

Case Comments

Commentaires d'arrêt

Malicious Prosecution: *Nelles v. Ontario*: REJOINDER — John Sopinka — [1994] 74 Can. Bar Rev. 366.

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In his case comment the Honourable Mr. Justice Sopinka claims, at 372, that “[i]n the absence of immunity, there is no valid theoretical reason why prosecutors would not be liable for negligence”. Such comment invites, at least implicitly, a significant departure from the present standard of liability for prosecutors, which requires malice. His Lordship also implies that the preferred vehicle for accomplishing this proposed development in tort law is the *Charter*. Justice Sopinka concludes his comment as follows, at 374:

As part of the search in our society for a more perfect criminal justice system, one which maximizes prosecution of the guilty with protections for the innocent, at least for malicious prosecution and the considerations surrounding that tort, it does appear that old dogs can be taught new tricks to reflect changed modern concerns.

Now it could be argued that a Supreme Court of Canada judge ought not to express opinions about teaching old dogs new tricks on important and unresolved legal questions bound to be before that very court in the near future. But that is not the purpose of this reply. This reply considers further the suggestion by Mr. Justice Sopinka that via the *Charter*, negligence is an appropriate standard of civil liability for Crown prosecutors. Assuming that a constitutional foundation for civil recovery for wrongful criminal prosecution is a salutary development, this reply argues that a negligence standard is inappropriate and unworkable. Even if the tort of malicious prosecution fails to control prosecutors and compensate victims adequately, it is wrong to simply assume that the proper replacement is the tort of negligence dressed up as a novel *Charter* remedy. Instead, Crown prosecutors should be subject to suit for a new constitutional tort of abuse of process. This standard is more generous to plaintiffs than malicious prosecution, but also more sensitive to the realities of prosecuting criminal cases than is simple negligence. Abuse of process as a constitutional tort is a more just standard than either malicious prosecution or negligence, because it alone strikes a principled and practical balance between the legitimate remedial needs of wrongfully prosecuted persons, and our collective need for an effective criminal justice system.

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The point of this reply, then, is agreement with Mr. Justice Sopinka that in the area of wrongful prosecution, old dogs can and should be taught new tricks but that it is wrong to pass off the old standard of negligence as something new and presumptively appropriate. Based on a comprehensive, knowledgeable assessment of the Crown prosecutor's conceptual and practical realities, a new civil standard of abuse of process is needed.

1. *Setting the Standard for a New Constitutional Tort: A Question of Policy*

The first step in setting constitutional tort standards for prosecutors is to recognize the nature of the task at hand. As stated by the Supreme Court in *Nelles*,¹ "[a] review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy". Therefore, setting standards of prosecutorial liability means meeting the policy maker's challenge of balancing competing principles: assessing to what extent a new standard of liability, aimed at redressing victimization more effectively, will undesirably curtail worthwhile prosecutions. It is also necessary to assess what degree of curtailment matches the benefit to plaintiffs accorded by the new standards of liability.

Prosecutorial liability remains a policy issue even when cast in constitutional terms. *Charter* rights are subject to reasonable limits demonstrably justified in a free and democratic society. A pre-eminent organizing principle of a free and democratic society is due enforcement of the criminal law, in which Crown prosecutors play a pivotal role. Therefore, setting a *Charter* standard of liability for prosecutors involves precisely the same balancing of competing interests that would be involved in setting statutory or common law standards.

Lowering the prosecutor's immunity to exclude malicious prosecution was the focus of the policy analysis in *Nelles*.² However, because of the important implications for the administration of criminal justice of any departure from the *Nelles* standards, it is irresponsible to assume that any such change is warranted without carefully scrutinizing the policy concerns afresh. Such a task obviously requires a thorough conceptual and legal understanding of the Crown prosecutor's position. But most importantly, it also requires a thorough practical understanding of how Crown prosecutors discharge their duties. Without such a thorough understanding of the prosecutor's role, changing the standard of prosecutorial liability may cause disproportionately grave harm to the administration of criminal justice. This reply will examine the Crown prosecutor's position by focussing on two of its central aspects: trial advocacy, and charge screening.

¹ *Nelles v. The Queen*, [1989] 2 S.C.R. 170 at 199.

² *Ibid.* at 194-200.

2. *The Role of Crown Counsel at Trial*

The dual role of Crown counsel as vigorous prosecution advocate and impartial quasi-judicial minister of justice is well known, and recognized in leading cases such as *Boucher*³ and in *Nelles*. However, that dual role may be misunderstood in ways important to any consideration of a lower liability threshold than set out in *Nelles*. For example, one commentator has stated that Crown counsel "ought to regard himself as part of the Court *rather than* as an advocate"⁴ (emphasis added). If this formulation prohibits vigorous advocacy for the prosecution because it conflicts with a higher duty as impartial minister of justice, it is wrong in law. Further, it misconceives basic characteristics of our adversarial method of historical inquiry at trial, and the role of counsel in that inquiry.

Better statements of Crown counsel's role endorse the importance of vigorous advocacy by the prosecution, without neglecting the "minister of justice" aspect of the role. A leading example is in *R. v. Savion and Mizrahi*:⁵

By reason of the nature of our adversary system of trial, a Crown prosecutor is an advocate; he is entitled to discharge his duties with industry, skill and vigour. Indeed, the public is entitled to expect excellence in a Crown prosecutor just as an accused person expects excellence in his counsel. But a Crown prosecutor is more than an advocate, he is a public officer engaged in the administration of justice ...⁶

A trial is an historical inquiry. Short of a guilty plea and accompanying admission as to what took place, the adversarial criminal trial is our legal system's chosen method of ascertaining the facts of an event alleged to be a criminal wrong, so that legal responsibility for what has occurred can be determined. Historical truth is distilled by an impartial judicial observer of vigorously advanced opposing perspectives on the events in issue. Thus the adversarial method *depends* upon vigorous advocacy from Crown counsel, because nothing less is at stake than the reliability of the historical inquiry upon which criminal liability is premised. If Crown counsel's "minister of justice" role precludes effective adversarial advocacy, the Court is deprived of an essential source of information and perspective. The vigorous advocacy of defence counsel is without the requisite counterbalance and the decision making method is compromised. Any such compromise would be very serious given the grave outcomes at stake in a criminal trial. The *Martin Report* captures the essence of the three cornered relationship that must be maintained:

³ *Boucher v. The Queen* (1954), 110 C.C.C. 263 at 270.

⁴ M. Manning, "Abuse of Power by Crown Attorneys" [1979] L.S.U.C. Lectures 571 at 580.

⁵ (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.).

⁶ See also the Ministry of the Attorney General (Ontario), *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) at 31-33. Hereinafter referred to as the *Martin Report*.

It cannot be forgotten that Crown counsel is only one of the participants in an adversarial system of justice. Crown counsel performs his or her duties in the context of a system that ascribes fundamentally important, and counterbalancing, responsibilities to defence counsel, and to the judge. *It is the interaction of these three parties in the criminal process, and not the action of Crown counsel alone, that ensures just outcomes to criminal proceedings.* [Emphasis added]⁷

Crown counsel's duties as advocate are no less important for questions of law than fact. The defining characteristic of legal argument in the common law tradition is inductive reasoning; the distillation of general principles from numerous prior cases reaching particular outcomes on particular facts. Reasoning of this sort, seeking to rationalize an undifferentiated mass of prior cases, depends heavily on competing visions of the "right" legal answer being advanced by adversaries who are equally unconstrained.

The centrality of vigorous partisan advocacy by Crown counsel has important implications for standards of prosecutorial liability. A counter-example from the legal literature makes the point. Sossin⁸ commences from the startling premise that vigorous advocacy by the Crown, such as arguing for conviction on the facts of a case, "tarnishes" the ideal of the prosecutor.⁹ Not surprisingly, given his initial misunderstanding of Crown counsel's duties, Sossin asserts that prosecutorial abuse of power is a "widespread structural problem in the administration of criminal justice in Canada".¹⁰ He then concludes that only strict liability of prosecutors, independent of fault, where every breach of constitutional rights leads to damages, would remedy the problem.

To understand Crown counsel's role properly, is to know that strict liability is unnecessary medicine for illusory ills. Given enough evidence to hold a trial, arguing firmly but fairly for conviction, far from tarnishing the ideal of Crown prosecutor, *in fact* defines it. Crown counsel's dual roles, prosecution advocate and minister of justice, do not part company when the Crown seeks a conviction where the evidence will support it. Both aspects of the role demand the same attention to the needs of the adversarial trial because it is *both* the partisan Crown advocate *and* the impartial minister of justice who accept that seeking a conviction where the evidence so warrants is beneficial in that, it precipitates a fair final decision on the merits of a serious allegation of wrong doing.

It is not enough, however, to simply understand that the duty to advocate defines Crown counsel's role. One must also see *how* this duty is discharged to ensure that standards of prosecutorial liability properly reflect the realities of the position of Crown prosecutor. In many respects, the "how" of advocacy, is like

⁷ *Ibid.* at 32.

⁸ L. Sossin, "Crown Prosecutors and Constitutional Torts: The Promise and Politics of *Charter* Damages" (1994) 19 *Queen's L.J.* 372

⁹ *Ibid.* at 375-76.

¹⁰ *Ibid.* at 413.

the "how" of art. The advocate's art is to construct a clear, compelling narrative that sheds light on a shadowed historical event. In large measure that is accomplished by diligent, intelligent preparation, which is readily amenable to review where negligence is the applicable standard. However, counsel will also necessarily bring to the task a large element of the irreducibly subjective: the style of the advocate. Questions of style will infuse every aspect of mounting a case, including preparing witnesses, settling on a theory of the case, examination in chief, cross-examination, legal argument, and final argument.

Subjective variance in advocacy style itself has two aspects that bear on appropriate standards of prosecutorial liability. The first is that variations in style will contribute to variations in result. The criminal trial is an historical *inquiry*. The facts are not yet known. There are no settled answers to the historical questions in the case to guide counsel's efforts at historical inquiry. Therefore, variances in style, which have varying degrees of persuasive impact on different fact finders, inevitably mean that different prosecutors, acting equally diligently, will obtain different results in similar cases.

The second attribute of subjective variance in advocacy style is that there is no settled method of ranking style. There are clear improprieties in style, lying and inflammatory addresses being two. But short of such extremes, there is scope for variance in style that admits of no gradation from acceptable to unacceptable. As a class, the judges and juries whom counsel must persuade are heterogeneity personified. Thus it is inevitable that different advocacy styles will persuade with differing degrees of success in different cases. Consequently, a failure to persuade attributable in part to style, does not equate with unacceptable style. And conversely, persuading fact finders to accept a version of history that subsequent discoveries disprove is likewise not indicative of unacceptable advocacy style.

The role of Crown counsel as set out above must figure heavily in setting a just standard of prosecutorial liability. The standard must welcome vigorous prosecution advocacy as essential. The standard must place reliance on the counterbalancing roles of defence counsel and the judge in preserving fairness. The standard must accept wide variance in advocacy style, recognizing the inherently subjective nature of advocacy, and recognizing that style pervades all aspects of trial work. And perhaps most importantly, the standard must accept that style will make a difference. The proper standard of prosecutorial liability must not censure Crown counsel whose persuasive ability earns a conviction in a reasonably debateable case, even where subsequent events prove the conviction to be unsound.

Ultimately, a just standard of prosecutorial liability must give prosecutors wide latitude to bring their advocacy skills to bear on the case in issue. Mere negligence is not such a standard for a number of reasons. First, negligence is departure from the standard of the reasonably prudent person. However, prudence as a defining ethic fails to accommodate the essential needs of the vigorous advocate for the prosecution, who is obliged to forcefully press his or her case to its legitimate strengths in order to preserve the integrity of the

adversarial method of historical inquiry. Prudence as a standard would therefore deeply compromise the administration of criminal justice at trial.

The analogy to contact sport demonstrates the incompatibility of prudence and adversarialism. Standards of liability in contact sport permit aggressive physical contact that is otherwise actionable in tort. It is even commonplace that a player who violates the rules of the sport and causes injury is penalized only by the sport's referees, and faces no additional civil liability. Of course voluntary assumption of risk explains much of the curial distance from contact sport injuries, a notion which clearly has no place in a criminal trial court. However, the point remains that where adversarialism defines relationships, standards of liability must necessarily recede, permitting additional latitude for more vigorous than usual engagement.

