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Articles

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 It is concluded that legislative bans on the plaintiff giving evidence about what they would have done should be repealed, and that whilst courts are correct to treat this evidence with caution in most cases, they are well-equipped to do exactly that.

In this article we examine the key issues in negligence for sugar-sweetened beverages. Despite increasing social and economic costs of obesity, type 2 diabetes and tooth decay — as well as greater understanding of the harmful effects of sugar-sweetened beverage consumption — negligence remains very much about personal responsibility and autonomy. This is particularly so as it tends to be the excessive consumption of sugar-sweetened beverages (rather than consumption itself) that might lead to harm. Importantly, too, in negligence it is not enough to show that many people who consume sugar-sweetened beverages become obese (or get type 2 diabetes or tooth decay); instead it is a matter of determining causation in relation to the individual who is bringing the claim, and proving that sugar-sweetened beverages rather than other sources of sugar or genetic susceptibility caused the harm. The complex aetiology of sugar-sweetened beverage-related health problems makes this practically impossible. Indeed, there are just too many complexities, uncertainties and actors for private action in negligence to be successful. Quite clearly, then, negligence is not the appropriate forum to regulate sugar-sweetened beverages. It is up to the government, not the courts, to do something about it; but given the power of large industries in influencing public policy, we may be some way off effective measures being taken.

The Australian Government's policy of offshore immigration detention on Manus Island and Nauru has been characterised by a high degree of political sensitivity. In 2014, a class action, *Kamasaee v Commonwealth*, was commenced by almost 2,000 immigration detainees held on Manus Island, alleging negligence by the Commonwealth and its independent contractors who ran the regional processing centre. In 2016, the Supreme Court of Papua New Guinea ruled that the detention of asylum seekers at the Manus Island regional processing centre was unconstitutional under Papua New Guinean law. The class action was expanded to include a claim for false imprisonment. The case was settled in 2017 for $70 million. This article considers what might have been, had the case progressed to trial. It concludes the group members would likely have been unsuccessful in their claim of false imprisonment. This provides a lesson for future litigants: the tort of false imprisonment is an unwieldy shield against the behemoth of the state and its program of offshore immigration detention.

Case Note

Book Review