First a failure to inform, then a failure to listen: Why the plaintiff's evidence about what they would have done should not be inadmissible in failure to inform cases

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In negligent failure to inform cases, the plaintiff must prove that the harm complained of would not have materialised if they had been properly informed. This aspect of factual causation ordinarily necessitates an inquiry into what the plaintiff would have done in a hypothetical scenario which never arose, making the plaintiff's evidence on this point vulnerable to hindsight bias. This concern led the common law in Australia to treat it with great caution and, following the Review of the Law of Negligence, the civil liability legislation in several jurisdictions to make it inadmissible. This article contends that this statutory prohibition is ill-founded because it is inconsistent with a subjective approach to determining causation; it disregards the potential utility of the plaintiff's evidence on this point; and it is unjustifiable when hindsight evidence can be given by the plaintiff as to inquiries other than causation, and by witnesses other than the plaintiff. It is concluded that legislative bans on the plaintiff giving evidence about what they would have done should be repealed, and that whilst courts are correct to treat this evidence with caution in most cases, they are well-equipped to do exactly that.

I Introduction

The civil liability legislation in each Australian jurisdiction sets out that 'the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation'.[1] In negligent failure to inform cases, one such fact is that if properly informed, the harmed person would not have suffered the harm that is complained of.[2] This is an aspect of factual causation, in that the failure to inform cannot be a 'necessary condition' of harm which would still have occurred even if the person was properly informed — that is, but for the negligence, the harm would still have come about.[3] For example, in a medical negligence matter in which a health practitioner has failed to warn their patient of a material risk associated with a proposed procedure, the plaintiff must prove that had the practitioner disclosed the risk, the patient would not have opted to proceed with the procedure as proposed.[4]

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1 With the exception of the Northern Territory. *Civil Law (Wrongs) Act 2002* (ACT) s 46; *Civil Liability Act 2002* (NSW) s 5E; *Civil Liability Act 2003* (Qld) s 12; *Civil Liability Act 1936* (SA) s 35; *Wrongs Act 1958* (Vic) s 52; *Civil Liability Act 2002* (WA) s 5D; and in similar terms to the same effect, *Civil Liability Act 2002* (Tas) s 14.

2 *Chappel v Hart* (1998) 195 CLR 232, 242 [22]–[23] (McHugh J) ('*Chappel*').

3 Thomas Addison, 'Negligent Failure to Inform: Developments in the Law since *Rogers v Whitaker*' (2003) 11(2) *Torts Law Journal* 165, 181–2.

4 *Chappel* (n 2) 242 [22]–[23] (McHugh J). The court must be satisfied that the patient would either have declined the procedure or chosen to delay the procedure where the evidence shows that such a delay would likely lead to the risk not materialising.

As such, in failure to inform cases, it will be relevant to the determination of factual causation to establish what the plaintiff would have done if the negligent person had not been negligent.[5] In all Australian jurisdictions this is a subjective inquiry, focusing on what the plaintiff themselves would have done.[6] It follows that the plaintiff's testimony as to what they would have done but for the negligence is 'indisputably relevant'[7] and therefore, according to the ordinary rules of evidence, prima facie admissible.[8]

However, despite its apparent relevance, in several Australian jurisdictions such testimony is made inadmissible by the legislative reforms that followed the *Review of the Law of Negligence* (the 'Ipp Review'). This article contends that these prohibitions are ill-founded and that there should not be any statutory ban on the plaintiff giving evidence about what they would have done if the defendant had not been at fault. Part II briefly explores the treatment of this evidence at common law before canvassing the Ipp Review and its reasons for recommending that this evidence be inadmissible. Part III then outlines various problems with the statutory prohibition, including that the prohibition is fundamentally inconsistent with a subjective approach to determining causation. Recommendations for reform and the appropriate treatment of this evidence are provided in Part IV.

It is concluded that provisions imposing the ban on such evidence should be repealed, and that whilst courts are correct to treat this evidence with caution in most cases, they are well-equipped to do just that. The legislative bans are both problematic and unnecessary — courts can be trusted to attach appropriate significance to this evidence on a case-by-case basis.

II The common law and civil liability legislation

A Treatment at common law

Traditionally the common law required the plaintiff to provide express evidence that had they been properly informed, they would have avoided the harm (eg, by opting not to undergo a proposed medical procedure).[9] As put by the New South Wales Court of Appeal in *Towns v Cross* ('*Towns*'): 'In a warning case, evidence as to what the plaintiff would have done, had a warning been given, is necessary to establish that damage flowed from the lack thereof.'[10] However, the Court continued to note that '[a]lthough the test is a subjective one, a court is

5 *Civil Liability Act 2002* (NSW) s 5D. This question also arises in other contexts, including where an employer fails to provide protective equipment but claims that if it had been provided the employee would not have used it; see *Review of the Law of Negligence* (Final Report, September 2002) 112–13 ('Ipp Review').

6 *Rosenberg v Percival* (2001) 205 CLR 434, 449 [44] (McHugh J) ('*Rosenberg*').

7 *Elbourne v Gibbs* [2006] NSWCA 127, [67] (Basten JA, Beazley JA agreeing) ('*Elbourne*').

8 JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12th ed, 2019) 777–8 [21025].

9 See Bill Madden, Janine McIlwraith and Benjamin Madden, *Australian Medical Liability* (LexisNexis Butterworths, 3rd ed, 2016) 318–19; *Chappel* (n 2) 239 [9] (Gaudron J).

10 [2001] NSWCA 129, [21] (Davies AJA, Mason P and Giles JA agreeing) ('*Towns*'). But see *Victoria v Subramanian* (2008) 19 VR 335, 355–6 [57].

not bound by a plaintiff's evidence as to what the plaintiff would have done if warned.'[11]

In fact, the common law approach had developed to adamantly resist blind acceptance of the plaintiff's evidence on this point, even where the plaintiff's demeanour indicated that they were giving evidence honestly. In *Chappel v Hart* ('*Chappel*'), McHugh J set out the inherent difficulty with this evidence:

> Human nature being what [it] is, most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken. In determining the reliability of the plaintiff's evidence in jurisdictions where the subjective test operates, therefore, demeanour can play little part in accepting the plaintiff's evidence.[12]

In *Hoyts Pty Ltd v Burns* ('*Hoyts*'), Kirby J described the plaintiff's evidence about what they would have done as 'so hypothetical, self-serving and speculative as to deserve little (if any) weight, at least in most circumstances'.[13] As identified in these judgments and in countless other decisions, the plaintiff's evidence on this point is unavoidably wise with hindsight — it is easily 'coloured by the fact that the risks did in fact eventuate'.[14]

Because of the concern surrounding the tainting effect of hindsight bias, a practice developed whereby the reliability of the plaintiff's evidence about what they would have done was assessed by reference to the surrounding circumstances at or about the time that the failure to inform occurred.[15] Such circumstances include, inter alia, the attitude and conduct of the plaintiff,[16] the desire or need to proceed with the course of action that ultimately led to harm,[17] the availability of appropriate alternatives,[18] and the remoteness of the risk.[19]

In practice, then, the plaintiff's assertion about what they would have done but for the negligence would likely not be regarded as reliable where the surrounding circumstances indicated that they would have acted in the same way even if properly informed.[20]

