SASKATCHEWAN
LAW REVIEW

Causation in Tort Law: A Decade in the Supreme Court of Canada

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I. INTRODUCTION

In the past decade, the Supreme Court of Canada has taken an active role in restating the rules of causation that apply in tort actions arising from personal injuries. As will be seen, the relevant decisions fall within two broad categories. In the first group of cases, policy considerations have led the Court to emphasize that common sense, rather than science or philosophy, is the touchstone of causation in tort law. In the second group of cases, different policy considerations have led the Court to manipulate basic principles in the context of "failure to warn" actions and to reason constructively. The former set of decisions is desirable and defensible; the latter is not.

II. COMMON SENSE

It is a fundamental principle of tort law that a defendant should not be held liable for damage sustained by a plaintiff unless the former's breach is causally connected to the latter's injury. Typically, the existence or non-existence of that relationship is determined by means of the "but for" test: a claimant bears the onus of proving, on a balance of probabilities, that if a defendant had not acted wrongfully, no loss would have occurred. Because of perceived deficiencies in the "but for" test, a number of unorthodox doctrines developed over time to alleviate evidentiary difficulties affecting claimants. Recently, however, the Supreme Court of Canada has abandoned many of those doctrines as unnecessary and confusing. While supporting policy considerations that occasionally ease a claimant's burden, the Court has stated that basic principles, approached in a common sense manner, are generally capable of producing appropriate results.

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* Faculty of Law, University of Western Ontario. This paper is based on a presentation delivered on 12 June 1998 as part of the Law Society of Upper Canada's Special Lecture series *Personal Injury Law: Current Practices and Emerging Directions*. I would like to thank Ms. Alison Hughes and Professor Ian Kerr for their comments on an earlier draft. Mr. Brian Smith and Ms. Mysty Clapton provided valuable research assistance, funded by the Law Foundation of Ontario and the University of Western Ontario, Faculty of Law.

A. SHIFTING BURDENS AND CAUSAL INFERENCES: *SNELL* v. *FARRELL* (1990)[1]

Where justified by the circumstances, the Supreme Court of Canada will reverse the burden of proof so as to require a defendant to disprove the existence of a causal nexus between his or her carelessness and a plaintiff's injury. *Cook* v. *Lewis*[2] is a leading authority. The litigants were members of a hunting party. Cook and Akenhead negligently discharged their weapons in Lewis' direction at the same time, but he was hit by only one shot. On the evidence, each was an equally likely culprit. Under orthodox rules, recovery would be denied because Lewis could not prove, on a balance of probabilities, which companion had caused his injury. The Court nevertheless recognized the possibility of liability by holding that each defendant bore the burden of proving that the other's shot was to blame. As Rand J. explained, the decision was warranted by the fact that the defendants had "culpably impaired [the plaintiff's] remedial right of establishing liability" by "destroy[ing] the victim's power of proof."[3] That surely is correct. By acting not only carelessly, but also simultaneously, Cook and Akenhead created an environment that caused Lewis' injury, as well as insurmountable impediments to proof on orthodox principles. Consequently, on the unique facts of the case, any other decision would have offended common sense.

By its very nature, the rule in *Cook* will seldom apply. A defendant's misconduct will rarely render the orthodox burden of proof "difficult if not impossible"[4] for a plaintiff to discharge. However, it is not uncommon for evidentiary difficulties to arise non-culpably and to preclude clear proof of a causal nexus between a defendant's breach and a plaintiff's injury. In such circumstances, there is often an understandable judicial desire to find that the relationship between these two elements is causal and not merely coincidental. The infamous decision in *McGhee* v. *National Coal Board*[5] illustrates the ends to which that desire may lead. The plaintiff cleaned brick kilns for the defendant. Because the employer carelessly failed to provide shower facilities, the claimant was required to cycle home caked in dust and grime. While he not surprisingly developed dermatitis, he was unable to produce medical evidence conclusively linking his injury to the defendant's breach. The expert witnesses were willing to say only that his working conditions "materially increased the...risk"[6] that he

1 [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289.

2 [1951] S.C.R. 830, [1952] 1 D.L.R. 1. See also *Summers* v. *Tice*, 199 P. 2d 1 (Cal. S.C. 1948); *cf. Baker* v. *Australian Asbestos Insulation Pty. Ltd.*, [1984] 3 N.S.W.L.R. 595 (S.C.).

3 *Cook, ibid.* at 832.

4 *Ibid. Cf.* note 86.

5 [1973] 1 W.L.R. 1 (H.L.).

6 *Ibid.* at 6.

would develop the skin condition. Although all five members of the House of Lords found causation in spite of the equivocal evidence, it is Lord Wilberforce's unique reasoning that caught the attention of lower courts:

> [W]here a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.[7]

Following that lead, Canadian courts routinely reversed the burden of proof once a plaintiff established that a defendant had increased the risk of the injury that actually occurred. Unless the defendant could *disprove* the existence of a causal connection between carelessness and injury, liability would follow.[8]

The House of Lords subsequently rejected Lord Wilberforce's analysis, notwithstanding its obvious appeal to lower courts. In *Wilsher* v. *Essex Area Health Authority*,[9] Lord Bridge endorsed Lord Reid's observation in *McGhee* that "the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life."[10] On that basis, Lord Bridge interpreted the majority opinions in *McGhee* as reiterating, rather than revising, traditional rules:

> *McGhee* v. *National Coal Board*...laid down no new principle of law whatever. On the contrary, it affirmed the principle

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7 *Ibid.*

8 See *e.g. Wipfli* v. *Britten* (1984), 13 D.L.R. (4th) 169 (B.C. C.A.); *Powell* v. *Guttman (No. 2)* (1978), 89 D.L.R. (3d) 180 (Man. C.A.); *Letnik* v. *Metropolitan Toronto (Municipality)* (1988), 49 D.L.R. (4th) 707 (F.C.A.).

9 [1988] 2 W.L.R. 557 (H.L.). The defendant hospital administered an excessive amount of oxygen to the plaintiff after he was born prematurely. The infant developed a condition which resulted in almost complete blindness and which he blamed on the defendant's breach. The evidence, however, merely indicated that the defendant's carelessness materially increased the risk of injury. The infant's condition also might have been caused by a number of other factors. Although liability was imposed at trial and affirmed in the Court of Appeal, the House of Lords ordered a new trial on the ground that the issue of causation had not been resolved in accordance with appropriate principles.

10 *Supra* note 5 at 5. In *Wilsher*, *supra* note 9 at 567, Lord Bridge supported the result in *McGhee* on the basis that:

> where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when the brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis.

> that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.[11]

Lord Wilberforce's heresy was scotched.

