] 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 intended 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.

In the course of an interlocutory application for a split trial 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 s5D(3).[10] In particular, his Honour noted 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.

Dealing first with the evidence that the plaintiffs themselves would be permitted to give at trial, his Honour found that they would not be permitted to explain that, had they been told of the true risk of Down syndrome then they would have sought and obtained a termination of pregnancy, such evidence being prohibited by s5D(3). However, there is nothing in s5D(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, 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 the statements in the hospital notes.

These views are consistent with what the Court of Appeal said in *Neal v Ambulance Service of NSW*.[11] As the Court of Appeal noted, the s5D(3) prohibition on evidence from the plaintiff 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.

It has also been suggested, not entirely facetiously, that the best means by which a plaintiff can deal with the prohibition on evidence contained in s5D(3) is to give evidence as to what s/he *could* have done 'but for' the negligence, not what s/he *would* have done. This evidence would seem to fall within s5D(3)(a), rather than (b), and would arguably be admissible, though not necessarily of any great weight.

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 the face of it, amounted to statements as to what they would have done 'but for' the negligence. Any such statements from psychiatrists' or other experts' reports would be unlikely to be admissible as evidence of the underlying facts. That is, provided that the defendant took the objection under s5D(3), the trial judge would either have to reject a psychiatrist's report, whether in whole or in part, or make a specific order under s136 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*,[12] such limiting orders

are frequently made in relation to histories given by plaintiffs to treating doctors.[13]

It is certainly prudent for the defence counsel appearing in any of the above situations to object if the plaintiff seeks to give self-serving evidence on factual causation and also to object when plaintiffs' counsel seeks to tender an expert report that contains a self-serving history. A number of cases suggest that where objection is not taken to evidence that should be excluded under s5D(3), it remains before the trial judge and may be relied upon.[14]

It is particularly important to bear in mind that, because of s60 of the *Evidence Act*, evidence of out-of-court representations of fact admitted to explain the assumptions on which an opinion is based, may then, subject to s136, also be used to prove the existence of the asserted facts. In other words, if the defence counsel does not object and seek, at a minimum, that a limiting order is made under s136, then the expert report can be used to prove the existence of the asserted facts.[15]

DOES S5D(3) RENDER CERTAIN QUESTIONS TO PLAINTIFFS OBJECTIONABLE?

The answer to the above question, on the basis of a sensible construction, must be no. This is because s5D(3) applies to 'statements' made only by the plaintiff. It does not deal with questions posed to the plaintiff in the course of the hearing. However, the court has ruled otherwise in at least one decision.

In *LK v Parkinson*, Goldring DCJ rejected the following question, which was put to the plaintiff by the defendant's counsel:[16]

> '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 that 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 had one inserted. Her case was that had she been so warned, she would have undergone a tubal ligation instead.

Counsel for the plaintiff objected to the question on the basis, *inter alia*, that the effect of s5D(3)(b) was unclear and that such a question created a danger of unfair prejudice, therefore it should be rejected under s135 of the *Evidence Act*. His Honour accepted that position, on the basis 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 s5D(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 s5D(3) gave defence counsel a free kick.[17]

District Court Judge Goldring's decision was an interlocutory one and, ultimately, the matter settled. But his rejection of defence counsel's question was plainly wrong, for a number of reasons.

First, his Honour's inability to discern the underlying purpose of s5D(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 that 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 was so.

The second reservation concerning Goldring DCJ's decision in *LK v Parkinson* is his rejection of the question under s135 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 s135 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, providing some evidence that was being sought to be admitted, it is hard to understand how s135 could have applied at all. Put another way, his Honour was in no position to conduct the >>

weighing exercise required under s135 until he had actually heard the evidence.

Further, it has been held that evidence is not unfairly prejudicial to a party merely because it tends to damage the case of that party or support the case of an opponent.[18] In circumstances where defence counsel's question was clearly aimed at securing a concession against the plaintiff's interests that would have been relevant in the proceedings, it is difficult to see how what was being sought was unfairly prejudicial to the plaintiff.