[11] *Towns* (n 10) [22] (Davies AJA, Mason P and Giles JA agreeing).
[12] *Chappel* (n 2) 246 [32] n 64 (McHugh J).
[13] (2003) 77 ALJR 1934, 1943–4 [54] (Kirby J) ('*Hoyts*').
[14] *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 581 (Samuels JA) (*'Ellis*'). See also Danuta Mendelson, 'Australian Tort Law Reform: Statutory Principles of Causation and the Common Law' (2004) 11(4) *Journal of Law and Medicine* 492, 507.
[15] *Chappel* (n 2) 246 [32] n 64 (McHugh J).
[16] Ibid.
[17] *Elbourne* (n 7) [80]–[84] (Basten JA, Beazley JA agreeing), citing Addison (n 3). See also Madden, McIlwraith and Madden (n 9) 326–7, citing as examples *Bustos v Hair Transplant Pty Ltd* (New South Wales Court of Appeal, Gleeson CJ, Powell and Beazley JJA, 15 April 1997); *Reid v Lim* (2006) 49 SR (WA) 1.
[18] *Elbourne* (n 7) [80]–[84] (Basten JA, Beazley JA agreeing), citing Addison (n 3). See also Madden, McIlwraith and Madden (n 9) 326–7, citing as examples *Causer v Stafford-Bell* [1997] ACTSC 90; *Henderson v Low* [2001] QSC 496.
[19] *Elbourne* (n 7) [80]–[84] (Basten JA, Beazley JA agreeing), citing Addison (n 3). See also Madden, McIlwraith and Madden (n 9) 326–7, citing as an example *O'Brien v Wheeler* (New South Wales Court of Appeal, Mason P, Powell and Stein JJA, 23 May 1997).
[20] See, eg, *Smith v Barking, Havering & Brentwood Health Authority* (1994) 5 Med LR 285, 289 (Hutchison J).

B *Review of the Law of Negligence* and current provisions

The Ipp Review expressly considered and made recommendations in relation to cases in which the causal link depends on the plaintiff's hypothetical reaction.[21] The Ipp Review Panel recommended maintaining the common law's subjective approach to determining what the plaintiff would have done if the defendant had not been negligent.[22] However, the Panel was also concerned with the effect of hindsight bias on the plaintiff's testimony about what they would have done. In particular, the Panel noted that: 'the judge's view of the plaintiff's credibility is likely to be determinative ... As a result, such decisions tend to be very difficult to challenge successfully on appeal.'[23]

The Panel therefore recommended that 'in determining causation, any statement by the plaintiff about what they would have done if the negligence had not occurred should be inadmissible'.[24]

The subjective approach is now enshrined in the civil liability legislation in New South Wales, Queensland, Tasmania, Victoria and Western Australia.[25] In each of those states except for Victoria, the legislation also makes inadmissible statements made by the injured person about what they would have done if the tortfeasor had not been at fault (the 'statutory prohibitions'). The provisions in New South Wales, Queensland and Tasmania apply only to statements made after suffering the harm, and set out that such statements are inadmissible except to the extent (if any) that the statement is against the person's own interest.[26] The Western Australian provision has a wider application: inadmissibility is not limited to statements made after suffering the harm and there is no carve-out for statements against interest.[27]

Courts applying the statutory prohibition have interpreted it to be of 'quite a limited scope'.[28] It excludes the plaintiff's testimony only insofar as it directly sets out what the plaintiff would have done in the hypothetical counterfactual scenario demanded by the 'but for' test.[29]

This evidence may still be led in the Australian Capital Territory, the Northern Territory,

[21] Ipp Review (n 5) 112–14.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] *Civil Liability Act 2002* (NSW) s 5D(3)(a); *Civil Liability Act 2003* (Qld) s 11(3)(a); *Civil Liability Act 2002* (Tas) s 13(3)(a); *Wrongs Act 1958* (Vic) s 51(3); *Civil Liability Act 2002* (WA) s 5D(3)(a). Note that all of these provisions, but for that in WA, set out that the inquiry is determined subjectively but in light of all the relevant circumstances.
[26] *Civil Liability Act 2002* (NSW) s 5D(3)(b); *Civil Liability Act 2003* (Qld) s 11(3)(b); *Civil Liability Act 2002* (Tas) s 13(3)(b).
[27] *Civil Liability Act 2002* (WA) s 5D(3)(b).
[28] *Neal v Ambulance Service (NSW)* [2008] NSWCA 346, [41] (Basten JA, Tobias JA and Handley AJA agreeing) ('*Neal*').
[29] Ibid [41]–[42].

South Australia and Victoria.[30] There is therefore some inconsistency as to the admissibility of the plaintiff's evidence on this point throughout the Australian jurisdictions. Further, the recent Federal Court judgment of Katzmann J in *Gill v Ethicon Sàrl [No 5]* ('*Gill*') confirmed that federal courts adjudicating negligence claims are not bound by the state provisions prohibiting the plaintiff's evidence about what they would have done.[31]

III Problems with the statutory prohibition

A A subjective enquiry that does not avoid the defects of an objective approach

A primary issue with the statutory prohibition is that it turns what should be a subjective inquiry into an inquiry that is, in substance, largely objective. In doing so, it does not avoid the fundamental problems associated with the objective approach.

As mentioned in Part II, the Ipp Review recommended retention of the common law's subjective approach to determining what the plaintiff would have done in failure to inform cases. The Ipp Review was correct to do so. As the Ipp Review pointed out, an objective 'reasonable person' approach to determining what the plaintiff would have done has been adopted in some other jurisdictions,[32] but the subjective approach should be preferred for several reasons. The Ipp Review noted some of the defects associated with the objective approach, including that it undervalues a patient's interest in making their own healthcare decisions, may undermine the reactive duty to inform, and answers the question 'what *should* have happened', rather than the causal question: 'what *would* have happened?' [33]

Having made these points and a subjective approach being explicitly recommended, the Ipp Review goes on to recommend a provision that necessitates (at least in some cases) the very objective approach that it reasoned against — this being the recommendation that the plaintiff's own evidence about what they would have done be inadmissible. The Ipp Review and the resultant statutory provisions therefore establish a 'subjective' test that somewhat paradoxically cannot hear from the plaintiff.[34] Objectification of the inquiry is perhaps unavoidable given such a restriction.

This objectification is most evident in the recognition that evidence as to what reasonable persons would ordinarily do can be highly probative in determining what the plaintiff would have done. In *Neal v Ambulance Service (NSW)* ('*Neal*'), Basten JA said of the inquiry that 'no doubt the court would take into account the likely response of a reasonable person in such

[30] Madden, McIlwraith and Madden (n 9) 322–35. See also above n 10 and accompanying text.
[31] [2019] FCA 1905, [4450]–[4458] ('*Gill*').
[32] See Ipp Review (n 5) 113–14:

> in medical negligence cases (but not in other cases), Canadian law adopts a version of the objective approach under which the question to be answered is not simply what a reasonable person would have done, but rather, what the reasonable person in the plaintiff's position and with the plaintiff's beliefs and fears would have done.

[33] Ibid 113 (emphasis added).
[34] Bill Madden, 'Tort Reform and Medical Liability' [2002] (54) *Plaintiff* 14, 17.

circumstances'.[35] That is, even though the relevant test is and should be subjective, objective evidence about the degree of risk and what reasonable persons would ordinarily do is of importance.