The Supreme Court of Canada unanimously agreed. In *Snell* v. *Farrell*,[12] the plaintiff became blind in one eye after undergoing surgery by the defendant ophthalmologist. As in *McGhee*, the evidence was inconclusive. While the claimant argued that her injury was caused by the physician's failure to respond properly to haemorrhaging that occurred during the initial stages of the procedure, the expert witnesses indicated that the blindness might have been caused innocently by the fact that the patient suffered from cardiovascular disease, high blood pressure, and glaucoma. The trial judge applied Lord Wilberforce's reasoning in *McGhee*, reversed the usual burden, and imposed liability in the absence of proof by the defendant that the breach and the blindness were *not* causally connected.[13] Sopinka J. agreed with the result, but insisted upon a different analysis. While accepting that traditional rules might be displaced, exceptionally, on policy grounds,[14] he saw no need to do so on the facts before him. "[P]roperly applied, the principles relating to causation are adequate to the task."[15] And, he further explained, orthodox principles are "properly applied" not through a rigid search for scientific or metaphysical truth, but rather through a flexible, common sense assessment of the evidence.[16] In that regard, he stressed that "evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."[17] Where, as in the case before him, "the facts lie

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11 *Wilsher*, *supra* note 9 at 569.

12 *Supra* note 1.

13 (1986), 77 N.B.R. (2d) 222 (T.D.), aff'd (1988), 84 N.B.R. (2d) 401 (C.A.).

14 "If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt [alternative rules]": *Supra* note 1 at 326-27.

15 *Ibid.* at 327.

16 *Ibid.* at 328.

17 *Ibid.*, quoting *Blatch* v. *Archer* (1774), 1 Cowp. 63 at 65 (K.B.), Lord Mansfield.

particularly within the knowledge of the defendant...very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary."[18]

The effect of *Snell* has been significant. Although Sopinka J. insisted that a plaintiff bear the burden of positively establishing causation in all but truly exceptional circumstances, his "robust and pragmatic approach" to the causal inquiry (to use Lord Bridge's phrase) has proven favourable to claimants.[19] Lower courts have often exercised the latitude afforded by the Supreme Court's decision to impose liability in the face of scientifically inconclusive evidence.[20] That approach is eminently defensible. When a defendant is better positioned than a plaintiff to explain the relationship (if any) between an act of carelessness and the onset of injury, it is particularly unfair to hold the victim to the frequently impossible task of establishing causation to a scientific or philosophic standard.

B. SILENCING *RES IPSA LOQUITUR*: *FONTAINE* v. *BRITISH COLUMBIA* (1997)[21]

On the basis of much the same reasoning, the courts often applied the maxim of *res ipsa loquitur* as a means of compelling a recalcitrant defendant to disclose information that was not available to a plaintiff.[22] Thus, in certain circumstances, it was said that "the thing speaks for itself" and that an inference of causative negligence could be drawn from the mere fact that an accident occurred. The precise effect of the maxim varied from case to case, but invariably it made it desirable (if not necessary) for a defendant to offer an explanation as to how a plaintiff was injured.

Although the maxim was generally discussed in connection with the standard of care in negligence actions, it also pertained to causation.[23] This fact is clear from the criteria upon which *res ipsa loquitur* was based.[24] First, before an inference of causative carelessness could be drawn from the mere occurrence of an injurious incident, a plaintiff was required to establish that the situation was such that an

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18 *Supra* note 1 at 328-29.

19 *Ibid.* at 324.

20 See *e.g. Lankenau Estate* v. *Dutton* (1991), 79 D.L.R. (4th) 705 (B.C. C.A.); *Levitt* v. *Carr*, [1992] 4 W.W.R. 160 (B.C. C.A.); *Taylor* v. *Logan* (1994), 119 Nfld. & P.E.I.R. 37 (Nfld. C.A.).

21 [1998] 1 S.C.R. 424, 156 D.L.R. (4th) 577.

22 A. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) at 217-18. Significantly, however, the maxim also extended to situations in which the true cause of a mishap was unknown to either party.

23 J.G. Fleming, *The Law of Torts*, 9th ed. (North Ryde: LBC Information Services, 1998) at 353, 356-58.

24 *Jackson* v. *Millar*, [1976] 1 S.C.R. 225 at 235-36, 59 D.L.R. (3d) 246.

accident would not ordinarily occur in the absence of negligence. If it was not so established, then there was no basis for inferring that the victim's injury resulted from culpable conduct. Second, a plaintiff was required to establish that the instrumentality of harm was under the control of a defendant. If it was not so established, then there was no basis for inferring that the culpable conduct resulting in the accident was attributable to the defendant. Third, a plaintiff was required to establish that the cause of the accident was unknown in the sense that the factors that triggered the sequence of events that resulted in injury could not be proven by direct evidence. If it was not so established, then causative carelessness could be established directly and there was no need to draw an inference of negligence on the basis of indirect, or circumstantial, evidence.[25] Essentially then, whereas the first criterion suggested the defendant's negligence, the second suggested that the plaintiff's injury was *caused* by that carelessness. The third criterion merely indicated circumstances in which the court's analysis could properly be based on that process of inferential reasoning.

Historically, the effect of the maxim was a source of considerable debate and confusion. According to the most extreme view, if a plaintiff satisfied the three criteria noted above, the burden of proof shifted such that, unless a defendant was able to prove on a balance of probabilities that the claimant's injury was not carelessly caused, liability followed. Until very recently, English courts generally subscribed to that theory.[26] Canadian courts seldom followed suit,[27]

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25 Although the three criteria attracted refinements and exceptions over time, for present purposes, they are sufficiently illustrated by the facts of the leading case of *Byrne* v. *Boadle* (1863), 2 H & C 722 (Exch.). The defendant employed a practice of lowering barrels of flour from the second story of its warehouse to the street below. The plaintiff was injured when a barrel fell on his shoulder as he passed by the defendant's premises. Despite the fact that the claimant was unable to positively establish that the defendant carelessly caused the accident, liability was imposed. As Pollock C.B. explained, (i) barrels do not normally fall out of windows and cause injuries to passersby unless they are carelessly handled, (ii) the barrel in question was under the control of the defendant, and (iii) as a stranger to the defendant's premises, the plaintiff was in no position to adduce direct evidence regarding the events that resulted in his injury. *Res ipsa loquitur.*

26 Although English courts historically held that *res ipsa loquitur* reversed the burden of proof (see *e.g. Moore* v. *R. Fox & Sons*, [1956] 1 All E.R. 182 (C.A.); *Barkway* v. *South Wales Transport Co. Ltd.*, [1948] 2 All E.R. 460 at 471 (C.A.)), it is likely that they will now follow the Privy Council's advice in *Ng* v. *Lee Cheun Tat*, [1988] R.T.R. 298 (Hong Kong) and hold claimants to the burden of ultimately proving causative carelessness on the basis of either persuasive inferences or direct evidence: *Widdowson* v. *Newgate Meat Corp.*, *The Times*, 4 December 1997 (C.A.), online: QL (UKJ); *Carroll* v. *Fearon*, *The Times*, 26 January 1998 (C.A.), online: QL (UKJ).