Prudence also fits poorly with the three-cornered shape of trial adversarialism, where responsibility for the fairness of the outcome lies not with any one of Crown counsel, defence counsel or the judge, but with the interaction of all three. The counterbalancing roles of counsel and the judge call into serious question the utility of prudence as a legal requirement for Crown counsel. Prudence properly defines relationships of co-operative accommodation, as with neighbours. But prudence is counterproductive in a very different relationship that *requires* vigorous oppositional engagement, and permits reliance on a neutral judicial third party to assess the fallout. Mere proximity cannot be enough to trigger a duty of prudence. This idea is stated in terms of duty of care in *German v. Major*:¹¹

The trial-as-a-contest of which I speak requires, in our tradition, a champion. The loyalty of counsel to client traditionally has no bounds save to be honest and respectful. It would be a remarkable alteration in the adversary system for counsel for one party in litigation to be accountable to the other party for the conduct in good faith of the litigation. The duty of counsel is to represent his client's interests; the law should not impose a conflicting duty upon him.

Counsel for the Attorney General in a criminal case is no different. His duty is to represent the interests of the Attorney General. ...

To the point made in the foregoing quote must be added Crown counsel's minister of justice duties, which do include concern for fairness to the accused. Thus vigorous prosecution advocacy is proper only following prior dispassionate charge screening to ensure the evidence is sufficient for trial. There must also be full discharge of other pre-trial "minister of justice" duties, such as disclosure, and proper advice to the police on *Charter* rights during the investigation. These quasi-judicial duties, discharged without contemporaneous supervisory oversight by the court or opposing counsel, are critical to the fairness of vigorous prosecution advocacy at the subsequent trial.

¹¹ (1985), 20 D.L.R. (4th) 703 at 718 (Alta. C.A.); See also *Elguzouli-Daf v. Commissioner of Police of the Metropolis*; *McBrearty v. Ministry of Defence*, [1995] 1 All E.R. 833 (C.A.).

Prudence as a standard of prosecutorial liability has the additional failing of offering no insight into questions of style, that are central to any trial. Exactly what is prudence as applied to varying advocacy styles, none of which save obvious extremes are better or worse than any others? A mandatory standard of prudence for advocacy is as unsuitable for prosecuting counsel as it would be for the story-teller, novelist or biographer. Subjective qualities are too central for advocacy to be judged by a prudence standard, which is the objectively reasonable. Advocacy style, can clearly make a difference in trial outcomes. But if there is no judging of style it cannot be said that outcomes attributable to superior persuasiveness, even if subsequently proven wrong, are imprudent and thus actionable.

In sum, on a proper understanding of Crown counsel's role as trial advocate in our adversarial tradition, negligence is an unsuitable standard of liability. Imposing a prudence standard on Crown counsel without complementary realignment of the roles of defence counsel and the judge would compromise the administration of criminal justice.

3. *The Role of Crown Counsel Before Trial: Charge Screening*

Much of Crown counsel's work has little to do with trial preparation and advocacy. Thus it is wrong to assume that vigorous adversarialism, is proper for all aspects of Crown counsel's function. Most importantly, vigorous advocacy at trial is warranted only where there has been a careful quasi-judicial determination by Crown counsel that resort to a trial is warranted.

Charge screening, the review to determine what cases are fit to be tried, is a central aspect of the quasi-judicial duties of Crown counsel. The *Martin Report*,¹² states that charge screening is the pivotal event that "prevents the process of the criminal law from being used oppressively". It is also the pivotal event that ensures that the criminal law is used effectively. Therefore, charge screening can be a crucial determinant of prosecutorial civil liability. Since charge screening is simultaneously the gate to the criminal justice system, and a key to civil liability, standards of liability will directly influence how wide that gate stays open. Accordingly, it is essential to harmonize the ideals of charge screening and standards of civil liability, to ensure that the gate is open as wide as it ought to be in the public interest.

Most Canadian charge screening standards, provincial and federal, require a conviction to be a reasonable eventuality.¹³ The precise wording varies, and includes, "reasonable prospect of conviction", "reasonable chance of conviction", "reasonable likelihood of conviction", or "être raisonnablement convaincus de

¹² *Op cit.* footnote 6 at 51.

¹³ *Ibid.* at 52-55, surveying the charge screening standards across the country.

pouvoir établir la culpabilité de l'accusé".¹⁴ Since reasonableness is the heart of the charge screening standards in use it is an objective exercise. The importance of objectivity is explained in the *Martin Report* and captured in its aphoristic conclusion on point: "A decision as important as who is or is not to be prosecuted should not depend on the happenstance of who is assigned to the case."¹⁵ In marked contrast to trial work, with its central element of subjective advocacy style, charge screening seeks to eradicate the subjective, to ensure quasi-judicial even-handedness and consistency in bringing cases before the courts. This point has important implications for the right liability standard, since liability to suit can flow directly from charge screening decisions.

If charge screening is to eliminate variance among prosecutors, the prosecutorial liability standard must do the same. Otherwise the two will work at cross purposes, and undermine the even handed administration of criminal justice. There are three attributes of a civil liability standard that will maximize complementarity with charge screening standards and thus preserve objectivity. The civil standard must be ascertainable in advance; it must generously accommodate the crucial distinction between an acquittal and an improperly screened charge; and it must not require personal belief by Crown counsel (as distinct from the police officer swearing the criminal information) in the guilt of the accused person. These three necessary attributes of the prosecutorial civil liability standard are discussed in turn.

(a) *The Need for a Clear Standard*

A civil liability standard ascertainable in advance is essential because charge screening will invariably lead to prosecutions that end in acquittals: a category of case ripe for subsequent civil suit. Properly screened charges will inevitably lead to acquittals because charge screening must be done shortly before or after the charge is laid. Thus screening decisions are based on limited information: a paper summary of the Crown's case alone, with little or no input from defence counsel. There can be no assessment of witness credibility with merely a paper copy of witness statements. And in any event, charge screening credibility assessments must be limited to prevent even-handed and consistent screening being compromised by subjective variance in credibility assessments among prosecutors. Further, the charge screening standards in use across the country necessarily and wisely fall well short of requiring a certainty of conviction. In sum, the inherently limited nature of the screening review, and screening standards that require only a reasonable prospect of conviction, not a certainty, mean that acquittals following screened cases are to be expected.

The inevitability of acquittals following properly screened cases means that many such cases, are, from the narrow perspective of the person acquitted,

¹⁴ *Ibid* at 52-54.

¹⁵ *Ibid.* at 66-69.

“wrongly” brought forward. Crown counsel who screen charges are thus unavoidably exposed to suit from these persons. Therefore, if the civil liability standard is not clear and ascertainable in advance, objective charge screening standards may be quietly compromised by Crown counsel cautiously overestimating the constraints imposed by an unclear civil standard. Since charges can be screened out in the privacy of Crown counsel’s office, with far less public accountability than accompanies courtroom conduct, the natural tendency among prosecutors trying to comply with civil standards of conduct, may well be to permit only the strongest cases to proceed to trial. Thus the charge screening standard will creep upward from the sound position that it now occupies.

Further, this upward movement of screening standards, premised on civil concerns, will have nothing to do with the viability of charges thereby screened out. This would compromise the administration of justice, leaving criminal acts unpunished, deserving victims without curial vindication, and society inadequately protected. In addition, the secrecy of the upward movement of charge screening standards resulting from the unstated impact of civil liability assessment would render the publicly stated charge screening standards of Attorneys General inaccurate, turning them into illusory commitments to criminal law enforcement.

An unclear civil liability standard would not just push up charge screening standards to the detriment of criminal law enforcement; it would also do so inconsistently, which is itself a separate harm. Risk aversion is essentially a subjective character trait. It will affect charge screening as a function of the trepidation of individual Crown counsel screening the charge and attempting to assess an uncertain standard of civil liability. An unclear civil standard would thus precipitate direct repudiation of the sage admonition in the *Martin Report*, that “[a] decision as important as who is or is not to be prosecuted should not depend on the happenstance of who is assigned to the case”.¹⁶

The civil standard of liability best placed to ensure appropriate and consistent charge screening is that stated in *Nelles*. A standard requiring both the absence of reasonable and probable cause and malice, has two advantages. First, assessing reasonable grounds is a mandatory part of charge screening. In this respect, the civil liability and charge screening standards will work hand in glove to maximize criminal law enforcement and also ensure no tort of wrongful prosecution. Second, a malice requirement for civil liability provides the clearest possible civil standard to adhere to. Malice is a subjective state and thus to comply fully the prosecutor need only be aware of his or her own state of mind and screen the charge accordingly.

In stark contrast, a negligence standard of prosecutorial liability poses all the threats to the integrity of charge screening outlined above. Negligence

¹⁶ *Ibid.* at 69.

includes inadvertent conduct. Thus a prosecutor screening charges where subsequent acquittals are inevitable, cannot be assured of adherence to a negligence standard by taking proper account of all that he or she knows. Further, Crown counsel and the police investigators have a complex relationship of constitutional independence and practical interdependence.¹⁷ This complex relationship may in some circumstances limit Crown counsel's ability to control that for which he or she might ultimately be held liable in negligence. Thus if a negligence standard prevails, charge screening will always be performed in an atmosphere of uncertainty about civil liability. When that is piled upon the inherent uncertainty in charge screening, prudence would inevitably lead to erring on the side of screening out many charges that properly proceed to trial at present. The result would be that the administration of criminal justice would be compromised by the direct operation of the civil law.

(b) *Distinguishing Between Acquittals and Improperly Screened Charges*

The second essential attribute of a civil liability standard of maximum complementarity with charge screening objectives is that it distinguishes between acquittals and improperly screened charges. The *Martin Report* explains this distinction:

... the fact of an acquittal at trial does not mean that the threshold test was necessarily improperly applied. Unexpected defences may succeed. Defence cross-examination may be particularly effective. Likewise, it is well known that testimony of prosecution witnesses at trial may, on occasion, fall short of what might have reasonably been anticipated before trial. Neither does the fact that a verdict is set aside as unreasonable on appeal necessarily indicate that there was no reasonable prospect of conviction prior to trial. The Court of Appeal has, of course, the benefit denied to a prosecutor [at the charge screening stage] of reviewing all of the evidence as it unfolded at trial, including any evidence called by the defence.¹⁸

To this list must be added the persuasive abilities of defence counsel, which can lead to acquittal in a viable prosecution for reasons unrelated to the quality of the charge screening.

If the criminal law is to be properly enforced, developments at trial subsequent to charge screening that undermine a prosecution obviously cannot found civil liability for improper charge screening. Accordingly, prosecutors must have latitude to carry forward cases with some recognizable uncertainties. In this respect it is significant that the *Martin Report* rejects a charge screening standard stipulating that a conviction must be more likely than not.¹⁹ It is often impossible to forecast with precision the prospects of conviction when the complainant is, for example, a child or a person with a physical or mental

¹⁷ For further discussion of this relationship, see the *Martin Report* at 37-39.

¹⁸ *Ibid.* at 74. See also *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.).

¹⁹ *Martin Report* at *ibid.* 58-59.

disability that impairs his or her ability to communicate the evidence necessary to substantiate the charges. Further the *Martin Report* notes that a "more likely than not" screening standard,

is unhelpful because of the false conception implicit in such language that the prosecutor's decision-making bears the stamp of scientific objectivity. Nothing could be more misleading inasmuch as it obscures the reality of the situation.²⁰

If there is a reasonable prospect of conviction (and the prosecution is otherwise in the public interest), the charge should proceed, despite obvious uncertainty about the outcome. Indeed, given the explicit rejection in the *Martin Report* of the "more likely than not" standard, it may be desirable to prosecute a charge where it is slightly more likely that an *acquittal* will result. In these cases an acquittal is certainly reasonably foreseeable. Thus if the civil standard is negligence, a prosecutor could be liable for conducting an ultimately unsuccessful prosecution when he or she was duty bound to do so by charge screening rules. Furthermore, civil liability could flow from trying in good faith especially grave allegations of child sexual abuse for example, where the prospects of conviction are notoriously difficult to assess in advance. These are clear examples of the criminal and civil law working intolerably at cross purposes, and reveal the patent undesirability of negligence as a standard of prosecutorial civil liability.

The charge screening prosecutor's duty is to put forward reasonably debateable cases. In a criminal trial, much is at stake: stigma and liberty for the accused, denunciation and deterrence for society, and vindication for the victim. Accordingly, the conduct of the trial will often be heated. But because of what is at stake on all sides whatever the outcome, it is the holding of that public inquiry/debate that is the most important consideration, not the outcome itself. Properly understood then, the charge screening prosecutor's role is to cause intense and costly inquiry and debate when the outcome is at a minimum only reasonably certain, and when an acquittal may sometimes be slightly more likely than not. A prudent person would not do this with the frequency necessary to properly administer criminal justice. Therefore, negligence as a standard of civil liability for the prosecutor is unacceptable.