For example, in *Morocz v Marshman*, Harrison J found that whilst the plaintiff would proceed with surgery if advised of 'unlikely,' 'extremely rare,' or 'slight' risks, she would not have proceeded if the risks were 'very highly likely to occur' or 'high' risks.[36] Harrison J noted that the plaintiff did not and could not have given evidence about what she would have done if she had been told about these risks given the statutory prohibition.[37] In *Marko v Falk*, Hislop J said that the 'reasonable response' would have been to consent to removal of a polyp encountered during an upper endoscopy procedure if relevantly warned, and 'there is no reason to apprehend that the plaintiff's subjective response would have been otherwise'.[38]

Reflecting on these examples, it now seems to be the case that in jurisdictions with the statutory prohibition, it is difficult for a plaintiff to establish that they would have acted to avoid a risk where evidence shows that materialisation is objectively remote or that the reasonable response would be to accept it. It follows from this that 'where the statistical evidence is such that it shows that most people would proceed anyway … it may be difficult for a plaintiff to overcome this evidence'.[39]

It must be acknowledged that consideration of such evidence is not improper — it is consistent with the wording of the civil liability provisions that require the inquiry to be determined 'subjectively in the light of all relevant circumstances'.[40] As noted in Part II(A), objective evidence including the remoteness of risks could also be received under the

[35] *Neal* (n 28) [42] (Basten JA, Tobias JA and Handley AJA agreeing).

[36] [2015] NSWSC 325, [217]–[219] ('*Morocz* (2015)'). The relevant risks being spoken of were 'extreme and premature breathlessness upon exertion' and 'disabling headaches'. Note that Harrison J found these matters not to be risks the defendant was required to inform of but provided this analysis in case such findings were wrong ([208]). The plaintiff pursued an ultimately unsuccessful appeal which did not concern causation: *Morocz v Marshman* [2016] NSWCA 202.

[37] *Morocz* (2015) (n 36) [210].

[38] [2007] NSWSC 14, [52]. Note that whilst this trial was conducted by reference to the common law, the plaintiff did not give evidence in chief about what she would have done if informed, and therefore this is a good example of the necessary reliance on objective factors where the plaintiff cannot give evidence about what they would have done.

[39] Tina Cockburn and Bill Madden, 'Proof of Causation in Informed Consent Cases: Establishing What the Plaintiff Would Have Done' (2010) 18(2) *Journal of Law and Medicine* 320, 331.

[40] *Neal* (n 28) [46] (Basten JA, Tobias JA and Handley AJA agreeing). But note that *Civil Liability Act 2002* (WA) stands alone amongst the jurisdictions that have enshrined the subjective approach in statute, in that it does not expressly prescribe that the inquiry is to be determined in the light of the circumstances. However, see *AVWest Aircraft Pty Ltd v Clayton Utz [No 2]* [2019] WASC 306, [159]–[160] ('*AVWest [No 2]*'), which suggests that this omission from the statute is of little significance in this context and that the evidence is 'normally assessed in light of the surrounding objective facts and circumstances'.

common law in Australian jurisdictions.[41] It is also used in other jurisdictions where the subjective approach is in operation.[42]

The concern is not necessarily that the objective evidence is received, but rather the heightened reliance on objective evidence in jurisdictions with the statutory prohibition. As acknowledged in *Falkingham v Hoffmans*, where direct evidence from the plaintiff about what he or she would have done is admissible, it can weigh against the acceptance of objective evidence.[43] Whilst it may be difficult for a plaintiff to overcome the aforementioned objective evidence even without the statutory prohibition, it is *especially difficult* to overcome if they are unable to directly assert that despite the objective evidence they would have decided differently.

This is problematic because although objective evidence may indicate what the ordinary or reasonable person would have done, it is not necessarily indicative of what the plaintiff themselves would have done. This sentiment is reflected in Jay J's judgment in *Mordel v Royal Berkshire NHS Foundation Trust* ('*Mordel*'), in which it is tacitly acknowledged that some people make decisions in an imprecise and idiosyncratic manner that is often removed from precise conceptions of probability and statistical risk.[44] In that case, Jay J noted that the inquiry as to what the claimant (who was at the relevant time an expectant mother) would have done must be:

> a case-specific evaluation tailored to this particular claimant. The notion that this particular claimant would have weighed up a 1:X risk of Down's syndrome (whatever X was) against a 1-2% risk of miscarriage is implausible. She would have made the assessment [in] a far less precise manner.[45]

In the healthcare context, the reliance on objective evidence is especially problematic because of its conflict with the interests that the relevant duty is founded upon. As suggested by the Ipp Review, an objective test could undervalue the plaintiff's right to self-determine[46] — an aspect of which is the ability to make 'irrational' decisions for one's own health.[47] This is reflected in the *Rogers v Whitaker* ('*Rogers*') test for materiality of information, in that information may be material if the health practitioner knows or ought to know that the individual patient would attach significance to it even if the ordinary person would not (the 'reactive' duty to inform).[48] As put by the Ipp Review:

> [The] duty requires the doctor to give the patient information that the doctor knows or ought to know the patient wants, regardless of whether the reasonable patient would want the information. If the doctor fails to give such information, it would seem inconsistent to answer the question, of how the

41 See, eg, Addison (n 3) 183, which notes that even prior to the imposition of the civil liability legislation the inquiry was 'applied in an increasingly objective manner'.

42 See, eg, *Jones v North West Strategic Health Authority* [2010] EWHC 178 (QB), [26] (Nicol J), discussed in Cockburn and Madden (n 39) 332.

43 (2014) WAR 510, 523 [43] (Pullin and Murphy JJA).

44 [2019] EWHC 2591 (QB), [148] ('*Mordel*').

45 Ibid.

46 Ipp Review (n 5) 113.

47 See, eg, *Re C (Adult: Refusal of Medical Treatment)* [1994] 2 FCR 151.

48 *Rogers v Whitaker* (1992) 175 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) ('*Rogers*').

> patient would have acted if the information had been given, on the basis that the patient was a reasonable person.[49]

The subjective limb of *Rogers*,[50] in combination with the subjective approach to determining what the plaintiff would have done, can protect 'the right of patients to act "unreasonably"'.[51] As such, an undesirable consequence of the increased reliance on objective evidence has been an erosion of the law's protection of self-determination and a patient's right to irrationally refuse treatment.

It can also be said that reliance on objective evidence has perhaps led to another problem that the Ipp Review associated with the objective approach — the inquiry does not elicit an answer to the causal question, 'what would have happened'.[52] Greater reliance on objective evidence naturally skews the inquiry to elicit answers to 'what would usually happen' or what 'might have happened if the plaintiff were a reasonable person'.

Consideration of the rationale for retention of the subjective approach, as set out in the Ipp Review, therefore provides a useful indication of some of the issues created by the statutory prohibition. As a result of the objectification of the inquiry, which is in part due to the statutory prohibition, the law modelled on the Ipp Review has created a so called 'subjective' inquiry that does not avoid the problems associated with the objective approach.

B The utility of the plaintiff's evidence about what they would have done if properly informed

In *Livingstone v Mitchell* ('*Livingstone*'), Walmsley AJ noted that 'it has been said … that a plaintiff's assertion as to what he or she would have done in hypothetical circumstances may of itself carry little weight'.[53] Indeed, this sentiment is repeated frequently in the relevant judgments.[54] This article does not seek to totally challenge that view — it is acknowledged that in many cases consideration of such evidence may not add much to the fact-finding process. However, it is contended that the plaintiff's evidence about what they would have done *can* be of value, that it *can* carry weight, and that courts *have* found it to be persuasive in some cases. It is therefore asserted that the statutory prohibition is problematic because it prevents courts from considering potentially valuable evidence that may assist in their fact-finding task.