27 *Cf. Bartlett* v. *Children's Hospital Corp.* (1983), 40 Nfld. & P.E.I.R. 88 (Nfld. T.D.), rev'd (1985), 55 Nfld. & P.E.I.R. 350 (Nfld. C.A.).

but they occasionally did hold that *res ipsa loquitur*, if successfully invoked, raised a presumption of negligence effectively compelling a defendant to provide a plausible explanation for a plaintiff's injury that was consistent with the absence of negligence.[28] Although the burden of proof did not shift, and a defendant was not asked to disprove culpable responsibility on a balance of probabilities, a plaintiff succeeded unless the *prima facie* case created by the maxim was rebutted and the scales of proof at least returned to a balance.[29] A third and preferable approach accorded the least weight to the maxim. At its root, it merely allowed a plaintiff to avoid a defendant's motion for non-suit by providing a basis upon which *some* inference of negligence *might* be drawn.[30] A trier of fact was entitled, not compelled, to presume that a defendant had carelessly caused a plaintiff's injury. Moreover, the strength of that presumption (if any) varied according to the evidence and might range from virtually conclusive to practically insignificant. Consequently, while it would be tactically dangerous to do so, a defendant could theoretically remain silent, call no evidence in rebuttal, and still avoid liability.

As properly applied then, the maxim only represented a conventional mode of reasoning inferentially from circumstance. Unfortunately, the mere fact that it bore a latin label created a mystique that occasionally deflected judicial attention from the simple task of determining the extent to which a defendant's causative carelessness could be presumed on the basis of indirect evidence. It is for those reasons that the Supreme Court of Canada abolished *res ipsa loquitur*.

The direct evidence in *Fontaine* v. *British Columbia* was slight.[31] Edwin Fontaine and Larry Loewen departed for a hunting trip on November 9, 1990 but, contrary to their plans, failed to return three days later. Eventually, on January 24, 1991, they were found dead inside Loewen's badly damaged truck, which had come to rest in a river bed. Loewen's body was discovered behind the vehicle's steering wheel, his seat belt still in place. Records indicated that on the weekend of November 9, 1990, when the men were assumed (but not proven) to have died, the area in which the accident occurred had experienced very heavy rain and gusting winds. A police officer testified that there was a swale in the road at the point where the truck was believed to have left the highway and noted that 12.5 to 38 millimetres of rain might have accumulated in that dip. Finally, the physical

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28 *Woolman* v. *Cummer* (1912), 4 O.W.N. 371 (C.A.); *Crawford* v. *Upper* (1889), 16 O.A.R. 440 (C.A.).

29 *Erison* v. *Higgins* (1974), 4 O.R. (2d) 631, 48 D.L.R. (3d) 687 (Ont. C.A.).

30 *Interlake Tissue Mills Co.* v. *Salmon*, [1949] 1 D.L.R. 207 (Ont. C.A.); *Cogar Estate* v. *Central Mountains Air Services Ltd.*, [1992] 3 W.W.R. 729 (B.C. C.A.).

31 *Supra* note 21. The decision is discussed in M. McInnes, "The Death of *Res Ipsa Loquitur* in Canada" (1998) 114 L.Q. Rev. 547.

evidence revealed that the vehicle had left the road at a sufficient speed to clear a path through a patch of small trees.

The trial judge dismissed an action brought under the *Family Compensation Act*[32] by Fontaine's widow against Loewen's estate.[33] While recognizing that the vehicle left the road at high speed, she held that, in light of the (presumed) weather and road conditions, the evidence did not raise an inference of driver negligence. Moreover, she held that even if a *prima facie* case had been established by the plaintiff, defence counsel had offered several equally plausible explanations (*e.g.* that the accident occurred because Loewen swerved to avoid an animal), none of which involved carelessness. A majority of the British Columbia Court of Appeal similarly denied the widow's contention that "the thing spoke for itself" and accordingly dismissed her appeal.[34]

Major J., writing the unanimous opinion of the Supreme Court of Canada, agreed that the circumstantial evidence did not support an inference of negligence and affirmed the lower courts' decision.[35] In so doing, however, he expressly rejected not only the application, but also the continued existence, of the maxim.

> Whatever value *res ipsa loquitur* may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.
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> It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant.[36]

Thus, while courts will continue to draw inferences of causative negligence where appropriate, they will do so as part of the general exercise of assessing and weighing the totality of evidence. And while

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32 R.S.B.C. 1979, c. 120.

33 *Fontaine* v. *Loewen Estate*, [1994] B.C.J. No. 716 (B.C. S.C.), online: QL (BCJ).

34 *Fontaine* v. *British Columbia (Official Administrator)*, [1996] 9 W.W.R. 305 (B.C. C.A.).

35 *Fontaine*, *supra* note 21.

36 *Ibid.* at paras. 26-27.

that exercise will continue to be subjective, and hence somewhat uncertain, Major J.'s decision undoubtedly will improve matters insofar as it will prevent lower courts from being distracted by the confusion previously engendered by *res ipsa loquitur.*

C. ORTHODOXY RESTATED: *ATHEY* v. *LEONATI* (1996)[37]

In *Fontaine,* the Supreme Court of Canada dramatically abolished a long-standing maxim in order to clarify the causal inquiry that occurs under the cause of action in negligence. While the judgment in *Athey* v. *Leonati* does not carry the same doctrinal impact, it does similarly illustrate the Court's resolve to simplify governing principles and to restate them along orthodox lines. Because this judgment has already been subject to exhaustive examination,[38] only its essential features will be discussed here.

The plaintiff, who suffered from a pre-existing back condition, sustained injuries to his neck and back as a result of a traffic accident caused by the defendant's carelessness.[39] The claimant was advised by his doctor to commence a rehabilitative exercise program, but when he attempted to comply, he experienced a herniated disc and consequently was unable to return to his job as an autobody repairman. Although the trial judge accepted that the injuries sustained during the traffic accident causally contributed to the onset of the eventual disability, she reduced the plaintiff's damages by 75 per cent to reflect the fact that his herniated disc was primarily attributable to his pre-existing back condition.[40] The British Columbia Court of Appeal tersely affirmed that decision.[41]

In allowing a further appeal, Major J. delivered a unanimous judgment in the Supreme Court of Canada that permitted the appellant to recover 100 per cent of his damages.[42] He reached that conclusion by reiterating fundamental principles of tort law. The victim, he explained, was merely required to prove, on a common sense assessment of the evidence, that the tortfeasor had probably caused or materially contributed to his injury.

> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole

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37 [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235.

38 M. McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" (1997) 35 Alta. L. Rev. 1013.

39 The plaintiff actually brought actions against the drivers responsible for two separate collisions. However, because both of those drivers had the same insurer, the cases proceeded on the simplifying assumption that there had been only one traffic accident.

40 *Athey* v. *Leonati,* [1993] B.C.J. No. 2777 (B.C. S.C.), online: QL (BCJ).

41 *Athey* v. *Leonati,* [1995] B.C.J. No. 666 (B.C. C.A.), online: QL (BCJ).