Ironically, a negligence standard implemented to make prosecutors more accountable, but that forced the charge screening standard secretly upward, and made it uneven, would make prosecutors less accountable in a less fair system. The public would lose the benefit of seeing more reasonable criminal allegations resolved in open court where prosecutorial conduct is subject to close scrutiny. Instead, many reasonable criminal allegations would be quietly resolved in favour of the accused in the privacy of the prosecutor's office, for reasons the public could never know, but which may have more to do with concerns about

²⁰ *Ibid.* at 59, quoting with approval J.L.J. Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984) at 416.

civil liability than with the absence of an objective need to try the allegation in a public courtroom.

Screening standards on the admissibility of evidence further demonstrate the need for considerable distance between an acquittal and a conclusion that the charge was improperly screened: a distance that negligence cannot deliver. The charge screening prosecutor must always assess whether the evidence required to prove the charge is at least arguably admissible. However, the Ontario Charge Screening Guideline states that this requirement

is not meant to institutionalize the *status quo*. It may be appropriate to continue a prosecution in which evidence is initially inadmissible to try to effect a change in the law.

This Guideline accords with the evolutionary nature of the common law of evidence, markedly present in recent Supreme Court cases on hearsay.²¹ Trial counsel must have latitude for reasoned novelty in legal argument, because the trial is where the need for new approaches first arises. That is where the foundation is laid for precedents later set by appellate courts. The trial court is the doorway to the encounter between the legal system and changing social conditions, evolving human understanding, or new technologies. Thus trial counsel must be free to facilitate that encounter when the result can be fairer, or more efficient trial procedures, even if that sometimes means prosecuting in the face of contrary precedent and marked uncertainty as to the outcome. Negligence as a civil standard is ill-suited to accommodate such good faith evolutionary efforts, and therefore would thwart improvements in the criminal justice system.

(c) *Subjective Belief in Guilt by Crown Counsel*

The third essential attribute of the civil standard of prosecutorial liability, in light of charge screening requirements, is that it not require subjective belief by the Crown prosecutor in the accused's guilt. The reasons are set out in the *Martin Report*:

It is also generally inappropriate, in the Committee's view, for the prosecution to turn on the prosecutor's personal feelings or opinion as to whether or not the accused is guilty. This is inconsistent with Crown counsel's role as Minister of Justice. A prosecution clearly cannot commence unless an informant, usually a police officer, has reasonable grounds to believe, *and does believe* [emphasis in original], that the accused has committed the offence for which he is charged. However, after the information is laid, an important aspect of Crown counsel's prosecutorial responsibilities is to maintain an impartial independence from the police or other informant, and an objectivity with respect to the prosecution that the police may not have, due to their minds having been made up in the course of the investigation. ...

²¹ See *R. v. Khan* (1990), 59 C.C.C. (3d) 92, *R. v. Smith* (1992), 75 C.C.C. (3d) 257, *R. v. K.G.B.* (1993), 79 C.C.C. (3d) 257, and *R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97.

... If only those cases were prosecuted in which Crown counsel firmly believed in the guilt of the accused, the settled notion that "the purpose of a criminal prosecution is not to obtain a conviction" [per Rand J. in *Boucher*] may well be compromised in practice by prosecutors who, having formed the opinion that the accused is guilty, would therefore see it as their duty to obtain a conviction. ... a prosecutor's animus toward an accused person is irrelevant. ...

Crown counsel need not and ought not to be substituting his or her own views for those of the trial judge and jury, who are the community's decision makers. It cannot be forgotten that much of the public's confidence in the administration of justice is attributable to the trial court process that ensures that justice is not only done, but is seen to be done, and to the appellate court process that ensures an orderly and reasoned review of trial decisions where necessary. Granting Crown counsel the power to initiate or discontinue prosecutions based on a subjective assessment of whether or not the accused is guilty would, in some circumstances, be tantamount to replacing these open, impartial, and community-based processes with the unexplained, unreviewable decisions of prosecutorial officials who have no direct accountability to the public.²²

In addition, if there is a reasonable prospect of conviction but no more, a prosecutor forced to decide personally on the accused's guilt or innocence and to screen accordingly to minimize civil risk, may well withdraw the charge, with the undesirable systemic consequences explored above.

Based on the foregoing, requiring the Crown prosecutor's subjective belief in the accused's guilt before proceeding with a charge would distort the role and effectiveness of the prosecutor, introduce a destabilizing subjective element to charge screening, and undermine the openness, impartiality and accountability of some decision making on criminal liability. The criminal courts must remain organs of genuine inquiry: a forum for intense scrutiny of competing and debateable perspectives on an historical act alleged to be a crime. They must not be reduced to merely rubber stamping foregone conclusions of a prosecutor that a particular person is guilty. As stated in *S. (An Infant) v. Recorder of Manchester*:

The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty.²³

Accordingly, a civil standard of liability requiring Crown counsel's belief in the accused's guilt would set the civil and criminal law at odds with each other. Ironically, it may also insulate from civil liability those least respectful of Crown counsel's role as impartial minister of justice: those who are quick to judge, and think everyone guilty. As said by Learned Hand J. in *Gregoire v. Biddle*, requiring the prosecutor's belief in the accused's guilt would "dampen the ardor of all but ... the most irresponsible":²⁴ a patently undesirable compromise of the administration of criminal justice that no standard of civil liability should engender.

²² *Supra* footnote 6 at 69-72.

²³ [1970] 2 W.L.R. 21 at 37 (H.L.).

²⁴ 177 F.2d 579 at 581 (C.A. 1949).

Not requiring belief by Crown counsel in the accused's guilt will permit objective charge screening, but may also expose more persons to trial and acquittal. Again, societal interests in public resolution of reasonable debates about criminal liability require no less. Faced with uncertainty as to who among those reasonably charged with crimes are guilty, the only socially responsible policy is to try all of them. To argue that the obloquy of facing criminal charges is so great that civil liability standards should limit that displeasure at all costs is to misperceive the role of Crown counsel and criminal courts, and undervalue the public debate/inquiry into guilt or innocence, as opposed to the conclusion of such. Hostility to reasonable prosecutions ending in acquittal is often expressed by the slogan that only the guilty should be prosecuted; it is wrong to prosecute the innocent. But this facile assertion overlooks the obvious reality that it is only through prosecution that we ascertain in the first place who is guilty and who is not. It also overlooks the fact that acquittals based on reasonable doubt often mean lack of sufficient proof, not factual innocence. Indeed, one who is probably guilty, without more, must be acquitted. But it cannot be said that such a person was wrongfully prosecuted.

At first blush it may seem that not requiring Crown counsel's belief in the guilt of the accused defies the *Nelles* holding that the prosecutor must have, "an honest belief in the guilt of the accused".²⁵ However, resolution of this apparent contradiction lies in the ambiguity of the term "prosecutor". On full review of the relevant reasons in *Nelles*, it appears that the "prosecutor" who must believe the accused guilty can be the informant, not Crown counsel. And of course s.504 of the *Criminal Code* requires just such a belief by the informant. As authority requiring the prosecutor to believe the accused guilty the Court in *Nelles* cited *Hicks v. Faulkner*.²⁶ However in *Hicks*, the malicious prosecution suit followed a private prosecution.²⁷ Since private prosecutions were the norm in Victorian England, and the prosecutor and complainant the same person, it is clear why *Hicks* held that the prosecutor must believe the accused guilty. But the *Hicks* rule as referred to in *Nelles* has no application to the very different Canadian system of public prosecutions whereby Crown counsel are necessarily independent from the police and other informants. Indeed, as set out above, the *Hicks* rule would undermine the Crown Attorney system of public prosecutions.

The Court in *Nelles* also states that a requirement of malicious prosecution is that the prosecution in issue be "initiated" by the prosecutor/defendant.²⁸ In Canada that clearly cannot include Crown counsel, who have no responsibility for swearing informations, the step that initiates a prosecution. Again, an important function of Crown counsel as a minister of justice is to maintain an independence from the police who usually swear informations, in part to permit

²⁵ *Supra* footnote 1 at 193.

²⁶ (1878), 8 Q.B.D. 167, 171.

²⁷ *Nelles*, *supra* footnote 1 at 189.

²⁸ *Ibid.* at 193.

effective charge screening. So it appears that *Nelles* properly read does not interfere with the salutary principle that Crown counsel need not form a belief as to the guilt of the accused.

4. *Recovery for Breach of Constitutional Rights: An Unsuitable Standard*

A standard permitting civil recovery for a violation of constitutional rights, without more, has currency in the literature. However, this standard is unsuitable because it fails to accommodate the Crown prosecutor's legal duties and the dictates of the *Charter* itself. Consider for example a case with evidence obtained via a *Charter* breach, that is sufficient to warrant a trial and where it is not clear whether the evidence will be excluded under s.24(2).

The *Martin Report* states the following on the admissibility of evidence.

The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.²⁹

On this standard, Crown counsel must prosecute on the above example because the impugned evidence is not clearly or obviously inadmissible. However in so doing the prosecutor knowingly subjects an accused to the obloquy of a criminal trial based on unconstitutionally obtained evidence. If civilly liable for mere breach of constitutional rights, the Crown prosecutor has no defence. It would not matter that the accused was convicted and the conviction upheld on appeal, because that would not change the basic nature of the prosecution. Indeed a conviction might make the prosecutor worse off, because it would increase the plaintiff's compensable losses.

The sensible prosecutor would not prosecute in the above scenario. Thus s.24(2) of the *Charter* would become a dead letter, because reliance upon it in any prosecution would mean civil liability. There would also be great disincentive to prosecute where a substantive constitutional right is only arguably violated, because a ruling contrary to the Crown on the point would leave the case entirely dependent upon s.24(2), and again decide civil liability against the Crown.

Limiting civil recovery to constitutional violations that also result in s.24(2) evidence exclusion would not improve matters appreciably. It is clear that there can be reasonable disagreement on what brings "the administration of justice into disrepute".³⁰ Thus Crown counsel prosecuting based on a reasonable view that evidence is admissible under s.24(2) would be civilly liable if the judge disagreed.

²⁹ *Supra* footnote 6 at 65.

³⁰ *R. v. Silveira*, [1995] 2 S.C.R. 297 at 365-66. It is one of ten Supreme Court of Canada decisions that makes this point.

No civil standard of prosecutorial liability can intrude upon the criminal process, and upon the constitution itself, to such a remarkable degree. Prosecutions that founder on s.24(2) admissibility are, absent flagrant aggravating features, necessary explorations of the fluid constitutional border between individual freedoms and the state's investigative and prosecutorial powers. And convictions based on evidence properly admitted under s.24(2) are by nature constitutionally sound. Thus civil mechanisms of prosecutorial control could not possibly advance the public good by eradicating either acquittals or convictions of this sort. The essential balance between public and individual good in the administration of justice has already been constitutionally struck by s.24(2) and other *Charter* sections, and it is not for the civil law to upset it. The constitutional imperative in s.24(2) is that we are prepared to tolerate some unconstitutional conduct to enforce criminal laws. American exclusionary principles have been an important teacher in this respect. The s.24(2) compromise between competing principles was not chosen lightly. Civil standards of prosecutorial liability cannot, therefore, be permitted to mount a collateral attack on a firmly entrenched and deliberative constitutional norm.

Civil recovery for mere breach of constitutional rights also defies the settled contextual method of *Charter* interpretation, which posits that rights have different values depending upon the context.³¹ In a criminal trial, where liberty and the stigma of conviction are at stake, constitutional rights must be enforced vigorously. However, in a civil suit against a prosecutor, the very serious potential impact of civil liability on the administration of criminal justice, as discussed above, properly casts constitutional rights in a very different light.

A clear recent display of the floating, context-dependent value of *Charter* rights is *Mooring v. National Parole Board et al.*³² In *Mooring*, evidence of a crime was gathered and charges were laid, but later stayed by the Crown due to a *Charter* breach. The National Parole Board none the less revoked *Mooring*'s release on parole on that same evidence. The Supreme Court upheld the revocation, ruling that tribunals with different purposes can properly treat constitutional violations very differently. The Court bluntly stated that the Board can act on evidence that a court has excluded under s.24(2). *Mooring* therefore refutes the claim that civil liability can rest on mere breach of *Charter* rights. On that logic *Mooring* would have an unanswerable claim in wrongful imprisonment against the National Parole Board for conduct the Supreme Court has condoned. At the very least, after *Mooring* one cannot assume that *Charter* breaches alone found civil liability without first scrutinizing the interplay between civil liability and criminal justice, as undertaken in this reply.

³¹ See, for example, *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.).

³² (1996), 192 N.R. 161 (S.C.C.).