Prior to the High Court's judgment in *Chappel*, it was not unusual for courts to treat the plaintiff's evidence about what they would have done as valuable and probative.[55] For example, in *Hribar v Wells* ('*Hribar*'), the court placed great weight on the fact that 'the

[49] Ipp Review (n 5) 113.
[50] *Rogers* (n 48) 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).
[51] Addison (n 3) 184.
[52] Ipp Review (n 5) 113.
[53] [2007] NSWSC 1477, [43] ('*Livingstone*'), citing *Rosenberg* (n 6) 441–2 [15]–[17] (Gleeson CJ), 449 [44]–[45] (McHugh J), 461–2 [86]–[87] (Gummow J), 485–6 [157]–[158] (Kirby J), 504–5 [221] (Callinan J).
[54] See, eg, *AVWest [No 2]* (n 40) [159]–[160].
[55] Addison (n 3) 182.

respondent swore that she would not have had the operation had she been warned' in deciding that the trial judge did not err in finding factual causation despite evidence that the respondent had a history of doing 'what doctors or surgeons suggested without demur'.[56]

Though this sort of evidence came to be treated with more caution following *Chappel*, still where it is admissible there are more recent instances of courts finding it to be credible and valuable notwithstanding that it is given in hindsight. For example, in *Lederberger v Mediterranean Olives Financial Pty Ltd* ('*Lederberger*'), the Victorian Court of Appeal relied on Mrs Lederberger's evidence about what she would have done in finding factual causation in a third party claim,[57] stating that

> [u]ndoubtedly, there are cases in which a Court would give little, if any, weight to hindsight evidence ... However, this case is not one of them. In our view, having regard to Mrs Lederberger's background and the circumstances we have already described, Mrs Lederberger's evidence is entirely credible … We do not think it was open to his Honour to reject Mrs Lederberger's evidence [about what she would have done if properly informed].[58]

Similarly, in *Gill*, Katzmann J said of one applicant's evidence about what she would have done:

> [I]t is not incredible. To the contrary, as the applicants submitted, it has the ring of truth about it. I am acutely conscious of the wisdom of hindsight, but in all these circumstances I accept Mrs Dawson's evidence.[59]

Gill was a class action concerning complications after transvaginal mesh surgery, requiring the applicants to prove that if warned of the relevant risks, they would not have proceeded with the transvaginal mesh surgery as proposed. On the basis of Mrs Dawson's evidence, Katzmann J was satisfied that she would instead have pursued native tissue repair or other conservative treatments if warned of the risks.[60]

From these examples it is evident that not all hindsight evidence can be painted with the same brush, and that there are instances where the plaintiff's evidence about what they would have done is valuable and deserving of weight. It appears that evidence on this point is likely to be regarded as more reliable if it is corroborated by or consistent with other evidence (the desirability of this approach is discussed in further depth in Part IV). For example, in

[56] (1995) 64 SASR 129, 140–1 (Bollen J, King CJ and Duggan J agreeing generally) ('*Hribar*'). But see ibid 182 n 109, which questions aspects of this judgment.

[57] (2012) 38 VR 509, 541–2 [116]–[119] (Nettle, Redlich JJA and Beach AJA) ('*Lederberger*'). Mrs Lederberger was a defendant at first instance, where she brought a third-party claim against Sterling & Sheink (a law firm). By the time of the appeal Mrs Lederberger was no longer a party to the matter as she had died. The executors of her estate were substituted as the appellants. In respect of the third party claim, the Victorian Court of Appeal found that: 'if ... Mrs Lederberger had a liability in respect of the transactions the subject of this proceeding, then she would have been able to recover damages in respect of that liability from Sterling & Sheink': at 543 [123].

[58] Ibid 542 [117]–[119] (Nettle, Redlich JJA and Beach AJA).

[59] *Gill* (n 31) [4514].

[60] Ibid [4514]–[4515].

Lederberger, Mrs Ledeberger's background and circumstances played a role in determining that her evidence was credible.[61] In *Gill*, Katzmann J noted that Mrs Dawson's evidence about what she would have done 'was not inconsistent with the contemporaneous evidence. Indeed, it was consistent with it.'[62]

Once it is acknowledged that this evidence *can* be of weight, it follows that the plaintiff may suffer some disadvantage if they are unable to bring it. Further, it becomes apparent that in jurisdictions where the statutory prohibition is in place, legislatures are depriving the courts from considering potentially valuable evidence that can assist with their fact-finding and truth-seeking tasks.[63] In *Gill*, Mrs Dawson's evidence about what she would have done appeared to be particularly helpful in circumstances where the contemporaneous evidence provided 'little, if any, assistance on this question'.[64]

In fact, admitting this evidence may assist courts with discovering the truth even where the evidence is *not* found to be credible. As set out by McHugh J in *Chappel*, whilst the plaintiff's demeanour cannot play much of a role in accepting evidence about what they would have done if informed, it 'may be a ground for rejecting the plaintiff's evidence'.[65] In giving this evidence, the plaintiff's demeanour may in fact indicate that they are *not* telling the truth.[66] There is, therefore, still value in this evidence being given in court (even if it is not of value to the plaintiff in such cases). In the same vein, in some cases the plaintiff's evidence on this point may be of such an exaggerated nature as to indicate a lack of merit and truthfulness. In *Odisho v Bonazzi* ('*Odisho*'), the appellant had given evidence in cross examination at trial (where she was the plaintiff) that she would not accept even a one in 'one trillion' risk of stroke associated with taking tranexamic acid, which she was prescribed by the respondent gynaecologist to treat abnormally heavy bleeding.[67] In that case the Victorian Court of Appeal reasoned that

> [t]he exaggerated nature of the appellant's answers to the questions put to her on the issue of what she would have done had she received a warning well justified the trial judge's rejection of this evidence... we are unpersuaded that an appropriate warning of the risk of pulmonary emboli would have made any material change to the events that occurred.[68]

61 *Lederberger* (n 57) 542 [117] (Nettle, Redlich JJA and Beach AJA). See also *Kambouris v Tahmazis [No 2]* [2015] VSC 174, [122], where a similar approach was taken in accepting aspects of the plaintiff's evidence about what she would have done.

62 *Gill* (n 31) [4513].

63 But see generally JJ Spigelman, 'Truth and the Law' (2011) 85(11) *Australian Law Journal* 746, 750, which supports the view that 'the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process'.

64 *Gill* (n 31) [4509].

65 *Chappel* (n 2) 246 [32] n 64 (McHugh J).

66 But note that those instances may be rare for the reasons set out in ibid.

67 [2014] VSCA 11, [40] (Beach JA and McMillan AJA, Nettle JA agreeing) ('*Odisho*').

68 Ibid [41].

The Court noted, quite rightly, that Mrs Odisho's evidence well-illustrated the 'dangers that may be associated with the acceptance of such evidence'.[69] Though this is true, it also well-illustrates a reason why such evidence should be admissible. In hearing this evidence in cross examination the trial judge and the Court of Appeal were able to view a clearer picture of the credibility of Mrs Odisho's claims and her evidence more widely.[70] Put simply, the admission and subsequent rejection of her evidence on this point assisted the Court in its fact-finding exercise.

Considering the various ways that a plaintiff's evidence about what they would have done can be of value to the courts, it is clear that the statutory prohibition on its admissibility is detrimental.