42 *Athey, supra* note 37.

> cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.... As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.[43]

Thus, the fact that both the defendant's tortious conduct and the plaintiff's pre-existing condition were prerequisites to the disc herniation provided no basis for a reduction in damages. The defendant was required to take his victim as he found him and, in the absence of proof that the plaintiff's latent weakness eventually might have resulted in the same loss regardless of any negligence,[44] could not excuse his breach on the ground that it had affected a fragile individual.

> If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 per cent of his or her loss only when the defendant's negligence was the *sole* cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.[45]

The lesson of *Athey*, then, lies in the need to keep sight of first principles. As Major J. stressed, the causal inquiry (as well as the closely related exercise of assessing damages) must reflect the fundamental fact that a defendant is neither permitted to worsen, nor compelled to improve, a plaintiff's position. *Restitutio in integrum* is the goal. If a causal nexus exists between a tortfeasor's carelessness and a victim's injury, the former is *prima facie* required to provide full compensation for those losses that would otherwise not have occurred. By the

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43 *Ibid.* at para. 17 [emphasis in original].

44 *Ibid.* at para. 36; *cf.* V. Black & D. Klimchuk, "A Comment on *Athey* v. *Leonati*: Causation, Damages and Thin Skulls" (1997) 31 U.B.C. L. Rev. 163 at 171-77.

45 *Supra* note 37 at para. 20 [emphasis in original].

same token, to the extent that a loss would[46] have been sustained regardless of any negligence, liability is not imposed.[47]

III. CONSTRUCTIVE CAUSATION

The preceding section explored the Supreme Court of Canada's general attempt in the past decade to simplify the causal inquiry in tort actions by de-mystifying the process and by focussing on the factual question of whether or not the plaintiff's injury resulted from the defendant's breach. As the cases considered in this section reveal, however, during the same period, the Court also entrenched an essentially fictitious approach to causation when dealing with certain types of claims against physicians.

The title of this part is derived from a story told by Peter Birks in *An Introduction to the Law of Restitution*.[48] The rules of an Oxford college prohibited dogs from being brought onto the premises. Confronted with the awkward fact that the college's Dean kept a labrador on the grounds, the governing body sought some means of adhering to the regulations while also serving the more immediate goal of maintaining the Dean's favour. It achieved its goal by simply declaring the animal in question to be a constructive cat.

The point of this story is that language can be used, intentionally or unintentionally, to obfuscate the true basis upon which legal disputes are resolved. More specifically, Birks was deriding the historical tendency to discuss claims based on unjust enrichment under wholly misleading rubrics like "constructive contract".

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46 As Major J. explained, the question of whether or not, as a matter of past fact, a defendant's carelessness caused or contributed to a plaintiff's injury is determined on a balance of probabilities, in an all-or-nothing manner: *ibid.* at para. 27. If a claimant proves the probable existence of a causal nexus, the relationship is treated as a certainty and full compensation is *prima facie* available. In the absence of such proof, relief is denied altogether. However, hypothetical questions, such as how a plaintiff's life would have unfolded in the absence of negligence or how events will unfold in the future, are resolved according to their likelihood. Consequently, if the evidence had established a 30 per cent chance that Athey eventually would have suffered the same loss, even in the absence of the defendant's negligence, his damages would have been reduced accordingly: *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 253, 83 D.L.R. (3d) 452. Likewise, if the evidence had established a 30 per cent chance that Athey's disability, caused by the defendant, would worsen in the future, his damages would have been increased accordingly: *Schrump* v. *Koot* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.).

47 *Cf. Corey* v. *Havener* 65 N.E. 69 (Mass. S.J.C. 1902) (plaintiff injured by simultaneous and independently sufficient tortious acts entitled to compensation from either defendant); McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada", *supra* note 38 at 1026.

48 P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989) at 22.

> That dog is a constructive cat. Deemed, quasi- or fictitious, it is not what it seems. When the law behaves like this you know it is in trouble, its intellect either genuinely defeated or deliberately indulging in some benevolent dishonesty.[49]

The potential problem of such reasoning is twofold. It displaces the truth and introduces a lie: we lose sight of what the animal really is, and we suppose it to be something that it is not. Of course, when dealing with dogs and cats, we are unlikely to be misled. It is absurd to call a labrador a cat, constructive or otherwise. There is, however, a real danger of error when constructive reasoning is used with respect to matters that are less familiar and more complex than household pets. Thus, use of notions like "constructive contract" previously led courts to misperceive the true nature of unjust enrichment and to wrongly premise the availability of restitutionary relief upon notions of contractual liability.[50] The law has yet to fully recover from the resulting confusion.

Notwithstanding the obvious force of Birks' criticism, Canadian courts continue to use constructive reasoning. That is to say, while employing language appropriate to one form of analysis, they often decide an issue on the basis of another.[51] Most significantly, for present purposes, this technique is employed with respect to the issue of causation whenever a physician's failure to warn a patient about the risks associated with a medical procedure is alleged to have resulted in injury.[52] Granted, the term "constructive causation" has yet to appear in the case law[53] (and one would hope that it never does). Nevertheless, it is clear that while the courts purport to render

49 *Ibid.*

50 *Sinclair* v. *Brougham*, [1914] A.C. 398 (H.L.) ("implied contract").

51 The constructive trust provides a vivid example. Ironically, that concept's remarkable popularity lies in the very fact that it has so little to do with orthodox principles. Legitimized by the language of trusts, but free of the rules that restrict the operation of true trusts, the constructive trust is a flexible mechanism by which courts can effect a wide range of policy goals, most commonly the equitable distribution of property upon the dissolution of a cohabitational relationship. The fact that such results generally cannot be reached on the basis of traditional trusts principles is irrelevant precisely because the constructive trust is anomalous. Desired results are achieved through disregard of doctrine: R. Chambers, "Constructive Trusts in Canada" (1999) 37 Alta. L. Rev. 173; M. McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1998) 25 Man. L.J. 513.

52 For greater clarity, it must be stressed that the issue under consideration arises with respect to a patient's allegation that an injury resulted from a physician's wrongful failure to disclose risks associated with a particular form of treatment. If a plaintiff's allegation of negligence pertains to the actual provision of treatment, liability is governed by orthodox rules of factual causation.

53 *Cf. Arndt* v. *Smith* (1995), 126 D.L.R. (4th) 705 at paras. 32, 34, Lambert J.A. (B.C. C.A.) ("notional causation", "deemed causation").

decisions under the rubric of cause-in-fact, they actually act upon the basis of extraneous considerations. More specifically, while ostensibly determining whether or not a physician's wrongful failure to disclose material information was causally connected to harm subsequently suffered by a consenting patient, the courts actually impose or deny liability largely on the basis of the perceived social desirability of not requiring doctors to provide compensation.