5. *Meeting the Needs of Justice for Everyone: Abuse of Process as the Civil Standard*

Abuse of process historically existed both at common law and under s.7 of the *Charter*. However after *R. v. O'Connor (H.P.)*,³³ abuse of process is a *Charter* doctrine alone, unless the *Charter* may not apply. The remedy for abuse of process is a stay of proceedings, disentitling the prosecution to a resolution of the case on the merits. The standard for abuse is high. The settled formulation is from *R. v. Young*:

... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.³⁴

Short of such clearly oppressive conduct by the prosecution, the law is clear that the greatest community interests lie in hearing and resolving criminal accusations on their merits.

The reasons for a high abuse of process standard are the difficulties of curial review of the prosecutor's discretionary conduct. This reply has addressed some of those difficulties related to trial advocacy, and charge screening. The most comprehensive judicial discussion of the difficulties is *R. v. Power*.³⁵ In an exhaustive review of the authorities and literature, the Supreme Court gives many reasons why courts must not review prosecutorial discretion except in the clearest cases of abuse. The points made are as follows.

- Close review by courts of prosecutorial discretion compromises the constitutional separation of powers between the judicial and executive branches of government, in which only the executive branch administers the criminal law.
- Crown counsel exercising prosecutorial discretion is a quasi-judicial officer who is to act independently, unconstrained by external influences.
- Courts reviewing prosecutorial discretion become supervising prosecutors and cease to be independent tribunals.
- If courts exercise their power to say what cases should or should not come before them, it may be thought that the cases that proceed are approved by the court.

³³ (1995), 191 N.R. 1 (S.C.C.).

³⁴ (1984), 13 C.C.C. (3d) 1 at 31 (Ont. C.A.). And see *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.), *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481 (S.C.C.), *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.), *R. v. V.T.*, [1992] 3 W.W.R. 193 (S.C.C.), and *R. v. Potvin* (1993), 83 C.C.C. (3d) 97 (S.C.C.).

³⁵ (1994), 89 C.C.C. (3d) 1 (S.C.C.).

- Factors relevant to prosecutorial discretion such as the strength of the case, the prosecution's deterrence value, and the Government's enforcement priorities are not susceptible to the kind of analysis the courts are competent to undertake.
- Review of prosecutorial discretion by the courts threatens to chill law enforcement by subjecting the prosecutor to outside inquiry.
- Review of prosecutorial discretion by the courts threatens prosecutorial effectiveness and deterrent value by revealing government enforcement policy.
- Since a myriad of factors can affect the exercise of prosecutorial discretion, the courts are ill-equipped to evaluate the decision properly.
- Review of prosecutorial discretion threatens confidentiality that is essential for the due enforcement of the criminal law; for example, decisions to reduce charges in exchange for confidential information about other ongoing investigations.
- Widespread review of prosecutorial discretion would leave little time for judging cases on their merits, and thus make the administration of justice inefficient.
- Widespread review of prosecutorial discretion would render prosecution policies inflexible, and thus less responsive to changing conditions. And,
- judicial control over prosecutorial discretion would reduce the prosecutor's ability to respond to public opinion where it was appropriate to do so.

The Court in *Powers* reiterated the essence of abuse of process, in this way:

To conclude that the situation is "tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interests of justice. ... the Attorney-General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney-General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice. Accordingly, courts should be careful before they attempt to "second-guess" the prosecutor's motives when he or she makes a decision. Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.³⁶

³⁶ *Ibid.* at 10.

Powers thus underscores that abuse of process prevents misuse of prosecutorial power while also preserving the effective administration of criminal justice. It cannot be overemphasized that these are precisely the same aims of the civil standard of prosecutorial liability.

The Supreme Court's many reasons for giving prosecutorial discretion wide latitude apply with equal force to civil suits. A wrongful prosecution case is nothing more than a review of prosecutorial discretion. If the civil standard is too low, the review will be too intrusive, and too frequent, with all of the adverse consequences listed above. Thus it is imperative that the prosecutor's civil liability standard be no lower than abuse of process. Civil courts must not compromise their independence, efficiency, and effectiveness as set out in *Powers*.

Furthermore, the lowest standard of review of prosecutorial discretion used by the courts, be they criminal or civil, will automatically become the one that governs prosecutorial conduct. It matters not whether proposed prosecutorial conduct will lead to a stay of the prosecution for abuse, or to civil liability. Either consequence must be avoided, and the conscientious prosecutor will not engage in the conduct in question. Thus if the civil standard of liability is lower than abuse of process, it will directly govern how the criminal law is administered by Crown counsel. As such, the civil standard will constitute an intrusive erosion of the standard of abuse of process as authoritatively stated and repeatedly reiterated by the Supreme Court of Canada.

A civil standard of prosecutorial liability lower than abuse of process will also disserve the administration of criminal justice in that some non-abusive prosecutions, that would otherwise have been heard in court on their merits, will no longer be brought. Since the civil and criminal courts have the same judges, it would be disingenuous for a judge to apply criminal law one day to say that a charge is not abusive and thus properly brought, and the next day apply the lower civil standard to the same facts, and say that the case amounts to wrongful prosecution, should not have been brought, and award damages. Yet this is just what a civil standard lower than abuse of process would foster.

A civil liability standard of abuse of process neatly avoids a hostile collision of civil and criminal law. In addition, it would also actively facilitate the due administration of criminal justice. The abuse of process standard is precisely what Crown counsel works with every day. It promotes resolute discharge of all requisite prosecutorial duties as discussed above. Charges can be screened objectively and consistently, without need for unstated modification driven by civil liability concerns. No destabilizing element of uncertainty would be obliquely introduced into charge screening by the civil law. Acquittals following properly screened charges would remain of no civil moment. And at trial, Crown counsel could advocate vigorously but fairly in his or her own style, assisting the court to the fullest in its task of adversarial inquiry.

Since abuse of process is already enshrined in s.7 of the *Charter*, it can readily become the standard for a constitutional tort of wrongful prosecution that now seems inevitable. Such a tort would both include and extend beyond

malicious prosecution. To prosecute maliciously without reasonable grounds is a clear abuse of process. However, there can also be an abuse of process where there is no malice, and thus no tort of malicious prosecution. As stated by the Supreme Court in *Conway*:

Stays for abuse of process are not limited to cases where there is evidence of prosecutorial misconduct. In delivering the reasons of the Court in [*Keyowski, supra* at 482-83], Wilson J. made it clear that all relevant factors, including, but not restricted to, bad faith on the part of the Crown, are to be considered:

To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. ...³⁷

A new tort standard that does not require proof of the prosecutor's state of mind is for plaintiffs a great improvement over the current law. See, for example the discussion in *Nelles* emphasizing the protections against suit that a malice requirement affords potential defendants. However, abuse of process as a tort also has other plaintiff-friendly features that improve on malicious prosecution. The plaintiff will not necessarily have to prove a negative, namely, the absence of reasonable grounds. And third, the plaintiff's pleading, as in negligence, can be as diverse as the circumstances require, given the statement in *Conway*, that all relevant factors of the case can come into play. This contrasts markedly with the rigid and constrained essential elements of malicious prosecution.

Finally, a civil standard of abuse of process would minimize transaction costs for all parties. The "transaction", broadly viewed, would commence with an abuse of process stay application in the criminal trial. With an identical civil standard and the same parties, the criminal court outcome would usually answer the civil claim. On a successful stay application upheld on appeal the civil parties could go directly to damages. And with an unsuccessful stay application upheld on appeal the civil matter would likely end without more. Everyone would be spared the expense of litigating in two courts, and the criminal justice system would be spared the loss of much needed prosecutorial person hours eaten up in defending civil suits.

In sum, both a knowing assessment of the contemporary realities of prosecuting, and the ever present need to avoid wrongful prosecution, show that a new civil standard of prosecutorial liability is feasible under the *Charter*. Old dogs can and should be taught new tricks, but not the old one of negligence. There should be a truly new civil standard of abuse of process.

³⁷ *Supra* footnote 32 at 302.

Torts — Negligent Failure to Warn — Learned Intermediary Rule —
Causation — Appellate Court Powers: *Hollis v. Dow Corning Corp.*

Vaughan Black* and Dennis Klimchuk**

The decision of the Supreme Court of Canada in *Hollis v. Dow Corning Corp.*¹ has garnered considerable public attention. As the Court's first ruling on a suit involving silicone breast implants, it will have an impact on the large number of similar actions which are before other Canadian courts, some of them by way of class action.² *Hollis* offers a clear articulation of the elements of negligence as they apply to a manufacturer's duty to warn. It also features discussions of some basic yet troublesome issues of causation, and those will be the main focus of this comment.

1. *The Judgments*

Susan Hollis brought suit in respect of a silicone breast prosthesis which had ruptured following implantation, causing her substantial pain and suffering. She named four defendants: the implant's manufacturer Dow Corning Corp., Dow's Canadian agent, the doctor who inserted the implant (Dr. John Birch), and the doctor who operated to remove it. At trial she succeeded only against Dow on the basis of negligent manufacture.³ Despite the fact that she had also pleaded that Dow should be held liable on the basis of negligent failure to warn of the risks of rupture, and although she had introduced evidence on this point, the trial judge found it unnecessary to consider this argument since he had already held Dow liable for negligent manufacture.

The British Columbia Court of Appeal accepted Dow's argument that they should not be held liable for negligent manufacture.⁴ However a majority also agreed with Ms Hollis that Dow should be held liable for

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¹ [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 [hereinafter *Hollis* cited to D.L.R. only].

² Cases where breast implant actions have been certified as class proceedings include *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, 16 C.P.C. (3d) 156 (Gen. Div.), *Harrington v. Dow Corning Corp.* (11 April 1996), Vancouver C954330 (B.C.S.C.) and *Doyer v. Dow Corning Canada Inc.* (17 November 1994), Montreal 500-06-00013-934 (Sup. Ct.).

³ *Hollis v. Dow Corning Corp.*, [1990] B.C.J. No. 1059.

⁴ *Hollis v. Dow Corning Corp.* (1993), 81 B.C.L.R. (2d) 1, 103 D.L.R. (4th) 520. For a comment on this decision see S.M. Wexler, "*Hollis v. Dow Corning* and *Buchan v. Ortho Pharmaceuticals*" (1994) 22 Man. L.J. 426.

negligent failure to warn. Southin J.A. dissented on this point. She would have ordered a new trial on this issue so that there could be clear findings of credibility on the evidence of whether a reasonable person would have gone ahead with the operation even if she had been warned of the risks. A different majority of the Court of Appeal allowed Ms Hollis's appeal against Dr. Birch and directed a new trial against him on the issue of failure to warn.

A further appeal by Dow was dismissed by a majority of the Supreme Court of Canada. Writing for himself and four other judges, La Forest J. agreed with the British Columbia Court of Appeal that Dow should be held liable for negligent failure to warn of the risks of rupture of its implants. He also agreed that, even though the trial judge had made no findings of credibility on the evidence on this point, the appellate court was in a suitable position to reach a holding of liability without remitting the matter for a new trial. With respect to the standards of a manufacturer's liability for failure to warn of the risks of use of its products, the majority held that the question of what would have happened if Ms Hollis had been warned should be considered by asking what Ms Hollis herself (as opposed to the hypothetical reasonable woman) would have done. Finally the majority acknowledged the applicability of the so-called learned intermediary rule: Dow would have been able to discharge their duty to warn Ms Hollis by conveying the warning to Dr. Birch. However the majority went on to hold that if Dow did not adequately warn Dr. Birch (as was the case here) it was not open to Dow to claim that the causal chain between their negligence and Ms Hollis's injury was broken by arguing that if Dr. Birch had received a warning from Dow he would not have passed it on to Ms Hollis. In the result, Dow was held liable for the \$95,000 damages assessed by the trial judge and Ms Hollis was entitled to a new trial against Dr. Birch.⁵

Sopinka J., writing for himself and McLachlin J., dissented on three points. In his view the Court of Appeal was not in a proper position to find the facts relevant to considering the question of failure to warn, and thus a new trial was required on that issue. Secondly, he thought that the question of whether Dow's negligent failure to warn was the proximate cause of Ms Hollis's injury should be answered by applying an objective test: would a reasonable woman have proceeded with the operation? Finally, he thought that the issue of whether even if Dow had warned Dr. Birch he would not in turn have warned Ms Hollis was relevant, and if that were established it would break the causal chain and exempt Dow from liability.