C Inconsistent and unjustified different treatment for the plaintiff's evidence as to causation

Thus far, this article has established that the statutory prohibition on the plaintiff's evidence about what they would have done does not avoid the problems associated with the objective approach and denies courts the ability to hear evidence that can assist with the fact-finding process. These points demonstrate that the statutory prohibition is ill-founded. So too does the fact that the statutory prohibition gives rise to a number of inconsistent outcomes relating to the giving of speculative evidence and hindsight evidence more broadly. This portion of the article will first highlight how similar evidence is still admissible in negligence claims to satisfy inquiries other than causation. It then sets out that although hindsight bias is not confined to the plaintiff, speculative and hypothetical evidence from other witnesses about what they would have done remains admissible.

The statutory prohibition therefore leads to an inconsistent outcome whereby the plaintiff's evidence about what they would have done is treated differently to evidence of the same nature given in different circumstances. In light of this, and the desirability of consistency in the law, it is contended that the statutory prohibition is difficult to justify.

1 Inquiries other than causation

The statutory prohibition does not completely prevent the plaintiff from bringing evidence about what they would have done — it only prevents them from doing so if it is led for the purpose of establishing causation.[71] Evidence about what the plaintiff would have done can, therefore, be led in relation to other aspects of the negligence framework.

69 Ibid.

70 Though it was not addressed in *Odisho* (n 67), it is possible that Mrs Odisho's evidence would have been admissible even in New South Wales, Queensland and Tasmania (but not in Western Australia). This is because her comments could be regarded as 'against interest'. But see *Ralston v Jurisich* (2017) 105 ATR 114, 129 [85]–[86] (McDougall J, Ward JA agreeing, Emmett AJA partially agreeing).

71 At least this would seem to be the intention of the statutory prohibition, as understood by reference to the Ipp Review (n 5) 114 (emphasis added): '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'. The

In the medical negligence context, such evidence might be led to establish that a risk is material by virtue of the subjective limb of the duty to inform as set out in *Rogers*.[72] Though the test for subjective materiality of risks and the inquiry as to what the plaintiff would have done for factual causation are indisputably different, the type of evidence that might be given to satisfy both aspects is in many ways similar. In *Rosenberg v Percival* ('*Rosenberg*'), Gummow J said that:

> It is not necessary when determining materiality of risk to establish that the patient, reasonable or otherwise, would not have had the treatment had he or she been warned of the risk in question. The test is somewhat lower than that. However, it is necessary that the reasonable patient or particular patient respectively would have been likely seriously to consider and weigh up the risk before reaching a decision on whether to proceed with the treatment.[73]

It is therefore evident that even though the tests are different, both inquiries require the plaintiff to prove what they would likely have done in the circumstances. As has been canvassed throughout this article, for factual causation the plaintiff must establish that they would have acted so as to avoid the risk.[74] For the subjective limb of *Rogers*, the plaintiff must prove that they would have been 'likely seriously to consider and weigh up the risk before reaching a decision' (and that the practitioner was or should have been aware of this fact).[75] Given that the plaintiff in these cases is necessarily claiming that no adequate warning was given, any evidence from the plaintiff asserting that they would have attached significance to a risk if informed is *equally* as hypothetical as evidence relating to what they would have done if warned.

For example, in *Baker v Hardcastle*, evidence was given by the plaintiff at first instance that had he been properly informed of various risks inherent in the spinal surgery he underwent then he 'would have given that some thought and would have attached some significance to that'.[76] Such evidence, which would still be admissible even in jurisdictions with the statutory prohibition in place,[77] surely suffers from the same hindsight bias that is used as a justification for making inadmissible similar evidence when led to establish factual causation.

author was unable to locate any further authority on this point, and it may be arguable that the statutory prohibition makes the evidence completely inadmissible for any purpose whenever it is relevant to factual causation.

72 *Rogers* (n 48) 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

73 *Rosenberg* (n 6) 459 [80] (Gummow J).

74 *Chappel* (n 2) 246 [22]–[23] (McHugh J).

75 *Rosenberg* (n 6) 459 [80] (Gummow J).

76 [2000] WASCA 166, [12] (Parker J, Pidgeon and Wallwork JJ agreeing).

77 Provided that it is not led for causation, but see above n 71. Note that the plaintiff's evidence about whether they would have attached significance to a risk is plainly relevant to, though not determinative of, whether the risk was material and required a warning. Courts have at times appeared to equate a finding that the plaintiff would have attached significance to a risk with a necessary conclusion that the practitioner had a duty to warn of that risk — see, eg, *Hribar* (n 56) 139, quoting the trial judge: 'I am satisfied that the plaintiff, had she been warned of the risk, would have attached significance to it. I hold that the defendant's failure to advise and warn the plaintiff of the risk of permanent nerve damage constitutes a breach of his duty of care to the plaintiff.' With respect, such a finding should not of itself be determinative of the obligation to warn. It must *also* be shown that the practitioner either knew or ought to know that the plaintiff would be likely to do so.

It would therefore seem inconsistent and illogical to allow such evidence for one purpose but not for the other.

Similarly, evidence about what the plaintiff 'would have done' but for the negligence is also commonly received in the calculation of damages once the elements of negligence have been made out. For example, the plaintiff may give evidence about the age they would have worked until had they not been injured and rendered unable to work by the defendant's negligence.[78] Though this evidence cannot be said to suffer from the problem of hindsight bias,[79] it is affected by some of the other issues identified by Kirby J in *Hoyts*: it could be regarded as both speculative and self-serving.[80]

2 Witnesses other than the plaintiff

The statutory prohibition only prevents *the plaintiff* from giving evidence about what they would have done. When it is relevant to causation what *another person* would have done, that evidence would be prima facie admissible even in jurisdictions where the statutory prohibition is law.

For example, in *Smith v South Western Sydney Local Health Network*, the New South Wales Court of Appeal stated that the statutory prohibition 'did not apply to exclude evidence of [the plaintiff's mother's] mental processes relevant to the question of causation'.[81] In that case the appellant, Mr Smith (who was the plaintiff at first instance), sought damages for personal injury suffered as a result of his attempt to commit suicide by hanging.[82] At trial his mother gave evidence that if certain information was provided to her by the defendant health service, then 'she would have acted either to prevent the appellant going out with his friends ... or would have immediately returned him to the hospital' — either of which, it was argued, would have prevented Mr Smith from attempting suicide on the relevant occasion.[83] It is clear that evidence of this kind can clearly be affected by many of the problems associated with the plaintiff's own evidence about what they would have done: it may be hypothetical, speculative and affected by hindsight bias. Indeed, in this case the Court of Appeal approved of the trial judge's determination that the admissible evidence reflected that Mr Smith's parents felt 'a sense of responsibility for what had occurred to their son' and was biased by hindsight.[84]

78 See, eg, *Alvarez Cabrera v Piv's Engineering Pty Ltd* [2012] WADC 62, [509]; *Crowe v Trevor Roller Shutter Services Pty Ltd (No 2)* [2011] VSC 28, [122]; *Li v Toyota Motor Corporation Australia Ltd* [2010] VSC 458, [84].

79 Perhaps more comparable in this regard is evidence given in relation to the assessment of damages in contractual disputes involving non-delivery of shares. In such cases the plaintiff may give evidence about when they would have sold those shares — evidence which is wise with hindsight knowledge as to when the share prices were highest. See, eg, *White v Shortall* (2006) 68 NSWLR 650; *Olivero v Ailakis* (2012) 81 SR (WA) 300, 331–4 [192]–[214].

80 *Hoyts* (n 13) 1943–4 [54] (Kirby J).

81 [2017] NSWCA 123, [178]–[180] (Gleeson JA, Meagher and Payne JJA agreeing).