In itself, reference to policy considerations provides little basis for concern. Although policy frequently guides causal assessments, it is typically used only to supplement basic tests and thereby to implement fundamental principles. The courts, then, merely adapt conventional rules in order to better pursue the orthodox inquiry into the factual relationship between a defendant's conduct and a plaintiff's injury. In contrast, when deciding whether or not to hold a physician liable for a wrongful failure to warn, the courts occasionally disregard this inquiry and hold that, regardless of whether a causal nexus exists between carelessness and damage, a patient cannot succeed in an action in negligence. There is no defensible reason for doing so.

A. THE "REASONABLE PERSON" TEST

1. Introducing Objectivity: *Reibl* v. *Hughes* (1980)[54]

The starting point for discussion is *Reibl* v. *Hughes*. The defendant doctor diagnosed the plaintiff patient as suffering from a blocked artery. Although the condition carried some risk of stroke, paralysis, and death, it did not constitute an emergency or require immediate surgery. The non-imperative nature of the procedure eventually proved important because the plaintiff had been employed by Ford Motor Company for the better part of a decade and would have become entitled to a lifetime pension if he had worked for an additional eighteen months. The defendant physician removed the arterial obstruction, but the patient suffered a stroke during or shortly after surgery. The stroke caused partial paralysis and consequently precluded the plaintiff from acquiring a vested pension from his employer. Significantly, the injury was not attributable to surgical incompetence. The defendant had performed the procedure with due care and skill. Rather, it represented the manifestation of a risk inherent in the procedure itself—a risk of which the doctor was aware, but of which he did not inform the patient. The plaintiff sued, alleging that the defendant negligently failed to disclose material risks attendant upon the treatment.[55]

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54 [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

55 While the plaintiff also sued in battery, the Supreme Court of Canada held, contrary to existing practice, that such an action lies with respect to medical procedures only if a patient's consent is obtained by fraud or misrepresentation. Where the gist of the complaint pertains to a failure to disclose material risks associated with

The ensuing litigation raised two related issues: (i) the standard of disclosure, and (ii) the test of causation. The trial judge applied traditional tests on each count. With respect to the former, he held the defendant to the "professional standard": the doctor was required to inform the patient of those risks that the reasonable surgeon would have disclosed in like circumstances. With respect to the latter, he applied a subjective test: the patient was required to prove that, but for the doctor's non-disclosure, he probably would have postponed treatment and thereby avoided the debilitating stroke. The Court resolved both issues in the plaintiff's favour, holding the defendant liable on the basis that: (i) he failed to inform the patient that the procedure carried risks beyond those attendant upon any surgery, and (ii) if properly informed, the patient would have declined the treatment or at least postponed it until after his pension had vested.[56]

The Supreme Court of Canada, reversing the Ontario Court of Appeal's decision,[57] affirmed the trial decision. In so doing, however, it endorsed a new approach to medical consent cases, purportedly in the interests of patient autonomy, which revised both the standard of care and the test of causation. With respect to the former issue, Laskin C.J.C. extended his comments of some five months earlier in *Hopp* v. *Lepp*[58] and emphatically rejected the "professional standard" test in favour of the "prudent patient" test. The relevant question was said to pertain not to what the reasonable physician would disclose, but rather to what the reasonable patient would want disclosed:

> To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure.... The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing [*sic*] certain surgery or other treatment.[59]

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a form of treatment, the applicable action is negligence: *ibid.* at 891-92. Consistent with the theme of this paper, it has been observed that the Supreme Court's decision to preclude an action in battery provides "considerable protection to medical practitioners who fail to provide necessary information": *Frerotte* v. *Irwin* (1986), 51 Sask. R. 108 at 114 (Q.B.).

56 *Reibl* v. *Hughes* (1977), 78 D.L.R. (3d) 35 (Ont. H.C.J.).

57 *Reibl* v. *Hughes* (1978), 89 D.L.R. (3d) 112 (Ont. C.A.).

58 [1980] 2 S.C.R. 192, 112 D.L.R. (3d) 67.

59 *Supra* note 54 at 894. See also *Ciarlariello* v. *Schachter*, [1993] 2 S.C.R. 119, 100 D.L.R. (4th) 609.

The theoretical effect of that development, particularly as interpreted in subsequent decisions, was a generous expansion of the scope of potential liability. And, indeed, the courts have become much more willing to find fault with a physician's level of disclosure.[60]

In practice, however, the expanded standard of care has not substantially liberalized the availability of compensation. The primary reason stems from the second major alteration[61] that the Supreme Court effected to the action in negligence as it pertains to a failure to disclose medical risks. Laskin C.J.C. replaced the traditional subjective test of causation with an objective test of causation. The relevant question was said to be not whether a claimant would have adopted a different course of treatment if properly informed, but rather whether a reasonable person would have done so.[62] The explanation for that revision turned on a (perceived)[63] deficiency in the subjective test. Quoting from American literature, Laskin C.J.C. held that "the subjective standard has a gross defect: it depends upon the plaintiff's testimony as to his state of mind, thereby exposing the physician to the patient's hindsight and bitterness."[64]

> It could hardly be expected that the patient who is suing would admit that he would have agreed to have the surgery, even knowing all the accompanying risks. His suit would indicate that, having suffered serious disablement because of the surgery, he is convinced that he would not have permitted it if there had been proper disclosure of the risks, balanced by the risks of refusing the surgery. Yet, to apply a subjective test to causation would, correlatively, put a premium on hindsight, even more of a premium than would be put on medical evidence in assessing causation by an objective standard.[65]

While adopting an objective test, Laskin C.J.C. stressed that the causal inquiry must be contextualized. Were it otherwise, there would be a danger that an action in negligence would too often fail on the

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60 G. Robertson, "Informed Consent Ten Years Later: The Impact of Reibl v. Hughes" (1991) 70 Can. Bar Rev. 423 at 429-32.

61 While Laskin C.J.C. noted that the Supreme Court of Canada previously had not expressly endorsed a subjective test of causation, he recognized that such an approach had been adopted by lower courts: *Supra* note 54 at 897.

62 See also *Videto* v. *Kennedy* (1981), 33 O.R. (3d) 497, 125 D.L.R. (3d) 127 (Ont. C.A.).

63 As argued below, the Supreme Court of Canada's preference for an objective test over a subjective test is based on a misperception of the nature of the evidence that ought to be admissible under each option: see Section III.B.2, below.

64 *Supra* note 54 at 898, quoting "Informed Consent—A Proposed Standard for Medical Disclosure" (1973) 48 N.Y.U. L. Rev. 548 at 550.

65 *Supra* note 54 at 898.

ground that a reasonable person would inevitably abide by a physician's reasonable recommendation of medical treatment.[66] Thus, in formulating the standard in each case, courts were directed to imbue the reasonable person with *some* of the plaintiff's characteristics and conditions.