This dry recitation of the progress and judgments of *Hollis* fails to convey any of the emotion created by a more complete account of the underlying story. On the basis of the facts as related in the trial judgment

⁵ Our understanding from a January 1996 telephone conversation with Ms. Hollis's counsel is that she will not proceed with the new trial against Dr. Birch.

and in the reasons of La Forest J., we feel great sympathy for Ms Hollis. She did not seek medical care out of any concern she had about her breasts. She sought this care for another reason altogether and was talked into the implantation by Dr. Birch who labelled her breasts "deformed".⁶ In addition we are angered by the conduct of the defendants, both of whom appear inconsiderate and oblivious to their obligation to be candid about the serious known risks inherent in the products and procedures they were promoting. Obviously this dispute must be seen in a larger context, one which includes consideration of the ways in which standards of female beauty are constructed, the real effect those standards have on the health of women in our culture, and the part which the medical profession and large corporate manufacturers play in that. Of course none of these matters is the primary responsibility of any one of the defendants. Consequently none of the judges dealt with the case in these terms and neither will our comment. However, our assessment of the rather abstract causation issues is certainly affected by our intuition that it would be unconscionable if both Dow and Dr. Birch were to escape liability for the harm that befell Ms Hollis.

2. Negligent Failure to Warn — The Learned Intermediary

There was little disagreement in either of the appellate courts about the threshold elements of the tort of negligent failure to warn as applied to manufacturers of products potentially dangerous to physical health. In the Supreme Court both the majority and the dissent agreed that Dow's potential liability was a straightforward application of the neighbour principle in *Donoghue v. Stevenson*,⁷ one which had been previously recognized in the failure-to-warn context by the Supreme Court in *Lambert v. Lastoplex*.⁸ La Forest J. argued that the informational advantage which manufacturers hold over consumers justifies imposing on the former a continuing duty to make clear, complete and current disclosure of the risks inherent in the ordinary use of their products. Such disclosure should be reasonably communicated. Particularly in the case of medical products the duty entails an obligation to disclose even low-probability risks. Such a duty is necessary to ensure true consent on the part of the product's user, which will in turn promote bodily integrity and genuine consumer choice.⁹

⁶ *Hollis*, *supra* footnote 1 at 612. Her initial visit had been to her general practitioner, who referred her to Dr. Birch, a surgeon, for further consultation. The general practitioner was not named as a defendant.

⁷ [1932] A.C. 562 (H.L.). This was cited by the majority in *Hollis*, *ibid.* at 618. In his dissenting reasons Sopinka J. began by stating (at 642): "I agree with Justice La Forest in his analysis of the principles relating to the duty to warn and in particular that the learned intermediary principles apply as he proposes."

⁸ [1972] S.C.R. 569 at 574-575, 25 D.L.R. (3d) 121 at 124-125, Laskin J.

⁹ *Hollis*, *supra* footnote 1 at 617-622.

More noteworthy is the Court's holding that in special circumstances a manufacturer may discharge the foregoing duty by passing the warning on to an intermediary. Drawing on American cases which initially adopted this approach in suits involving prescription drugs, La Forest J. held that in circumstances in which the product is of a very technical nature or is to be used under expert supervision, the manufacturer may discharge its duty to warn the consumer by fully apprising an expert intermediary of the risks in question. This approach, with which dissent agreed, had been applied by the Court of Appeal in *Hollis* and acknowledged by provincial appellate courts in other cases,¹⁰ but this represents its initial adoption by the Supreme Court of Canada.

As noted, there was no disagreement over either the general principles of the tort of negligent failure to warn or the circumstances in which the existence of a learned intermediary should become legally relevant. There was, however, a significant difference of opinion over the application of those principles to this case, and in particular over two subsidiary aspects of the way in which questions of causation should be assessed. Those differences were the primary concern of the dissenting judgment of Sopinka J. and are the focus of this comment.

3. *A New Trial or an Appellate Finding?*

Although causation issues are the Court's principal focus in *Hollis*, there was also a ground of appeal which dealt with the powers of appellate courts. Both the British Columbia Court of Appeal and the Supreme Court of Canada reached split decisions on the question of whether a new trial was needed on the issue of negligent failure to warn. The trial judge could have considered that issue but found it unnecessary to do so, having already held Dow liable for negligent manufacture. The British Columbia Court of Appeal unanimously agreed that there was no basis for a finding of negligent manufacture, but thought that there were grounds for a claim for negligent failure to warn. But it disagreed, as would the Supreme Court, on the question of whether it was in a fit position to make a holding on the failure-to-warn issue on the basis of transcripts of the trial evidence. Prowse J.A., with whom McEachern C.J.B.C. concurred, held that the appellate court was in an adequate position to make such a finding. Southin J.A. dissented, stating that there should be a new hearing so that the evidence could be subjected to clear findings of credibility. As noted, a majority of the Supreme Court rejected Dow's appeal on this issue. Of the four judgments to give reasons on this point — those of Southin and Prowse

¹⁰ *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 25 D.L.R. (4th) 658 (Ont. C.A.) and *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1995), 126 D.L.R. (4th) 1 at 27 (Nfld. C.A.). See also the judgment of Linden J. in *Davidson v. Connaught Laboratories Ltd.* (1980), 14 C.C.L.T. 251 at 276 (Ont. H.C.J.).

JJ.A. in the Court of Appeal and of La Forest and Sopinka JJ. in the Supreme Court — only Sopinka J. offers extended analysis. His points may be summarized as follows: Where a trial court has failed to make factual findings which are crucial to an issue, an appeal court should be extremely reluctant to reach decisions which normally depend on such findings. It would be unfair for an appeal court to decide a case against a person solely on the basis of transcripts. In fact it might even be said to violate a right which that person possesses, a right not to be found liable on evidence which has not been and cannot now be assessed for credibility in all respects.¹¹ Accordingly an appeal court should only take this course where unusual circumstances eliminate this concern. Such circumstances would exist where the trial judge has made the necessary findings of fact in respect of a different issue, where the evidence is not in dispute, where the parties request the appeal court to make the necessary findings of fact, or where no issue of credibility is involved.¹² Since, according to Sopinka J., none of those exceptions obtained here, there should be a new trial on the issue of Dow's liability for failure to warn.

The judgments which held that the Court of Appeal was in an appropriate position to consider the issue, those of Prowse J.A. and on further appeal La Forest J., gave much briefer reasons. La Forest J.'s reasoning on this point is short enough to quote in full.

It is well-established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level: see *Prudential Trust Co v. Forseth* (1959), 21 D.L.R. (2d) 587 at 593-5, [1960] S.C.R. 210, 30 W.W.R. 241. In this case, there was sufficient evidence on the record to allow the Court of Appeal to make a full and proper reassessment of the duty to warn issue without sending the case back to trial. While appellate courts are generally, and justifiably, wary of making findings of fact without having the advantage of seeing and hearing testimony firsthand, I do not believe that such concerns arise in this case because the bulk of the critical evidence adduced at trial was documentary, not testimonial. In light of the fact that Ms Hollis has now waited close to seven years for the final resolution of her claim, and the high costs already created by the unusual length of this appeal process, I believe the Court of Appeal followed the proper course in weighing and assessing the evidence in order to achieve a measure of finality in this case: see, e.g., *Davie Shipbuilding Ltd. v. The Queen* (1984), 4 D.L.R. (4th) 546 at 548-9, [1984] 1 F.C. 461, 53 N.R. 50 (C.A.); *Nova, An Alberta Corporation v. Guelph Engineering Co.* (1989), 70 Alta L.R. (2d) 97 at 110-12, 100 A.R. 241, 17 A.C.W.S. (3d) 977 (C.A.).¹³

¹¹ In *Hollis*, *supra* footnote 1 at 652, Sopinka J. cites *Just v. British Columbia*, [1989] 2 S.C.R. 1228 as support for the proposition "that the party affected is entitled to a new trial virtually as of right." *Just* did not deploy the word "right" in this context, though it did say that parties were "entitled to a finding of fact" (at 1246) [emphasis added].

¹² *Hollis*, *supra* footnote 1 at 654.

¹³ *Hollis*, *ibid.* at 625. The Supreme Court's decision in *Prudential v. Forseth* does indeed stand for the proposition that, in certain circumstances, an appeal court can go on to consider a matter not considered by the trial judge, though in that case the Supreme Court held that the Saskatchewan Court of Appeal should not have done so. In his dissent (at 653-

In part La Forest J. simply disagrees with Sopinka J. on the question of whether, given the fact that so much of the evidence on this point was documentary, the ability of an appeal court to assess the evidence is any less than that of the trial judge. As Sopinka J. points out in dissent, this assertion is difficult to square with the fact that a key piece of evidence will be the testimony of the plaintiff herself on the question of whether she would have had the operation if she had been warned.¹⁴

More noteworthy than the disagreement over the applicability of the exception is the difference in principle between the approach of the majority and that of the dissent. It is the view of La Forest J. that it is legitimate to give weight to the fact that the process has already gone on for a long time and that a new trial would be a lengthy one. As noted, in Sopinka J.'s analysis the parties have a *right* to a process which guarantees clear findings of credibility by someone who has observed the witnesses delivering their testimony. He appears to reject the view that this right can be overridden by concerns of the sort upon which La Forest J. relies.¹⁵ We suspect that the majority was influenced not only by general considerations of expense and time but by the fact that both of these could be expected to weigh far more heavily on an individual such as Ms Hollis than on a corporate party like Dow. There is every reason to suspect that if the Supreme Court had required Ms Hollis to return to the trial court and start again she would simply have given up. If, following *Hollis*, the law on this point now clearly permits courts to take account of *general* factors of expense and weight, it seems not inappropriate for it to take the further step of giving explicit consideration to the fact that those do not always impact equally on the parties. Normally — apart from matters such as applications for exemption from costs or permission to proceed *in forma pauperis* — the litigation process makes little allowance for the disparate resources of the parties. So far as we can tell, none was made for Ms Hollis in the trial in this case. However, when the question arises of whether to send the parties back

54) Sopinka J. seeks to distinguish the two other cases relied on by La Forest J. on the ground that they were cases where his exceptions applied.

Additional support for the approach of La Forest J. might be found in the Supreme Court's earlier decision in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, a case not mentioned in *Hollis*. In *Asamera* the Court decided that, despite a trial record it described as deficient (at 673), it would attempt its own assessment of damages rather than remit the matter for a new trial. In justifying the Court's unanimous decision on this point Estey J. refers to considerations of expense and time-consumption which parallel those mentioned by La Forest J. in the passage we have quoted.

¹⁴ *Hollis*, *ibid.* at 654.

¹⁵ Sopinka J. buttresses his argument with the observation that, since Ms Hollis already had to have a new trial against the doctor, it would add little hardship to have a new trial against Dow. *Ibid.* at 656. However this observation is not central to his rights-based argument. We note that the Supreme Court will soon revisit the matter as it has allowed leave to appeal in another case involving similar issues: *Athey v. Leonati*, [1995] B.C.J. No. 666 (B.C.C.A.), application for leave to appeal granted, [1995] 4 S.C.R. v. (L'Heureux-Dubé, Sopinka and McLachlin JJ.).

for a second trial, particularly when the underlying cause was not the fault of the plaintiff but rather the failure of the trial judge to consider a matter he or she could have considered, the situation seems different. Consequently if, following *Hollis*, considerations of time and expense are pertinent to the question of whether a new trial should be ordered, we favour an express consideration of the parties' *relative* resources.

4. *The Appropriate Standard — Subjective or Objective?*

Having decided that Dow had a duty to warn Ms Hollis of the risks inherent in the implantation of silicone prostheses, the question arises whether even if Dow had fulfilled that duty Ms Hollis might still have decided to have the implants. If she would have then Dow's failure to warn was not the cause of the resulting damage. Dow maintained that the question was properly answered by applying an objective test: would the reasonable person have consented to the implant procedure even if she had been warned? In support of this Dow relied on the Supreme Court's 1980 decision in *Reibl v. Hughes*.¹⁶ There, writing for a unanimous court, Laskin C.J.C. held that where the cause of action is a negligence claim against a doctor based on the doctor's failure to disclose material risks, the question to ask is whether a reasonable person in the plaintiff's position would have consented to the procedure if the risks had been communicated.¹⁷ However,

¹⁶ [1980] 2 S.C.R. 880.