82 Ibid [2]. Note that the claim was brought by his tutor.

83 Ibid [116].

84 Ibid [178]–[180]. See also *Richards v Rahilly* [2005] NSWSC 352 ('*Richards*').

Similarly, in *Livingstone*, Walmsley AJ admitted evidence from the son of the plaintiffs to the effect that if properly informed he would have advised his parents not to proceed with a purchase for a property with considerable defects.[85] Though the evidence was 'not precluded' by the statutory prohibition, Walmsley AJ appeared to accept that the hypothetical evidence was vulnerable to hindsight bias.[86]

The same conclusion was reached by the New South Wales Court of Appeal in *Lym International Pty Ltd v Marcolongo*,[87] which concerned damage caused to buildings owned by Mrs Marcolongo. The Court of Appeal found that the statutory prohibition would not have prohibited evidence about what Mrs Marcolongo's son would have done if properly informed, even though he acted on behalf of Mrs Marcolongo in connection with the relevant building work.[88] Again though, because Mr Marcolongo acted 'as though he were the agent of a plaintiff', the Court of Appeal noted that his evidence would have been affected by hindsight.[89]

A director of a plaintiff company may also give evidence about what they would have done but for the negligence, even though the director's evidence may also be hypothetical, self-serving and tainted by hindsight bias.[90] Despite these issues, as set out in *AVWest Aircraft Pty Ltd v Clayton Utz* ('*AVWest*'), 'it is only the hindsight bias in the plaintiff's own testimony that was to be addressed by the introduction of [the statutory prohibition]'.[91] Comments from Sackville AJA of the New South Wales Court of Appeal in *Stealth Enterprises Pty Ltd v Calliden Insurance Ltd* ('*Stealth*')[92] also indicate that the same principles would apply to employees of corporations. In that case it was said that the employee witness 'was not an injured plaintiff, but her evidence had some of the

85 *Livingstone* (n 53) [46]–[47].

86 Ibid [41]–[47]. Walmsley AJ spoke of the effect of hindsight from [41]–[45] before saying that the son's evidence 'can, I think, have little weight': at [47].

87 [2011] NSWCA 303.

88 Ibid [224], [228]–[229] (Campbell JA, Basten JA and Sackar J agreeing).

89 Ibid [229]. Accordingly, it was said that the evidence should be treated with caution and 'would have been of such slight weight that its absence is also of very slight weight'.

90 But see *Asden Developments Pty Ltd (in liq) v Dinoris [No 3]* (2016) 114 ACSR 347, 398 [160] in which Reeves J notes that the evidence of a previous sole director and shareholder of a company was hypothetical but she had 'no obvious personal interest at stake in the outcome beyond, perhaps, the natural inclination to be seen to be doing the right thing'. Note that this is not a negligence matter, but Reeves J's discussion is made with reference to the civil liability legislation provisions.

91 [2018] WASC 167, [70] ('*AVWest*'). See also *Cam & Bear Pty Ltd v McGoldrick* [2018] NSWCA 110, [67]–[68] (Macfarlan JA, McColl AP and White JA agreeing). Note that a consequence of this is that the statutory prohibition only applies to natural person plaintiffs and not to corporate entities: *AVWest* (n 91) [72]–[77]. But see *Re Metal Storm Ltd (in liq) (recs and mgrs apptd) [No 2]* [2019] NSWSC 1682, [30] in which Rees J suggests that in some cases 'hindsight evidence sought to be given by a person with a past or present association with a corporate plaintiff ... [might be regarded as] a statement "by" the corporation under [the statutory prohibition]'. For further discussion as to whether corporations can be affected by hindsight bias, see Michael Douglas, 'How to Prove What Never Was: *AVWest Aircraft Pty Ltd v Clayton Utz* and Evidence of What Company Directors Would Have Done' (2018) 25(1) *Torts Law Journal* 86.

92 [2017] NSWCA 71 ('*Stealth*').

characteristics of hindsight evidence given by injured plaintiffs … It was evidence given in the interests of her employer with the benefit of [hindsight].'[93]

Perhaps most strikingly, defendants are able to give evidence about what they would have done when a plaintiff's failure to inform the defendant is the basis of a contributory negligence claim. In *Reed v Warburton*,[94] the respondent plumber (who was the defendant at first instance) alleged that the appellant home-owner/builder was contributorily negligent in failing to advise the respondent of conditions in the property that presented a heightened fire hazard. At trial the respondent gave evidence that if he had been warned, he would have completed his tasks in an order which would have avoided the home-destroying fire that his work created. The New South Wales Court of Appeal relied on the respondent's evidence in attaching 'causative significance' to the appellant's failure to warn,[95] which ultimately led to a 50% reduction for contributory negligence.[96] The Court noted that '[a]lthough there is a prohibition on a plaintiff making self-serving statements on a hypothetical basis, after the event, the prohibition does not extend to a defendant.'[97]

It is therefore apparent that evidence given by other persons as to how they would have acted is often affected by many of the same problems associated with the plaintiff's evidence about what they would have done. Given that hypothetical hindsight evidence is commonly received from those witnesses, the same defects can hardly justify the exclusion of the same type of evidence when given by the plaintiff. It is contended that this illogical and inconsistent situation should be remedied. As occurs with the evidence from other witnesses, courts should be able to hear the plaintiff's evidence about what they would have done, then attach appropriate weight to it.

IV Recommendations

A Model provisions and residual concerns

This article has thus far established that the statutory prohibition on the plaintiff giving evidence about what they would have done but for the defendant's negligence is ill-founded and should not be law. This conclusion leads to the question: what should the law be?

It is contended that the present treatment of such evidence under the common law in those jurisdictions without the statutory prohibition is sensible. In those jurisdictions the plaintiff's evidence about what they would have done is admissible, but courts are required to be acutely aware of the dangers of hindsight evidence and to only ascribe appropriate (if any) weight to

93 Ibid [87] (Sackville AJA). Note that this is not a negligence matter, but Sackville AJA's discussion is made with reference to the civil liability legislation provisions.
94 [2011] NSWCA 98.
95 Ibid [33] (Basten JA, Hodgson JA and Handley AJA agreeing).
96 Ibid [36]–[40].
97 Ibid [33].

that evidence.[98] The plaintiff's assertions are evaluated using other evidence, including objective evidence that sheds light on what the reasonable person would have done.[99] It is proposed that the use of objective evidence in this way is not as problematic as the current use as described in Part III — the proposed approach is not prone to the same overreliance on objective evidence, and the plaintiff's subjective response becomes the central focus of the inquiry.

It is therefore recommended that New South Wales, Queensland, Tasmania and Western Australia should repeal from their civil liability legislation the provisions enforcing the statutory prohibition.[100] The effect of this would be to revert to the common law position as set out above. Alternatively, if desired it may be beneficial to replace the existing statutory prohibition provisions with provisions directing that courts must, when considering the plaintiff's evidence about what they would have done, take into account the effect of hindsight bias and evaluate the plaintiff's evidence about what they would have done against all other relevant evidence. The effect of such a provision would merely be to entrench the common law position, but may be preferred in the interests of certainty.

The proposed approach may be met with two central concerns — those being the concerns set out in the Ipp Review used to justify the prohibition on the plaintiff's evidence about what they would have done. First, there is likely to be concern about '[t]he enormous difficulty of counteracting hindsight bias' at trial.[101] Flowing from that is the secondary concern that 'the judge's view of the plaintiff's credibility is likely to be determinative … [and therefore] such decisions [would] be very difficult to challenge successfully on appeal'.[102] These concerns will now be dealt with in turn.