> [A]spects of the objective standard would have to be geared to what the average prudent person, the reasonable person in the patient's particular position, would agree to or not agree to, if all material and special risks of going ahead with the surgery or foregoing [*sic*] it were made known to him....
>
> Merely because medical evidence establishes the reasonableness of a recommended operation does not mean that a reasonable person in the patient's position would necessarily agree to it, if proper disclosure had been made of the risks attendant upon it, balanced by those against it. The patient's particular situation and the degree to which the risks of surgery or no surgery are balanced would reduce the force, on an objective appraisal, of the surgeon's recommendation.[67]

However, Laskin C.J.C. carefully confined the extent to which the objective test should reflect the plaintiff's circumstances:

> [T]he patient's particular concerns must be reasonably based; otherwise, there would be more subjectivity than would be warranted under an objective test. Thus, for example, fears which are not related to the material risks which should have been but were not disclosed would not be causative factors....In short, although account must be taken of a patient's particular position, a position which will vary with the patient, it must be objectively assessed in terms of reasonableness.[68]

Although the issue will be considered in greater detail below, a succinct statement of the cumulative effects of *Reibl* is worth noting

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66 Despite Laskin C.J.C.'s judgment, the courts commonly proceed upon the assumption that reasonable patients usually follow the advice of their physicians. As a result, it is often difficult for a plaintiff to prove that, if properly informed, he or she would have ignored a doctor's recommendation and refused to consent to a procedure: see *e.g. Meyer Estate* v. *Rogers* (1991), 78 D.L.R. (4th) 307 at 318 (Ont. Gen. Div.); *Dunn* v. *North York General Hospital* (1989), 48 C.C.L.T. 23 at 41 (Ont. H.C.J.); *Bucknam* v. *Kostiuk* (1983), 3 D.L.R. (4th) 99 at 114 (Ont. H.C.J.).

67 *Supra* note 54 at 899.

68 *Ibid.* at 899-900.

immediately. Essentially, what the Supreme Court gave with one hand, it took back with the other.[69] While favouring plaintiffs with an expansive duty of disclosure, it favoured defendants with a restrictive approach to causation. The increased respect shown for patient autonomy at the first stage was greatly undermined by the introduction of an objective test at the second stage.[70] Moreover, the decision on the causation issue entails, at least in some instances, a radical break from orthodox principle. While policy considerations may legitimately guide the formulation of the precise means used to pursue the end, the goal of any true causal inquiry must be a determination of whether or not a defendant's conduct *in fact* created or contributed to a plaintiff's injury. In the present context, then, the issue ought to be whether or not a plaintiff *in fact* would have adopted a different course of treatment if a defendant had made proper disclosure. At its core, this is a subjective test—it focuses upon the manner in which a plaintiff would have reacted if a defendant had not acted carelessly. Introducing an objective test necessarily alters the nature of the exercise. To ask what a reasonable person would have done in like circumstances will produce an appropriate answer to the true causal question only if a plaintiff sufficiently corresponds to the paradigm. If a plaintiff has an idiosyncrasy that cannot be accommodated within Laskin C.J.C.'s test and that would lead to an "unreasonable" refusal of treatment, the objective test generates an incorrect answer to the true causal question—it states that a defendant's carelessness was *not* causally connected to a plaintiff's injury. Indeed, such circumstances reveal that the objective test is not really concerned with causation *per se*, but rather with attribution of responsibility on the basis (at least in part) of the perceived social desirability of

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69 It has been suggested that by simultaneously expanding the element of disclosure and restricting the element of causation, the Supreme Court of Canada attempted to strike a fair balance between physicians and patients: S. Rodgers-Magnet, "Recent Developments in the Doctrine of Informed Consent to Medical Treatment" (1980) 14 C.C.L.T. 61 at 76. However, if the negligence analysis is to be manipulated to protect doctors, it is better to intervene at the duty or standard of care stage, where policy considerations are more commonly implemented, than to confuse the inquiry into factual causation: T. Honoré, "Causation and Disclosure of Medical Risks" (1998) 114 L.Q. Rev. 52 at 54-55.

70 In *Hopp, supra* note 58 at 196, Laskin C.J.C. defended an expanded scope of disclosure on the ground that it is the "right of a patient to decide what, if anything, should be done with his body". Likewise, La Forest J. subsequently insisted that "every individual has a right to know what risks are involved in undergoing or forgoing medical treatment and a concomitant right to make meaningful decisions based on a full understanding of those risks": *Hollis* v. *Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 24, 129 D.L.R. (4th) 609. Unfortunately, such ideals are substantially frustrated by an objective test of causation that overrides the choices that a patient would actually have made if properly informed.

protecting physicians from claims by objectively "unreasonable" patients.

Fortunately, the combined effect of the developments in *Reibl* did not conspire to deny relief on the facts of the case. With respect to the standard of care issue, Laskin C.J.C. found that the defendant had failed to disclose all of the information that a reasonable patient would have wanted to have received. And with respect to the causation issue, he determined that a reasonable person in the patient's circumstances (taking account of the non-critical nature of the patient's pre-operative condition and the relatively brief period he would have been required to work in order to acquire a vested pension) would have opted against surgery if properly informed. Liability followed accordingly.

2. Reaffirming Objectivity: *Arndt* v. *Smith* (1997)[71]

While compensation was awarded in *Reibl*, Laskin C.J.C.'s decision to employ an objective test of causation generally diminished prospects for relief. That fact, coupled with the theoretical deficiencies inherent in the reasonable person test, led both judges and jurists to call for reform.[72] Hope was expressed in some circles that, when presented with a clear opportunity to do so, the Supreme Court of Canada would reconsider its earlier decision and return to a subjective test of causation.[73] That hope was dashed in *Arndt* v. *Smith*.

Having contracted chicken pox during her third month of pregnancy, Carole Arndt consulted her obstetrician, Dr. Smith, regarding dangers posed by the condition. The physician researched the question and informed her patient of the risk that the child would be born with skin or limb abnormalities. She did not, however, disclose further that the disease exposed the unborn child to the risk of brain damage and serious physical disabilities. Miranda was carried to term and, tragically, was born with severe intellectual and physical disabilities. Ms. Arndt brought an action in negligence against Dr. Smith, alleging that if she properly had been warned of such a possibility, she would have had an abortion.[74]

Although the trial judge found that the physician had failed in her duty to inform the plaintiff of material risks, he denied liability

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71 [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48.

72 See *e.g. Arndt, supra* note 53 at paras. 91-92, Wood J.A. (B.C. C.A.); P.H. Osborne, "Causation and the Emerging Canadian Doctrine of Informed Consent to Medical Treatment" (1985) 33 C.C.L.T. 131.