¹⁷ *Ibid.* at S.C.R. 898-899, D.L.R. 16. The test in *Reibl v. Hughes*, while it renders irrelevant characteristics peculiar to the plaintiff, does permit the trier of fact to take into account the plaintiff's circumstances. This formulation has caused some courts and commentators to label it a "modified objective standard." See e.g. P.H. Osborne, "Causation and the Emerging Canadian Doctrine of Informed Consent to Medical Treatment" (1985) 33 C.C.L.T. 131 at 132, G. Robertson, "Informed Consent Ten Years Later: The Impact of *Reibl v. Hughes*" (1991) 70 Can. Bar Rev. 423 at 426, and *Arndt v. Smith* (1995), 25 C.C.L.T. (2d) 262 at 277 (B.C.C.A.), per Lambert J.A. Leave to appeal allowed, 6 May 1996, 24943 (L'Heureux-Dubé, McLachlin and Sopinka JJ.). In fact La Forest J. uses the term "modified objective standard" once in *Hollis*, *supra* footnote 1 at 625. In our view "modified objective standard" is a misnomer. The reasonable person is no more than an embodiment of a standard of behaviour which a party has a duty to maintain, either simply by virtue of being a citizen, or, in the case that a special standard attends that situation which is not expected of the general populace, by virtue of his or her membership in a certain profession. The real question is whether the defendant has discharged this duty — if it is appropriate to set the reasonable person in the defendant's circumstances to answer this question of duty, then in no way is the objectivity of the test undermined. Laskin J. appreciated this in *Reibl v. Hughes* itself. He simply refers to his test as an objective (simpliciter) one. He goes on at length (at S.C.R. 899-890, D.L.R. 16-17) to point out that his test allows the trier of fact to take into account the plaintiff's position and circumstances, but he does not characterize that as a modification of the objective standard, simply as an explanation of it. In addition many other courts, such as the Ontario Court of Appeal in *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, *supra* footnote 10, and Sopinka J. in *Hollis* (at 645) simply refer to the *Reibl v. Hughes* test as an objective test.

as Ms Hollis noted, the relevant relationship here is that between manufacturer and consumer, and the Ontario Court of Appeal in *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*¹⁸ had distinguished *Reibl v. Hughes* and held that in the case of a manufacturer's (as opposed to a doctor's) duty to warn, a subjective standard was proper. In further support of the appropriateness of a subjective standard, she argued that, regardless of what most women or the reasonable woman would have done, she would not have had the implants if the risks had been disclosed, and that to answer the question of the scope of Dow's duty to warn on the basis of an objective standard would amount to denying her the autonomy which the law should respect.¹⁹

The British Columbia Court of Appeal had applied the *Reibl v. Hughes* objective test, but had held in the plaintiff's favour based on its finding that "a reasonable woman in the position of [Ms Hollis] would not have consented to implantation of breast prostheses if she had been warned of the possibility of rupture of the implants inside her body."²⁰ In the Supreme Court the majority followed a different route, adopting a subjective test. La Forest J. accepted the view of the Ontario Court of Appeal in *Buchan* that a subjective test in the context of the manufacturer-consumer relationship was correct in principle and that what a so-called reasonable person in the plaintiff's position would have done was irrelevant. The only objection which he perceived to this view was the one which had persuaded Laskin J. in *Reibl v. Hughes*, namely that out of bitterness and with the benefit of hindsight a plaintiff will always claim that she would not have used the product had she been adequately warned. This objection was rejected by La Forest J. on the ground that the doctor-patient relationship in *Reibl v. Hughes* was significantly different from the manufacturer-user relationship before the court in *Hollis*.

[T]he duty of the doctor is to give the best medical advice and service he or she can give to a particular patient in a specific context. It is by no means coterminous with that of the manufacturer of products used in rendering that service. The manufacturer . . . can be expected to act in a more self-interested manner. In the case of a manufacturer, therefore, there is a greater likelihood that the value of a product will be overemphasized and the risk underemphasized.²¹

Even if we grant the premises of this argument it is not clear why the differences between the manufacturer-purchaser and doctor-patient relationships should affect a plaintiff's propensity to distort her testimony

¹⁸ *Supra* footnote 10 at D.L.R. 547 [hereinafter *Buchan*].

¹⁹ That autonomy is a concern here is confirmed in *Hollis* in the majority's general discussion of the tort of failure to warn, a discussion with which Sopinka J. voiced agreement. La Forest J. wrote that a "high standard of disclosure protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship." *Hollis*, *supra* footnote 1 at 621.

²⁰ *Hollis v. Dow Corning Corp.*, *supra* footnote 4 at D.L.R. 547.

²¹ *Hollis*, *supra* footnote 1 at 634.

due to bitterness and hindsight, a point which Sopinka J. makes in dissent.²²In fact it is not completely clear what the majority's point here is. Perhaps La Forest J. is acknowledging that the application of his subjective test will indeed result in some defendants wrongly being held liable, and that while we might countenance that result for manufacturers (many of whom are greedy distorters of the facts) we should not tolerate it for doctors (who by and large are honest). That would be an astounding proposition, one which it would be impertinent to consider in the absence of convincing proof that the premises upon which it is based are true. The other possible meaning is that with manufacturers there will be many more instances of non-disclosure, and perhaps many more law suits, than with doctors. However it does not follow that simply because claims against manufacturers will be more frequent than claims against doctors, our suspicion of the plaintiff's evidence will differ when one or the other type of claim is presented.

Sopinka J.'s dissenting view was that considerations of credibility adverted to in *Reibl v. Hughes* mandate an objective standard and that the differences between the doctor-patient relationship and the manufacturer-user one do not justify any abandonment of that. We agree with the dissent that differences between the manufacturer-user and doctor-patient relationships do not justify a different standard,²³ however we submit that the majority's subjective test is suitable for both. All sides concede that the subjective test is correct in principle. That is to say, all the judges agree that in principle the subjective test is the proper measure of the scope of the manufacturer's duty to warn, a duty it fails to discharge when the information it withholds would, had it been made available to the plaintiff, have affected her decision to use the product. That the scope of duty is so measured reflects the value attached by the law to personal autonomy. Thus the objective test in *Reibl v. Hughes*, a test which the dissent in *Hollis* would extend to the manufacturer-user relationship, is premised on the assumption that a patient's hindsight and bitterness will cause her to give false evidence on the issue of whether she would have opted for the procedure had the risks

²² *Ibid.* at 644-645.

²³ See Sopinka J., *ibid.* This is not to suggest that the tort of negligent failure to warn need draw no distinctions between medical practitioners and manufacturers. The need to preserve and foster the therapeutic relationship, and the fact that doctors (unlike manufacturers) can assess the situation while sitting face to face with their patients, will mean in deciding what should be disclosed the different context of the doctor-patient relationship will come into play. Perhaps something of this is captured in the fact that *Reibl v. Hughes* requires doctors to disclose only *material* risks, (*supra* footnote 16 at S.C.R. 894-895) while the qualifier "material" is not generally used in relation to a manufacturer's duty. It would be misleading to suggest that the absence of a qualifying adjective means that manufacturers have a duty to disclose all risks, however remote. Nevertheless the word "material" may serve to remind us that a doctor's context differs from that of a manufacturer and must be assessed accordingly. Be that as it may, in our view none of that affects the fact that those different situations do not affect the question of whether we adopt an objective or subjective standard when investigating what a patient/user would have done if a required warning was not delivered.

been disclosed. In the view of Sopinka J. the problem is not simply that the plaintiff has a *motive* to lie about the choice she would have made. (Presumably all plaintiffs have motives to lie, yet we often apply subjective tests, comforting ourselves with the assumption that the usual forensic processes, in particular cross examination, will disclose those lies in most cases.) The concern of Sopinka J. is that plaintiffs in failure-to-disclose cases will first deceive themselves about what they would have decided, and that having done so they will be particularly convincing givers of false evidence on that point.²⁴ He refers to no empirical support for the intuition that self-deception is a greater problem in failure-to-warn cases than in, say, the standard car crash case. Nor is support offered for the assumption that cross-examination is less likely to discredit the self-deceiving plaintiff than it is the plaintiff who is simply lying. Of course such propositions may not be candidates for empirical proof or disproof, and it must be admitted that the intuitions of Sopinka J. on these points certainly carry the weight of his long experience in the courtroom. However these concerns still seem insufficient reason for rejecting a standard which is otherwise correct in principle, as all sides agree it is.²⁵

In further support of the subjective standard it should be noted that no one suggests that under such a standard only the plaintiff's evidence will be relevant. The evidence of experts as to what most patients decide when they are told of the risks is still admissible to cast doubt on the plaintiff's testimony. In addition, Philip Osborne has shown that some (but not all) lower courts applying the objective test in *Reibl v. Hughes* have tended to let subjective factors creep into their decision making, with the result that the application of the test is unpredictable.²⁶ If this is so, then the objective

²⁴ Sopinka J. writes: "The plaintiff may be perfectly sincere in stating that in hindsight she believed that she would not have consented to the operation. . . . As such, the opinion may be honestly given without being accepted. In evaluating the opinion, the trier of fact must discount its probity not only by reason of its self-serving nature, but also by reason of the fact that it is likely to be coloured by the trauma occasioned by the failed procedure." *Ibid.* at 643.

²⁵ In addition it should be noted that some other comparably experienced persons do not share Sopinka J.'s views on this point. Consider the following passage from the judgment of Wood J.A. of the British Columbia Court of Appeal in *Arndt v. Smith*, *supra* footnote 17 at 291, a medical malpractice case where the court had to consider the objective standard in *Reibl v. Hughes*:

[T]he difficulty, which the trier of fact assessing the credibility of such evidence faces, seems to me to be no greater than that which arises in any other case where the task is to decide what would have happened if that which did take place had not occurred, and that which did not take place had. With respect, the desire to shield the physician from "the patient's hindsight and bitterness", emotions which could hardly be said to be unique to plaintiffs in medical malpractice actions, does not seem sufficient justification for a rule that deprives credible plaintiffs of the right to be believed by the trier of fact in such cases.

²⁶ Osborne, *supra* footnote 17 at 133-140.

test has administrative difficulties which may equal or exceed those which arise from the credibility concerns which accompany the subjective standard.²⁷

To conclude this part, we note that some judges and commentators have called for the Supreme Court to abandon the objective standard in *Reibl v. Hughes*.²⁸ Like us, they will be relieved that in *Hollis* the Court chose to confine that standard to the doctor-patient situation. As the Supreme Court has recently allowed leave to appeal in a case which raises this issue in the doctor-patient context,²⁹ it will soon be asked to reconsider *Reibl v. Hughes*. The decision in *Hollis*, however, gives little indication that the present Court is inclined to overrule that case.

4. *The Causal Link*

Dow also raised a counterfactual *novus actus interveniens* defence. They argued that their failure to warn Dr. Birch of the risks inherent in the use of their product was not the cause of the materialization of those risks and the attendant costs Ms Hollis subsequently bore, because there was evidence that Dr. Birch would not have passed on Dow's warning even if Dow had made one. Thus, argued Dow, to make her case out against them, Ms Hollis would have to show that Dr. Birch would have passed Dow's warning on to her.

La Forest J. presents several arguments against Dow's claim. He argues first that to require Ms Hollis to prove that Dr. Birch would have passed on Dow's warning "would be to ask her to prove a hypothetical situation relating to her doctor's conduct, one, moreover, brought about by Dow's failure to perform its duty."³⁰ We can extract two arguments from this claim.

²⁷ Adoption of the subjective standard does present courts with the problem of what to do with a plaintiff who is not merely more risk averse than the average patient but is idiosyncratically or unreasonably so. These are deep problems but common ones and pose no extra difficulty here. The question of standards should be answered first in relation to the question of the scope of duty. Evidentiary issues may justify departures from the answer to this first question only if (1) circumstances are exceptional and (2) they are very significant either in principle or practically.

²⁸ The most recent judge to put forth this view was Wood J.A. in *Arndt v. Smith*, *supra* footnote 17 at 291. It is shared by P.H. Osborne in his annotation to the case, (1995) 25 C.C.L.T. 262 at 268, and also by J. Torrens, "Informed Consent and the Learned Intermediary Rule in Canada" (1994) 58 Sask. L. Rev. 399 at 412-418.

²⁹ *Arndt v. Smith*, *ibid*. It should be noted that Québec courts have held that under the law of that province, a subjective standard should be applied when the failure-to-warn issue arises in the context of a doctor-patient relationship: *Drolet v. Parenteau* (1994), 26 C.C.L.T. (2d) 168 (Qué. C.A.) and *Lavoie v. Scalabrini* (1995), 27 C.C.L.T. (2d) 110 (Qué. C.S.). The appeal in *Arndt v. Smith* thus gives the Supreme Court an opportunity to make the law on this point uniform across the country.

³⁰ *Hollis*, *supra* footnote 1 at 638-639.

(1) It is unfair to ask Ms Hollis to prove something as elusive of proof as the hypothetical proposition Dow presents.

Furthermore:

(2) Insofar as it is a result of Dow's wrongful action that proof of their liability depends upon proof of this hypothetical proposition, it should not be Ms Hollis's burden to prove it.