B Counteracting hindsight bias at trial

The potentially tainting effect of hindsight on evidence about what a plaintiff would have done has already been discussed in this article. This article's rejection of the statutory prohibition should not be taken as ignorance or a lack of understanding of the effect of hindsight on this evidence. Whilst it is vital that courts are able to counteract hindsight bias when determining what the plaintiff would have done, it is not necessary to make such evidence inadmissible to do so. Even prior to the civil liability legislation, the common law had developed a strict and sensible approach to avoid the dangers of hindsight evidence whilst still enjoying the benefit of being able to hear it.[103]

The suggested starting point when dealing with evidence about what the plaintiff would have done (and indeed that which is now commonplace in those jurisdictions without the statutory

98 See, eg, *Gill* (n 31) [4514].
99 *Chappel* (n 2) 246 [32] n 64 (McHugh J); *Hoyts* (n 13) 1944 [57] (Kirby J).
100 Those provisions being the following subsections: *Civil Liability Act 2002* (NSW) s 5D(3)(b); *Civil Liability Act 2003* (Qld) s 11(3)(b); *Civil Liability Act 2002* (Tas) s 13(3)(b); *Civil Liability Act 2002* (WA) s 5D(3)(b).
101 Ipp Review (n 5) 114.
102 Ibid.
103 See, eg, *Ellis* (n 14) 581–8 (Samuels JA); *Chappel* (n 2) 246 [32] n 64 (McHugh J).

prohibition) is an explicit acknowledgement of the potential dangers of hindsight. For example, in *Gill*, Katzmann J said that: 'I am acutely conscious of the wisdom of hindsight, but in all these circumstances I accept Mrs Dawson's evidence.'[104] In the context of the proactive duty to inform, the Ipp Review recommended that one way to eliminate the effect of hindsight would be to 'require the issue of hindsight to be explicitly addressed'.[105] It is here contended that explicit consideration of hindsight can also help to eliminate its effects in this context.

The common law in fact requires much more than a simple acknowledgement of the effects of hindsight. The trial judge needs to assess the reliability of such evidence by reference to other evidence (as discussed in Part II).[106] In *Chamberlain v Ormsby*, Basten JA noted that 'the test of causation is ultimately one to be determined on all the relevant material and not merely upon the assertion of the plaintiff as to what he or she would have done in hypothetical circumstances'.[107]

Adherence to these principles prevents courts from unduly relying on hindsight evidence where it is inappropriate to do so. The consideration of other circumstances and factors when deciding whether to attribute weight to the plaintiff's evidence about what they would have done enables courts to counteract hindsight bias.[108]

A recent example of this can be seen in *Nouri v Australian Capital Territory* ('*Nouri Appeal*').[109] In this case the Australian Capital Territory Court of Appeal considered a wrongful birth claim where the appellants had not been successful at first instance because the primary judge, Elkaim J, was not satisfied that the they would or could have sought a selective termination of one twin in the United States of America if properly informed. At trial, Elkaim J expressly acknowledged the effect of hindsight:

> While I accept that the plaintiffs are now adamant that they would have sought a termination it is important to remember that they are looking back with the benefit of hindsight and in the knowledge of the disabilities that have affected [their child].[110]

The Court of Appeal noted that Elkaim J identified matters which gave weight to the plaintiffs' evidence, including their education and intelligence, their past preparedness to travel and spend money for medical care, one plaintiff's medical-related qualifications and the other plaintiff's experience of having a disabled niece.[111] However, Elkaim J found the effect of hindsight to be substantial and that although the plaintiffs were 'convinced they

[104] *Gill* (n 31) [4514].
[105] Ipp Review (n 5) 49.
[106] *Richards* (n 84) [257]; *Chappel* (n 2) 246 [32] n 64 (McHugh J); see generally *Elbourne* (n 7) [59]–[106] (Basten JA, Beazley JA agreeing).
[107] [2005] NSWCA 454, [137] (Basten JA); discussed in *Livingstone* (n 53) [44].
[108] See, eg, *Hoyts* (n 13) 1938 [22], 1941 [42], 1943 [53], in which the trial judge found that although the plaintiff honestly believed she would have paid attention to a sign, she likely would not have done so.
[109] [2020] ACTCA 1 ('*Nouri Appeal*').
[110] *Nouri v Australian Capital Territory* [2018] ACTSC 275, [423] ('*Nouri*').
[111] *Nouri Appeal* (n 109) [102].

would have found a way to achieve a termination'[112] they had not proved that they would or could have overcome the risks, logistics, and other practical difficulties of doing so.[113] The Court of Appeal found that Elkaim J did not err and that the hindsight evidence was appropriately scrutinised at trial, commenting that '[h]is Honour was clearly taking into account and giving weight to the effect of hindsight upon the evidence of the appellants'.[114]

Put simply, courts can and do effectively deal with hindsight evidence, just as Elkaim J did in *Nouri v Australian Capital Territory* ('*Nouri*').[115] Not only does this now occur in jurisdictions without the statutory prohibition, but it also occurs in those cases canvassed in Part III of this article — situations where hindsight evidence is given as to inquiries other than causation or by witnesses other than the plaintiff. Courts also routinely hear and deal with plaintiff assertions about what they would have done in claims brought for harm not resulting from negligence.[116]

There is judicial support for the view that courts are able to adequately deal with the problem of hindsight. For example, in *Rosenberg*, Kirby J said that

> [i]n *Chappel*, I expressed confidence that the dangers of attaching too much weight to the ex post claims of plaintiffs should not be overstated. It was my opinion then, as it is now, that '[t]ribunals of fact can be trusted to reject absurd, self-interested assertions.'[117]

In fact, it is always open to a court to 'disbelieve evidence found to be tainted by hindsight',[118] even where the evidence is unchallenged and uncontradicted.[119]

Whilst it is true that there may often be dangers associated with the *acceptance* of the plaintiff's hindsight evidence, it is not the case that those dangers are realised upon the *admission* of such evidence. Courts have shown themselves to be capable of counteracting hindsight bias, and should therefore be trusted to evaluate the plaintiff's assertions about what they would have done with 'great care'.[120]

This recommendation is consistent with the general approach to evidence in civil cases, in which a less strict and more discretionary attitude is typically taken to the admission of evidence due to the rarity of jury trials and the requirement for judges to provide reasons for

112 *Nouri* (n 110) [426].
113 Ibid [427].
114 *Nouri Appeal* (n 109) [102].
115 *Nouri* (n 110).
116 See, eg, *Commonwealth Bank of Australia v Clapham* [2015] NSWSC 1714, [66]; *AA v Kesby* [2019] NSWSC 1711, [18]; *PPK Willoughby Pty Ltd v Baird* [2019] NSWSC 705. But see, eg, *Civil Liability Act 2002* (NSW) s 5A(1) which indicates that the Part including the statutory prohibition applies to 'any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'.
117 *Rosenberg* (n 6) 486 [158] (Kirby J), quoting *Chappel* (n 2) 275–6 [93] (Kirby J). See also *Hookey v Paterno* (2009) 22 VR 362, 437 [335] (Neave JA).
118 *Gill* (n 31) [4470].
119 Ibid; *Ellis* (n 14) 581, 588 (Samuels JA); *Towns* (n 10) [22] (Davies JA, Mason P and Giles JA agreeing).
120 *Ellis* (n 14) 582 (Samuels JA); *Rosenberg* (n 6) 485–6 [157] (Kirby J).

their decisions.[121] Whilst it is true that judges can also be vulnerable to hindsight bias,[122] a requirement to consider the effect of hindsight in written reasons can help to counteract its dangers.[123]