73 See *e.g.* P.H. Osborne, "*Arndt* v. *Smith*: Annotation" (1995) 25 C.C.L.T. (2d) 264 at 268.

74 An action brought by the child's father was dismissed on the ground that a physician owes a duty of disclosure to the mother, but not to the father, of an unborn child.

on the ground that causation had not been established. In so doing, he was expressly influenced by four factors: (i) the risks inherent in abortion, (ii) the need, in 1986, to obtain approval for that procedure from a therapeutic abortion committee, (iii) the plaintiff's desire to have a child, and (iv) the plaintiff's scepticism of mainstream medicine. Having regard to that evidence, he concluded that the plaintiff would not have had an abortion even if she had been properly informed.[75] A majority of the British Columbia Court of Appeal ordered a new trial on the ground that the trial judge had drawn inferences that were unsupported by evidence and had improperly imported subjective elements into the reasonable person test.[76]

The Supreme Court of Canada allowed the physician's appeal and restored the result reached at trial. As discussed below, the various opinions vividly illustrate the difficulties surrounding the causation issue. Cory J.'s majority judgment affirmed the decision in *Reibl* on unpersuasive and arguably illogical grounds, and held that a reasonable person in the plaintiff's position would not have terminated the pregnancy even if properly informed of risks associated with maternal chicken pox. In dissent, Sopinka and Iacobucci J.J. argued that *Reibl* should be overruled and replaced with a subjective test of causation.[77] Because they believed that the trial judge either applied an objective test or was confused as to the nature of the causal inquiry, they favoured a new trial. Finally, while agreeing with Sopinka and

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75 *Arndt* v. *Smith*, [1994] 8 W.W.R. 568 (B.C. S.C.).

76 *Arndt*, *supra* note 53. In a partial dissent, Lambert J.A. argued that the issue of liability was better determined on the basis of fiduciary principles than on the basis of negligence principles. While intriguing, that approach was subsequently ignored by the majority of the Supreme Court of Canada and rejected by McLachlin J.: *Arndt*, *supra* note 71 at paras. 37-38.

77 It is interesting to contrast their Lordships' joint opinion in *Arndt* with their respective opinions in *Hollis*, *supra* note 70. As discussed below (at Section III.B.2, the latter case involved a negligent failure to warn by a manufacturer rather than by a physician. Although the majority of the Court, including Iacobucci J., held that the issue of causation in such circumstances should be resolved on the basis of a subjective test, Sopinka J. vigorously argued in favour of an objective test. Remarkably, then, the cumulative effect of the two decisions appears to place Sopinka J. in direct opposition to the majority of his colleagues: while they preferred an objective test for physicians and a subjective test for manufacturers, he preferred the reverse. This paper argues that the same approach should be used in both types of cases. However, if inconsistency is warranted, it surely must favour the physician. There are no policy arguments in favour of treating manufacturers with relatively greater leniency.

Conceivably, the puzzle created by Sopinka J.'s judgments can be resolved by interpreting his comments in *Arndt* as being of general application and hence, as implicitly reversing his comments in *Hollis*. That possibility is supported by the fact that his opinion in *Hollis*, at paras. 68-69, speaks of the desirability of a uniform approach and of the need to formulate a test that best approximates the choice that a plaintiff would actually have made if properly informed.

Iacobucci J.J. that the applicable test should be subjective,[78] McLachlin J. concurred with the majority's result. She did so somewhat surprisingly by interpreting the trial judgment as turning upon a subjective assessment of causation.[79]

B. POLICY CONSIDERATIONS

The central thesis of this paper turns on two propositions: (i) courts reason constructively with respect to the issue of causation in the context of failure to warn actions brought against physicians, and (ii) courts resolve the nominally causal question in such cases largely on the basis of a policy decision to protect doctors from liability. Both propositions are controversial and both require defence.

1. Constructive Reasoning

The first proposition is more easily established. To reiterate, to reason constructively is to employ language appropriate to one form of analysis while actually deciding an issue on the basis of another. The objective approach to causation, established in *Reibl* and reaffirmed in *Arndt*, involves precisely that process. Granted, judges occasionally suggest that the aim of the reasonable person test is to determine factual causation.[80] But with respect, that simply cannot be true. As a practical matter, surely it is counter-intuitive to seek subjective truth by means of objective criteria. If the aim is to know how the *plaintiff* would have reacted to proper disclosure, it seems odd to employ an inquiry that focuses on the probable reaction of a *hypothetical person*. Moreover, certain features of the objective test are simply

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78 The observations in the preceding note regarding Sopinka J.'s apparent inconsistency extend to McLachlin J. While preferring a subjective test in *Arndt*, she concurred with Sopinka J.'s adoption of an objective test in *Hollis*.

79 McLachlin J. implicitly held that the trial judge, notwithstanding *Reibl* and sixteen years of affirmative case law, either intentionally or unintentionally ignored Laskin C.J.C.'s authoritative judgment and applied a subjective test. However, as Sopinka and Iacobucci J.J. stressed, the trial judgment is, notwithstanding occasionally inconsistent passages, far more compatible with an objective approach to causation.

80 *Arndt*, *supra* note 71 at paras. 3, 8, Cory J. ("The question [is] how to determine whether the plaintiff would have actually chosen to decline the surgery if he had been properly informed of the risks"), ("The [*Reibl* v. *Hughes*] test...relies on a combination of objective and subjective factors in order to determine whether the failure to disclose *actually* caused the harm of which the plaintiff complains") [emphasis in original]; *Hollis*, *supra* note 70 at paras. 67, 69, Sopinka J. ("[T]he most reliable approach in determining *what would in fact have occurred* is to test the plaintiff's assertion by reference to objective evidence as to what the reasonable person would have done") (emphasis in original), ("the question for the plaintiff is...[h]ow would the plaintiff have responded if properly warned by the physician?"); *Ciarlariello*, *supra* note 59 at 141, Cory J. ("it was highly unlikely that Mrs. Ciarlariello would have refused...her consent").

irreconcilable with factual causation. It will be recalled that while Laskin C.J.C. recognized the need to import some of a plaintiff's circumstances into the reasonable person standard, he specifically disallowed fears and concerns that, while honestly held by a patient, were not reasonably based.[81] Consequently, if, on the basis of irrational beliefs, a claimant would have refused treatment that a reasonable person would have accepted, the objective test incorrectly concludes that an injury was not causally connected to a defendant's omission. Such a situation might arise, for example, if a patient had a phobia against receiving needles, even while under general anaesthetic. Laskin C.J.C.'s test, therefore, is incapable of consistently identifying factual causation. The determination of such a matter must take a patient seriously and must reflect decisions that would have actually occurred. Reality does not discriminate between reasonable and unreasonable choices.

2. Overcoming Evidentiary Hurdles: *Hollis* v. *Dow Corning* (1995)

Accepting that the objective test is a constructive approach to causation, the question remains as to the true basis of nominally causative conclusions. The answer might be thought to lie in the evidentiary concerns on which the Supreme Court generally defends the reasonable person test. In *Reibl*, Laskin C.J.C. rejected a subjective approach on the ground that a claimant's testimony is apt to be tainted by bitterness and hindsight, and hence, is unreliable.[82] Sopinka J.'s dissenting opinion in *Hollis* further explored the same argument.