Further to the second point, La Forest J. offers an analogy with the well-known causal uncertainty case of *Cook v. Lewis*.³¹ There, two hunters had negligently fired in the direction of the plaintiff, who was wounded by birdshot from one of their guns, but it could not be shown which. Unable to determine whose carelessness had caused the plaintiff's injury, the jury acquitted both defendants. The Supreme Court set aside the verdict and held that the defendants bore the burden of proving lack of causation. Rand J., in a concurring judgment, justified this shift of burden as follows:

[In circumstances such as this, what] the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.³²

"While the victim's power of proof has not been destroyed in the same sense as in the hunting party case," La Forest J. argues, "it has been seriously undermined in that the plaintiff is, on Dow's contention, called upon to prove what a doctor would have done in a hypothetical situation."³³

Note that this argument does not establish Dow's liability, but rather establishes the procedural terms upon which the defence they raise could succeed. However, La Forest J. goes on to offer several reasons why we can assign liability to Dow without waiting to see whether they can marshal proof that Dr. Birch would not have warned Ms Hollis even if Dow had warned him. The first is that

(3) Whether Dr. Birch would have failed to warn Ms Hollis might go to the issue of the apportionment of liability between Dow and Dr. Birch, but cannot absolve Dow of liability.³⁴

³¹ [1951] S.C.R. 830.

³² *Ibid.* at 832.

³³ *Hollis*, *supra* footnote 1 at 639-640.

³⁴ *Ibid.* at 640-641.

Further

(4) Allowing the defence that Dow proposes to succeed could produce the result that no one is liable. Dow escapes liability through a defence of counterfactual *novus actus interveniens*; Dr. Birch escapes liability because, not having been informed of the risks by Dow, there was no information for him to fail to disclose. Yet Ms Hollis cannot be asked to bear the costs of her injuries because she would not have consented to the procedure from which they arose had she been informed of the procedure's attendant risks.³⁵

Finally, La Forest J. suggests (though, in our view, does not adequately explain), that

(5) The structure of the learned intermediary rule disentitles Dow from raising the defence it proposes.

The ultimate duty of the manufacturer is to warn the plaintiff adequately. For practical reasons, the law permits it to acquit itself of that duty by warning an informed intermediary. Having failed to warn the intermediary, the manufacturer has failed in its duty to warn the plaintiff who ultimately suffered injury by using the product . . . [However, while] [t]he learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary . . . if it fails to do so it cannot raise as a defence that the intermediary could have ignored this information.³⁶

In his dissenting reasons, Sopinka J. argues that La Forest J.'s position amounts to a proposal to "eliminate the fundamental requirement of tort law that the plaintiff establish causation in order to prove the defendant's liability."³⁷ In Sopinka J.'s view, the majority's position allows Ms Hollis to establish Dow's liability by merely showing that Dow breached its duty, without also showing that their breach of duty caused her injury, an approach that "runs counter to well established tort principles."³⁸ Thus Sopinka J. rejects the claim (5 above) that the structure of the learned intermediary rule disentitles Dow from raising the defence it proposes, for all that Dow is asking for is that a necessary condition of tortious liability — that the defendant's breach of duty had caused the injury with respect to which the plaintiff brings suit — be proven.

If Dr. Birch would not have passed on information from Dow to Ms Hollis, Dow's failure to provide the warning cannot be said to have contributed to Ms Hollis' injury. Liability cannot be based on failure to take measures which would have no effect and be pointless.³⁹

³⁵ *Ibid.* at 641.

³⁶ *Ibid.* at 641.

³⁷ *Ibid.* at 646.

³⁸ *Ibid.*

³⁹ *Ibid.*

It follows from the fact that causality has not been proven that the claim (3 above) that the question of whether Dr. Birch would have warned Ms Hollis if Dow had warned him cannot be relegated to the question of the apportionment of liability, as “[a] finding of causation is a prerequisite to apportionment.”⁴⁰

Sopinka J. points out (correctly, in our view) that cases like *Cook v. Lewis* do not support the proposition that if the defendant impairs the plaintiff’s “remedial right of establishing liability” (Rand J.’s words in *Cook v. Lewis*) the issue of causation is rendered irrelevant. Rather, such cases support, at most, a shift in the burden (and substance) of proof.⁴¹ In particular, *Cook v. Lewis* is authority for the view that the burden may be so shifted if the defendant has tortiously destroyed the plaintiff’s means of proof.⁴² In addition, in *Snell v. Farrell*⁴³ the Supreme Court of Canada observed that the burden of proof could be shifted in cases where the subject matter of the alleged tortious conduct lies particularly within the knowledge of the defendant. In Sopinka J.’s view, neither condition obtains in *Hollis*. The primary evidence bearing upon the question of whether Dr. Birch would have passed the warning on to Ms Hollis had Dow warned him — namely, Dr. Birch’s own testimony — was both easily available and equally accessible to Dow and Ms Hollis (and so point 1 above is wrong).⁴⁴ Further, to whatever extent proof of the proposition that Dr. Birch would not have warned Ms Hollis even if he had been properly informed by Dow is elusive (not at all, in Sopinka J.’s view), it is not so by virtue of Dow’s negligent actions (so point 2 above is wrong).⁴⁵

In our view, Sopinka J.’s response to points 1 and 2 on the majority’s judgment is persuasive, as far as it goes. We say “as far as it goes” because,

⁴⁰ *Ibid.*

⁴¹ We say that the shift is both in the burden and *substance* of proof to highlight the fact that the proposition in need of proof changes depending upon who bears the burden of proof. In this case, Dow, to make its case, would have to prove that Dr. Birch would not have passed on their warning. Ms Hollis would have to prove that Dr. Birch would have passed on the information.

⁴² However, in *Cook v. Lewis* the shifting of the burden had the same effect as a finding of factual causality, since at the new trial neither defendant would be able to disprove causality.

⁴³ [1990] 2 S.C.R. 311 at 321. That was not the *ratio* of *Snell v. Farrell*, for there the Court managed to reach a finding of liability without resorting to a reversal of the onus of proof. In *Hollis* Sopinka J. states that *Snell v. Farrell* does support a reversal of the onus where the alleged tortious conduct lies particularly within the knowledge of the defendant. *Hollis*, *supra* footnote 1 at 648. He also claims (at 646) that the majority refers to *Snell v. Farrell*, though that is not in fact the case.

⁴⁴ *Hollis*, *ibid.* at 648-649.

⁴⁵ Sopinka J. does not consider point 4 above, that in the case that Dow’s proposed defence succeeds, there may be a finding of no liability. This follows, we suppose, from the fact that in his view the most fundamental questions of tortious liability have not been addressed.

as we will argue, the question of who should bear the burden of proof with respect to the question of whether Dr. Birch would have passed on Dow's warning need not come up at all — though if it would, Sopinka J.'s views on the matter seem right. We submit that point 5 is correct, though La Forest J. does not provide an argument in support of it, and that considerations similar to those presented in point 2 provide this argument. That is, a close look at the structure of the learned intermediary rule shows that Dow is disentitled from raising the counterfactual *novus actus interveniens* it proposes, and this is so for reasons akin to — but not identical with — the grounds upon which the defendants in *Cook v. Lewis* were disentitled from raising the defence that because it could not be shown which of the two of them caused the plaintiff's injury, both of them were entitled to an acquittal. Further, in our view, such departure from the ordinary rules of tortious liability bearing upon causality as is represented by this approach are tolerable and justifiable.⁴⁶

Consider again La Forest J.'s analogy between the present case and *Cook v. Lewis*. According to Rand J.'s concurring reasons, the defendants in *Cook v. Lewis* forfeited a certain right — that their liability will only follow on proof by the plaintiff that their action caused his injury — in light of the fact that they deprived the plaintiff of means of proof required for him to exercise his "remedial right of establishing liability." The Court's ruling thus evokes something akin to a principle of estoppel: the defendants' wrongdoing is the source of the evidential uncertainty, so they cannot invoke it on their behalf.⁴⁷ On our view, a similar principle disentitles Dow from raising the counterfactual *novus actus interveniens* defence they propose. However, *pace* La Forest J., the grounds upon which Dow is so estopped are not evidentiary, but rather substantive.

Let us consider the learned intermediary rule. It is important to bear in mind that, as La Forest J. emphasizes, the learned intermediary rule does not affect the scope of the manufacturer's duty to warn potential consumers of their product of the risks inherent in the use of that product. A manufacturer's duty to make available information concerning the risks inherent in the use of its product is always a duty to potential consumers of that product. In special circumstances, the law allows manufacturers to discharge that duty by warning those intermediaries necessarily involved in the product's distribution. Among these special circumstances are those which obtain in this case, namely that the product is never sold directly to the consumer but to an intermediary, who, by virtue of the special expertise and legal rights attendant to her or his profession, is among those persons

⁴⁶ It follows that we have no view as to point 3, the question of whether the question raised by Dow's proposed defence goes to liability generally or to the apportionment of liability, as we feel the defence is illegitimate in any case. We noted our sympathy to point 4 above, at *supra* footnote 4.

⁴⁷ Thanks to Arthur Ripstein for suggesting this reading of *Cook v. Lewis*.

exclusively permitted to engage in the procedure which, by virtue of the nature of the manufacturer's product, is the only means by which the consumer may consume it. But the fact that the learned intermediary enjoys this special status in the manufacturer-consumer relationship does not change the scope of the manufacturer's duty to warn. The consumer remains the person who would suffer the harms attendant to the materialization of the risks inherent in the use of the manufacturer's product. Hence the duty borne by the manufacturer to disclose the risks inherent in the use of their product remains a duty to the consumer notwithstanding the fact that this duty may, in the context of circumstances like those in the present case, be discharged by informing a learned intermediary.

The crucial point that follows from the foregoing is that the privilege enjoyed by manufacturers to discharge the duty to warn consumers by informing intermediaries is predicated on the assumption that informed intermediaries will fulfil their duties to pass on to the consumer the information given to them by manufacturers. Thus once a manufacturer chooses to discharge the duty to warn the consumer by warning a learned intermediary who will act as a conduit in the manufacturer-consumer relationship, that manufacturer elects to rely upon the assumption that the learned intermediary will pass on its warning. Only by so doing could the manufacturer be said to have discharged the ultimate duty to the consumer. Having relied upon this assumption, the manufacturer is thus estopped from raising a defence which depends upon revoking it.⁴⁸ Thus, we need not consider the question of who bears the burden of proving (or disproving, as the case may be) the proposition central to the counterfactual *novus actus interveniens* defence Dow proposes (*i.e.* that Dr. Birch would not have warned Ms Hollis even if Dow had informed him). Once manufacturers choose to rely upon the learned intermediary rule, they disentitle themselves from any⁴⁹ defence to their tortious liability that relies upon revoking the assumption upon which the learned intermediary rule is predicated.⁵⁰

Does this, as Sopinka J. would argue, amount to the more serious claim that by electing to rely on the learned intermediary role, Dow is thereby

⁴⁸ Classically, promissory estoppel is invoked to prevent a party exercising a right when so doing requires that party to revoke a statement upon which another party has relied. Here, however, the party that made the statement in question and the party that relied upon it is the same.

⁴⁹ Of course if the manufacturer conveys the information to the intermediary but the intermediary fails to pass it on, it might be said that the manufacturer has a defence, *viz.* that it discharged its duty to warn as formulated by the learned intermediary rule, but then we would be regarding the learned intermediary rule *itself* as a defence.

⁵⁰ One might respond that this argument depends upon an inaccurate portrayal of the degree of choice enjoyed by a manufacturer of a product like breast implants to rely upon the learned intermediary rule. La Forest, J. argues (*Hollis, supra* footnote 1 at 624), that "direct warnings from manufacturers of breast implants are simply not feasible given the need for intervention by a physician." There are two responses to this possible objection.

disentitled from enjoying the right to be found liable for only those wrongful actions or omissions which actually cause injury? Motivating the claim that it would, we suppose, is the fact that what Dow's proposed defence purports to show is that Dow's failure to inform Dr. Birch was not a "but-for" cause (or a cause *sine qua non*) of Ms Hollis's injury. If Dr. Birch would not have warned Ms Hollis even if Dow had informed him of the risks, then it is false that, but for Dow's failure to warn, Ms Hollis would have been deprived of the knowledge of the risks inherent in the use of Dow's product.

However, while failure to satisfy the but-for test typically constitutes sufficient grounds for rejecting the claim that the defendant's actions were a factual cause of the injury with respect to which the plaintiff brings suit, this is not always the case. Cases of causal over-determination, as when there are more than one independent and sufficient cause of some event, provide the clearest illustrations of this exception. The classic case is *Corey v. Havener*.⁵¹ There the plaintiff was injured after his horse was frightened and subsequently bolted when he was passed on either side by the defendants, who were riding motorbikes. Both defendants could escape liability on the grounds of the but-for test of factual causation, as each could say that it was false that but for his action, the horse would not have bolted and the plaintiff not been injured. This outcome would of course be unfair. But we may reject the defendant's argument not simply on the grounds of fairness, but also more strictly within the scope of the inquiry into factual causation. Compare the facts in *Corey v. Havener* with the facts in *Lambton v. Mellish*.⁵² There the plaintiff succeeded in a suit against two street vendors who jointly produced enough noise to ground a claim of nuisance.⁵³ Here, the but-for test yields a finding of factual causality: but for the contribution made by each of the defendants, the plaintiff's injury would not have occurred. That the but-for test is insufficient to establish factual causality in *Corey v. Havener*, we submit, reflects its inadequacy in that

First of all, manufacturers who produce products which are of such a nature that only a learned intermediary could inform the consumer of the risk inherent in that product's use do choose, after all, to manufacture that product. Secondly, we respectfully disagree with LaForest J.'s claim that Dow is in this position. The warning at issue — that breast implants may be caused to rupture by certain non-exceptional types of activity — does not need to be explained by an expert. Nor would it be difficult to convey this information to consumers. Doctors could be required to give patients written warnings provided by the manufacturer. They might require patients to sign a form acknowledging that they have read and understood these warnings. In any case, breast implants and the risks inherent in their implantation seem, in this respect, no different from oral contraceptives with which manufacturers are required to include written warnings.