C Difficulty for appellate courts

In *Neal*, Basten JA remarked that the purpose of the statutory prohibition

> appears to be to prevent a trial judge placing any weight on such evidence, in circumstances where it could not be said to be an abuse of his or her advantage as a trial judge. (Were it otherwise, an appellate court could intervene.)[124]

The Ipp Review's concern about the difficulty of successfully appealing trial judge decisions about what the plaintiff would have done is not unfounded. Of course, it is often difficult for an appellate court to determine that a finding of fact by the trial judge is wrong — such is the 'principle of restraint' which forms part of the Australian law relating to the review of fact.[125] This difficulty is not confined to findings about what the plaintiff would have done. The Ipp Review suggests that there was, however, heightened difficulty in this context because trial judges were likely to determine the matter largely by reference to perceptions of the plaintiff's credibility.[126]

It is true that appellate courts are required to demonstrate restraint before overturning findings of fact that are based substantially on assessments of credibility or demeanour.[127] However, this does not render such findings wholly beyond review. As put by Justice Virginia Bell (writing extracurially):

> the appellate court must be guided by the impression made on the trial judge; but circumstances quite apart from manner and demeanour may show whether a statement is credible and may warrant the appellate court differing from the trial judge.[128]

It is therefore the case that findings based substantially on credibility 'are no longer, if they ever were, immunised from appellate challenge'.[129]

121 Heydon (n 8) 4–6 [1030]. However, note that negligence trials in Victoria can take place before a judge and jury.

122 See, eg, Erin M Harley, 'Hindsight Bias in Legal Decision Making' (2007) 25(1) *Social Cognition* 48, 55–6.

123 Ibid 56–9.

124 *Neal* (n 28) [39] (Basten JA, Tobias JA and Handley AJA agreeing).

125 *Fox v Percy* (2003) 214 CLR 118, 128–9 [28]–[31] (Gleeson CJ, Gummow and Kirby JJ) ('*Fox*'); Justice Virginia Bell, 'Appellate Review of the Facts' [2014] (Summer) *Bar News* 26, 26.

126 Ipp Review (n 5) 114.

127 See generally *Fox* (n 125).

128 Bell (n 125) 26, citing *Coghlan v Cumberland* [1898] 1 Ch 704, 704–5.

129 Bell (n 125) 28, citing *Fox* (n 123) 128 [29] (Gleeson CJ, Gummow and Kirby JJ); *CSR Ltd v Della Maddalena* (2006) 224 ALR 1, 8 [21] (Kirby J, Gleeson CJ agreeing), 44 [180] (Callinan and Heydon JJ); *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588.

Relevantly, courts have described the determination of what a plaintiff would have done as a 'hypothetical issue … which cannot purely depend on general assessments of witness credibility'.[130] In fact, once it is accepted that courts must evaluate the plaintiff's hindsight evidence by reference to other evidence (as established above), it becomes apparent that concerns about the difficulty of successfully challenging such findings may not be well-founded.

Comments from McHugh J in *Chappel* and Kirby J in *Hoyts* are helpful here. These judgments suggest that 'credibility findings' will not stand as a barrier to appellate review where the trial judge's determination about what the plaintiff would have done is made by reference to evidence of the circumstances surrounding the plaintiff's testimony, not just their credibility.[131] Speaking specifically on this issue, Kirby J said that the 'invocation of credibility in the findings at first instance does not, without more, impose in every case an automatic barrier against the performance of appellate review'.[132]

It is therefore the case that where a trial judge has taken the correct approach to the plaintiff's evidence by considering the effect of hindsight and evaluating it by reference to other evidence, an appellate court should be in 'as good a position to reach its own conclusions as was the primary judge'.[133] An appellate court would also be able to perform its functions where the trial judge failed to consider hindsight, placed undue reliance on credibility assessments, or did not evaluate the plaintiff's evidence by reference to other evidence — in those cases it would be open to an appellate court to find that the trial judge erred.

The scope for successful appeal is best illustrated by reference to relevant cases. In *Stealth*, Sackville AJA of the New South Wales Court of Appeal was able to reach a different conclusion to the trial judge about what the respondent would have done because the appellate court could refer to the surrounding circumstances. In that case, Sackville AJA said:

> I accept the primary Judge's finding that Ms Shepherd was a credible witness. Even so, when the evidence is considered as a whole, I do not think that the primary Judge could have been satisfied on the balance of probabilities that [she would have acted as she later claimed she would have].[134]

In *Lederberger*, the Victorian Court of Appeal was able to have regard to Mrs Lederberger's 'background and the circumstances' in coming to the view that her hindsight evidence was in fact 'entirely credible', despite the trial judge's findings otherwise.[135]

All things considered, the admission of the plaintiff's evidence cannot be said to make it unduly difficult to challenge trial judge decisions about what the plaintiff would have done.

130 *Mordel* (n 44) [152].
131 *Hoyts* (n 13) 1944 [56]–[58] (Kirby J); *Chappel* (n 2) 246 [32] n 64 (McHugh J).
132 *Hoyts* (n 13) 1944 [58] (Kirby J).
133 Ibid 1944 [56].
134 *Stealth* (n 92) [97] (Sackville AJA). See above n 89 and accompanying text.
135 *Lederberger* (n 57) 542 [117] (Nettle, Redlich JJA and Beach AJA) [117]. See also above n 57 and accompanying text.

Such decisions should not rest too heavily on witness credibility, and it may be regarded as an error if they do.

The statutory prohibition and the corresponding recommendations from the Ipp Review are indicative of wider discomfort with the judicial method employed by trial judges in making decisions which might rest substantially upon credibility. Indeed, Justice David Ipp has written elsewhere of the need for general reform to the judicial fact-finding method, noting that '[j]udges are left to apply common sense or intuition', which he describes as 'a highly subjective platform and leaves considerable scope for irrational decisions that are difficult to overturn on appeal'.[136] This article does not assert that those wider concerns are not well-founded. However, the proposed approach set out in this article is intended to address those concerns as they apply to the plaintiff's evidence about what they would have done.

V Conclusion

Determination of factual causation is often complex. This is especially true where the counterfactual consideration demanded by the 'but for' test requires determination of what the plaintiff would have done in a situation that never arose. Humans can act unpredictably, irrationally and uncharacteristically, making it difficult to know how a person would have acted in a hypothetical scenario.[137] A further complication is that hindsight bias can affect a person's perceptions about what they would have done in that situation.

It follows that even the plaintiff's assertions at trial about what they would have done may be unreliable. One response to that potential unreliability is to prevent the plaintiff from giving that evidence — such is the effect of the statutory prohibition in the civil liability legislation in New South Wales, Queensland, Tasmania and Western Australia.

Another approach is to allow the plaintiff's evidence to be heard, with courts required to consider the effect of hindsight bias and evaluate the assertions against the other available evidence.

The latter approach, which reflects the position of the common law in Australia, is most sensible. Whilst courts are correct to treat the plaintiff's evidence about what they would have done with caution in most instances, they are capable of employing strategies to do exactly that.

Prohibiting courts from considering this potentially valuable evidence cannot be justified, especially in light of the statutory prohibition being inconsistent with both a subjective approach to determining causation and with the treatment of other similar evidence. The civil liability provisions enforcing that prohibition should, therefore, be repealed.

[136] Justice David Ipp, 'Problems With Fact-Finding'(2006) 80(10) *Australian Law Journal* 667, 672.
[137] Douglas (n 91) 92.