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 s135 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'.[19] Dealing with one of the other limbs of s135, 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.'[20]

While Goldring DCJ did not reject the question in *LK v Parkinson* on any other basis, might there be some other means by which he could or should properly have rejected the question? Authorities on ss11 and 26 of the *Evidence Act* set out in general terms the court's power to control the conduct of proceedings and the questioning of witnesses, and s41 of the *Evidence Act* deals with improper questions. It is doubtful that defence counsel's question could properly have been rejected under any of those sections.

In conclusion, s5D(3) does not operate to render as objectionable those questions put to the plaintiff on factual causation, even those that might be regarded as addressing the ultimate question on factual causation. Nor, given the legislative intention evident in s5D(3), should such questions be rejected on other grounds under the *Evidence Act*.

DOES S5D(3) APPLY TO PROHIBIT EVIDENCE FROM PERSONS OTHER THAN THE INJURED PLAINTIFF?

Unequivocally, the answer is no. That is, where someone other than the plaintiff who suffered the harm, but someone who was involved in the events in respect of which the claim has been brought, seeks to give evidence about what s/he would have done or told the plaintiff to do, there is nothing in s5D(3) that should render such evidence inadmissible.[21]

In *Livingstone* (which was affirmed on appeal), 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 their options, was allowed. In *Frisbo Holdings*, the injured plaintiff sued two defendants for personal injury and settled with one. That defendant then brought separate proceedings seeking an indemnity or contribution from the other defendant. The injured plaintiff was permitted to give evidence of what he would have done but for injury in those proceedings.

Thus, depending on the specific factual circumstances of a case, persons other than the plaintiff may be permitted to give self-serving retrospective evidence that is not caught by s5D(3). Even so, it still needs to borne in mind that, according to longstanding common law authority, even if it is admitted, such evidence is likely to be viewed carefully and given very limited weight.[22]

CONCLUSIONS

A number of basic principles may be stated regarding s5D(3):

(i) it applies to render inadmissible in-court and out-of-court statements;

(ii) the prohibition it creates on evidence from a plaintiff is of fairly limited scope, so that it does not render inadmissible evidence that is 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; and

(iv) it does not apply so as to render inadmissible evidence on factual causation from persons other than the plaintiff who has suffered the harm. ■

Notes: **1** Section 5D(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'. **2** This is made clear in s5A, but is subject to civil liability exclusions under s3B. For example certain intentional acts resulting in injury or death, some dust or tobacco diseases and some motor vehicle accidents. See also *Burns v Grevler* [2010] NSWSC 1219, at [65]. **3** The report was released on 2 October 2002. **4** Sections 4(1)(a) and 34(2). **5** *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553; *Rosenberg v Percival* (2001) 205 CLR 434; and *Chappel v Hart* (1998) 195 CLR 232. **6** *Reibl v Hughes* [1980] 2 SCR 880, at 928; and *Arndt v Smith* [1997] 2 SCR 539. **7** *KT v PLG & Anor* [2006] NSWSC 919, at [42]-[44]; and *LK v Parkinson* [2009] NSWDC 47, at [4]. **8** *McDonnell v Northern Sydney & Central Coast Area Health Service* [2010] NSWSC 376. **9** *Ibid,* at [4]. **10** *Ibid,* at [18]. **11** *Neal v Ambulance Service of NSW* [2008] NSWCA 346, at [35]-[42]. **12** At [18]. **13** See Stephen Odgers, *Uniform Evidence Law,* 8th Edition (2009), at [1.3.4330] and [1.3.14680]. **14** *Dominic v Riz* [2009] NSWCA 216 at [99]; and *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505, at [491], though see *Attard v James Legal Pty Ltd* [2010] NSWCA 311, at [118]-[126]. **15** *Guthrie v Spence* [2009] NSWCA 369, at [75]. **16** At [1]. **17** At [6]-[7]. **18** *Ainsworth v Burden* [2005] NSWCA 174, at [99]. **19** Stephen Odgers, *Uniform Evidence Law,* 8th Edition (2009), at [1.3.14560]. **20** *Re GHI (a protected person)* [2005] NSWSC 466, at [8]. **21** *Livingstone v Mitchell* [2007] NSWSC 1477, at [40]-[47]; *Frisbo Holdings v Austin Australia* [2010] NSWSC 155, at [29]-[38] and *Reed v Warburton* [2011] NSWCA 98, at [33]. **22** *Rosenberg v Percival* (2001) 205 CLR 434, at 441-2, 449, 445-86 and 504-5.

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