⁵¹ 65 N.E. 69 (Mass. S.J.C. 1902).

⁵² [1894] 3 Ch. 163.

⁵³ Chitty J. considers the possibility that each of the defendants' contribution might have been individually sufficient, but in the end decided the case on the principle that if their contributions were only jointly sufficient, liability should attach to both, a principle for which *Thorpe v. Brumfitt* (1873), 8 L.R. Ch. App. 650 is authority.

context, rather than the permissibility of the defence offered to the defendants in light of the fact that the test exculpates them. As Ernest Weinrib argues,

[i]f the partially causative noise produced by the street vendors was sufficient to satisfy the cause in fact requirement, the wholly causative noise produced by each motorcyclist should suffice *a fortiori*.⁵⁴

Thus, in some circumstances, it is appropriate to use as the criterion of factual causality not that the plaintiff's action was a necessary condition of the occurrence of the defendant's injury (as the but-for test requires), but rather that the plaintiff's action was partly or wholly sufficient to bring about the injury, in the circumstances. This second test is variously formulated as raising the question of whether the defendant's action was either a "substantial cause" or an "operating cause" of the plaintiff's injury, or whether the defendant's action "substantially contributed" to the plaintiff's injury.⁵⁵

We shall not attempt to enumerate the circumstances in which partial or complete causal sufficiency rather than causal necessity (and so the substantial or operating cause test rather than the but-for test) is the appropriate standard for answering the question of factual causality; nor will we attempt to determine a general principle explaining the distinction between these two fact situations.⁵⁶ Instead we will rely on a shared intuition that *Corey v. Havener* belongs to the former class, and suggest that the feature that makes it so is shared by *Hollis*. In both cases, by virtue of the complexity of the causal antecedents of the plaintiff's injury, the application of the but-for test of factual causation has the result of detaching what is clearly a tort from all the candidate tortfeasors.⁵⁷ Thus in both cases we may adopt causal sufficiency rather than causal necessity as the threshold of factual causation.

⁵⁴ E. J. Weinrib, "A Step Forward in Factual Causation" (1975) 38 Mod. L.R. 518 at 520. Weinrib points out, at 520, that because one motorcyclist's contribution would be held to be causative even if the other cause was a natural occurrence, e.g., thunder, the substantial cause test is more than an embodiment of the principle of fairness that we suggested would be violated had both the defendants in *Corey v. Havener* been acquitted.

⁵⁵ "In the circumstances" in the previous sentence in the text is an important qualification. The plaintiff's action could be considered a sufficient cause only by delegating any number of other factors to "background conditions." The substantial operating cause test thus depends upon, rather than explicates, our intuitions about the distinction between causes and background conditions. But so too does the but-for test.

⁵⁶ On these general issues see W. S. Malone, "Ruminations on Cause-In-Fact" (1956) 9 Stanford L.R. 60, and H.L.A. Hart and T. Honoré, *Causation In the Law* 2d ed. (Oxford: Clarendon Press, 1985).

⁵⁷ The idea of identifying a tort in the absence of a tortfeasor may sound as though it violates basic principles of tort law. Insofar as a tort is an injury caused by another's wrongful action or omission, it is, one might say, at least misleading to talk about a "bare" tort, unconnected to a specific defendant who breached a specific duty. But here it is clear that the injury that Ms Hollis suffered was causally connected to *someone's* failure to warn her of the risks attendant with the use of Dow's product; this much we can say without identifying whose.

We need to ask whether Dow's failure to inform Dr. Birch of the risks inherent in the use of its product was a substantial or operating cause of Ms Hollis's injury. We will argue that the answer is yes. Our case will be made in two stages. In the first, we will adopt the simplifying assumption that Dow would have been Dr. Birch's only source of the relevant information in 1983, when Ms Hollis saw him. In the second stage we will drop this assumption. While both are formulations of a test of causal sufficiency, we suggest that in the first fact situation it is helpful to think about the question of factual causation in terms of inquiring after the operating cause of some event, while in the latter the more appropriate formulation is that of substantial cause.

Let us note prefatorily that the cause in question is an omission, a failure to provide information to the plaintiff about the risks inherent in the use of a product, and the effect is the plaintiff's subsequent ignorance of those risks. That Ms Hollis's ignorance of these risks led her to consent to the procedure (and so was a causative factor in her injury) is assumed in the following analysis. On the assumption that Dow was Dr. Birch's only source of the relevant information, it seems clear that Dow's failure to provide it was the operating cause of Ms Hollis's ignorance of the risks inherent in the procedure to which she (as a consequence) consented. What Dr. Birch would have done with the information had Dow provided him with it is beside the point — he had no information to pass on *or* withhold.

That this assumption is false, however, is an important element of the evidence that Dow marshalled in support of its claim that Dr. Birch would probably not have passed on the information even if they had provided it. According to Dr. Birch, at the time he saw Ms Hollis, he relied upon articles he read in medical journals more than on manufacturers' warnings for the information upon which he determined the nature and scope of the warnings that he provided patients about the risks inherent in a given procedure.⁵⁸ Further he testified that in 1983 he was warning only 20% to 30% of his patients of the risk of implant rupture,⁵⁹ so he clearly had some information bearing upon the risks inherent in the procedure Ms Hollis underwent. We must, however, consider two further facts determined at trial. The first is that the average surgeon in 1983 was unaware of the fact that the risk of rupture was "a factor of any significance,"⁶⁰ and so that Dow most likely had information which was not a matter of common professional knowledge. More significantly, after Dow began, in 1985, to make available the warning that ruptures of the breast implants they manufactured occurred in women who had not engaged in any unusual sort of activity, Dr. Birch modified his practice accordingly, and by 1989, he warned all his patients of the risk of rupture.

⁵⁸ *Hollis*, *supra* footnote 1 at 638.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

This suggests that we may say that, at the least, Dow's failure to warn Dr. Birch of the risks inherent in the use of their product increased the chances that Ms Hollis would not be aware of those risks (an ignorance which was a causative factor in her decision to consent to the procedure which resulted, as it turned out, in the materialization of these risks). Having contributed to the chances that Ms Hollis would be unaware of the risks inherent in the use of their product, and having thereby contributed to removing one possible obstacle to her consenting to have the protheses implanted, Dow increased the risk of Ms Hollis suffering just the injury that she suffered. We suggest that what Lord Reid argued in *McGhee v. National Coal Board*⁶¹ is applicable to the defendants in this case.

From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.⁶²

"Material contribution" being sufficient for factual causality, we conclude that Dow's failure to warn satisfies the requirements of factual causality.

In *Snell v. Farrell*, Sopinka J. rejected the approach in *McGhee*⁶³ on the grounds that its adoption "would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent."⁶⁴ In our view, however, this concern is not raised by *Hollis*. That Dow's breach of duty in itself shows that their actions satisfy a substantial contribution standard of factual causation follows from certain features of that duty. Let us explain.

The duty in question is not the general duty imposed by tort law that one conduct one's dealings with others according to a certain standard of care. It is instead a duty of a certain sort of party to engage in a specific practice, a duty imposed upon manufacturers to inform potential consumers of their product of the risks inherent in its use. Such a duty is imposed in the belief that failure on the part of manufacturers to so inform will substantially increase the chance of consumers deciding to use the product on the basis of inappropriately⁶⁵ incomplete information. When the defendant's tortious action, by its nature, substantially increases the risk of the occurrence of some event, the risk of whose occurrence is the ground for the action being

⁶¹ [1973] 1 W.L.R. 1 (H.L.).

⁶² *Ibid.* at W.L.R. 5.

⁶³ Although neither of the doctrines he associates with *McGhee* is the one we endorse, *Snell v. Farrell* might, we suppose, be invoked as authority for the proposition that *McGhee* is not the law in Canada.

⁶⁴ *Supra* footnote 43 at S.C.R. 327.

⁶⁵ This qualification follows from the fact that manufacturers need not warn consumers of either the obvious risks associated with the use of a product — e.g., this knife may cut you — or risks associated with unlikely uses of a product — e.g., that when thrown at a window this hammer will likely shatter it.

one from which the plaintiff had a duty to refrain, *and* that event occurs, then, we submit, absent proof that some other factor *actually* caused the plaintiff's injury, the requirements of factual causation are satisfied.⁶⁶

Further, consider that the law's purpose in imposing this duty on manufacturers is to decrease the chance of the risk of something occurring: that a consumer will make an inappropriately ill-informed choice.⁶⁷ While it is, strictly speaking, fallacious to conclude from the fact that *x* is the purpose of a duty, that that duty is a duty to do *x*, it seems not inappropriate to consider Dow's duty as a duty to decrease the risk that consumers of its product will be ill-informed. It cannot be more so, for it is not Dow's responsibility to prevent all possible causes of misinformation, in particular those which are the responsibility of the consumer, *e.g.*, inattentiveness to warnings. That it necessarily follows from Dow's failure to inform, that the risk to potential consumers of its product is thereby increased (and that, as we argued above, they may therefore be held to substantially contribute to the injuries resulting from the materialization of those risks) does not mean that factual causality is ignored. On the contrary, it shows that it is satisfied.

To conclude this part, while *La Forest J.* was right to conclude that Dow is disentitled from raising their proposed defence, we submit that this follows from substantive rather than evidentiary principles. Further, we think *Sopinka J.* was wrong when he claimed that the approach of the majority is tantamount to eliminating the fundamental requirement of tort law that the plaintiff must establish causation for the defendant to be held liable.

⁶⁶ See *Reynolds v. Texas and Pacific Railway Co.* 37 La. Ann. 694 at 698 (S.C. La., 1885), where the court held, *per Fenner J.*, that

where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect and the injury.

Malone, *supra* footnote 56 at 77 offers a similar argument in rejecting the defence offered by operators of sea vessels who failed to attempt the rescue of a person who fell overboard, that the person would likely have drowned anyway.

It would be futile for the courts to recognize a duty to provide emergency equipment and to impose an obligation to proceed promptly to the rescue if the defendant could successfully seize upon the uncertainty which nearly always attends the rescue operation as a reason for dismissing the claim. In such situations an insistence on proof by probabilities or better has no place. The ever-present chance that the rescue might fail is part of the risk against which the rule protects.

⁶⁷ That this is an event against which the law seeks to protect potential consumers is, as we suggested above, motivated by respect for personal autonomy, and hence follows from a basic value which the law hopes to protect.

Our approach to the causation issue in *Hollis* may also lend some support to the decision in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, where the Court justified a debatable holding on a causation point by noting that the duty the defendant had breached was a fiduciary one. The Court referred (at 452) to "the need to put special pressure on those in positions of trust and power over others in situations of vulnerability."

Conclusion

As noted in our introduction, *Hollis* will have an impact on the large number of other breast implant cases to come before Canadian courts. In addition to raising questions similar to those dealt with in this comment, many of these cases are likely to present a range of issues which were absent from *Hollis*, in particular the link between leaked silicone and disorders such as rheumatoid arthritis, other connective-tissue diseases, and a range of other ailments whose relation to silicone is far from clear. These present difficult issues of determining liability when the key evidence is of an actuarial or probabilistic nature.⁶⁸ Like the key issues in *Hollis*, these are fundamental issues of causation. In our view, the Supreme Court in *Hollis*, while it reached the right result, went astray when it approached the problem as primarily one of evidence. The basic concerns lie within the realm of causation, and just results may be reached, not by abandoning traditional principles of causation, but by attending to them.

⁶⁸ For an introduction to some of these issues see J.G. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar Rev. 661 and J.D. Fraser and D.R. Howarth, "More Concern for Cause" (1984) 4 Leg. St. 131. The point that some of the ongoing breast implant litigation raises issues not touched on in *Hollis* was made by Mackenzie J. in the course of certifying the class action in *Harrington v. Dow Corning Corp.*, *supra* footnote 2 at paras. 11-17.