> The...subjective approach fails to take into account the inherent unreliability of the plaintiff's self-serving assertion. It is not simply a question as to whether the plaintiff is believed. The plaintiff may be perfectly sincere in stating that in hindsight she believed that she would not have consented to the operation....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.[83]

Ironically, however, the majority decision in *Hollis* illustrates precisely why such reasoning is unpersuasive. After suffering a

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81 *Supra* note 54 at 899-90. Cory affirmed that point in *Arndt, supra* note 71 at paras. 14-17.

82 *Supra* note 54 at 897-98, quoted above at note 65.

83 *Hollis, supra* note 70 at para. 67. See also *Arndt, supra* note 71 at para. 4, Cory J.

ruptured breast implant, Susan Hollis brought actions in negligence against Dow Corning, the manufacturer of the prosthetic, and Dr. Birch, the surgeon who performed the implant. The gist of the plaintiff's claim was that if she had been properly advised of the dangers inherent in the procedure, she would not have agreed to the cosmetic surgery. For present purposes, the dispute was narrowed to a single issue by the time it reached the Supreme Court of Canada: was causation to be established against the corporate defendant on an objective basis or on a subjective basis? La Forest J. distinguished *Reibl* on the ground that it dealt with a failure to warn by a physician[84] and held that, as against a manufacturer such as Dow Corning, the question of causation is resolved by a subjective inquiry.[85]

> Although the concern raised by Laskin C.J.C. [with respect to the unreliability of a claimant's testimony] is valid and should continue to be applied in a doctor-patient relationship, in a suit against a manufacturer for a failure to warn this concern can be adequately addressed at the trial level through cross-examination and through a proper weighing by the trial judge of the relevant testimony. While the difference between the type of proof required in the two kinds of actions may seem anomalous, it is amply justified having regard to the different circumstances in which the relevant duties arise, and the consequent difference in the nature of these duties....[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

84 See also *Buchan* v. *Ortho Pharmaceutical Canada Ltd.* (1986), 25 D.L.R. (4th) 658 (Ont. C.A.).

85 At trial, Dow Corning was held liable for negligent manufacture of the breast implant, but the action against Dr. Birch was dismissed on the ground that he had not breached his standard of care: [1990] B.C.J. No. 1059 (B.C. S.C.), online: QL (BCJ). A majority of the British Columbia Court of Appeal rejected the finding of negligent manufacture, but affirmed liability against Dow Corning on the basis that the company had failed to disclose material risks that, objectively assessed, were causative of the plaintiff's injury. A differently constituted majority ordered a new trial against Dr. Birch on the basis that the trial judge had erred in finding that the surgeon did not have access to information that (arguably) should have been transmitted to Ms. Hollis: (1993), 103 D.L.R. (4th) 520. A further appeal to the Supreme Court of Canada addressed only the action against Dow Corning. A majority found that the evidence supported the claimant's assertion that she would not have consented to the implant if she had been properly apprized. Sopinka and McLachlin J.J. dissented in favour of a new trial on the grounds that: (i) the test in *Reibl* v. *Hughes* should be extended to claims against manufacturers, and (ii) the plaintiff had not established that the reasonable person would have declined the implant if properly warned of the attendant risks.

> used in rendering that service. The manufacturer, on the other hand, 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 the product will be overemphasized and the risk underemphasized. It is, therefore, highly desirable from a policy perspective to hold the manufacturer to a strict standard of warning consumers of dangerous side effects of their products. There is no reason, as in the case of a doctor, to modify the usual approach to causation followed in other tortious actions.[86]

While no empirical evidence was offered in support of the proposition, it may well be true that manufacturers are more likely than physicians to overstate potential benefits and understate potential dangers. But if so, how is that fact material to the causal issue? More specifically, assuming that it has already been established that the duty of disclosure was breached, how is the reliability of a

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86 *Hollis, supra* note 70 at para. 46. In *Arndt, supra* note 71 at para. 7, Cory J. affirmed La Forest J.'s comments and added the following observations:

> I believe it is important to note that negligence actions against members of the medical profession based on a failure to warn will inevitably be hypothetical, because they are based on constructing what would have happened if the patient had been fully informed of the risks of a procedure. This introduces a degree of uncertainty into the analysis. Often, this uncertainty will be increased by the difficulty of determining the extent of a doctor's obligation to inform in a case where, based upon his or her professional knowledge and experience, the doctor believed that the risk was too insignificant to warrant advising the patient of it. On the other hand, pharmaceutical manufacturers have no reason not to provide the medical profession at least, if not the public generally, with *all* information concerning the medication they put on the market. It follows that it is eminently sensible to apply a more flexible standard of causation to doctors than to manufacturers [emphasis in original].

With respect, Cory J.'s arguments do not support his conclusion. First, the causal analysis in any duty to warn case (indeed, on any application of the "but for" test) involves a hypothetical inquiry as to what would have occurred if the defendant had acted with due care. The nature of that exercise is not affected by a defendant's status as a doctor. Second, a physician is as capable as a manufacturer of avoiding liability by disclosing *all* available information; subject to the medical exception of "therapeutic privilege," such an approach is as (in)feasible for one party as it is for the other: *cf. Buchan, supra* note 84 at 687, Robins J.A. (Ont. C.A.). But even if that was not true, there is no reason why the difference should affect the causal inquiry. Standard of care precedes causation in the negligence analysis. Because a court should have determined that the duty of disclosure was breached before determining whether or not a plaintiff's injury resulted from a defendant's fault, difficulties pertaining to the extent of a defendant's obligation should be resolved before the issue of causation is addressed.

consumer's testimony regarding the question of factual causation affected by a manufacturer's initially overreaching sales pitch? Is the analytical relevance of the company's deception not spent, before the causal inquiry even begins by the determination that the defendant had access to information that it should have disclosed? Likewise, to return to the arguments offered by Laskin C.J.C. and Sopinka J. in defence of the "reasonable person" approach in medical cases, is there any reason to believe that a plaintiff's perceptions are apt to be relatively more clouded by "bitterness and hindsight" if injury results from the carelessness of a physician? As these questions suggest, the Court's evidentiary argument relies upon a string of *non sequiturs*. There is simply no demonstrated reason to believe that a defendant's status affects the problems associated with a claimant's credibility.

Significantly, the majority judgment in *Hollis* also illustrates that a subjective test of causation is not fatally undermined by its reliance upon a claimant's testimony. In *Reibl*, Laskin C.J.C. adopted an objective approach largely because plaintiffs invariably insist that their decision regarding medical treatment would have been different had they been provided with adequate information. On a subjective assessment, it was thought, the mere institution of legal proceedings would indicate the existence of a causal nexus.[87] Such reasoning, however, misconstrues the nature of the evidence that is relevant under a subjective test.[88] As La Forest J. demonstrated in the analysis of the causal relationship between Ms. Hollis' injury and Dow Corning's carelessness, the material available to the trier of fact on that approach is not exhausted by the plaintiff's testimony as to how she would have reacted if the defendant had not breached the standard of care.[89] The veracity and validity of that testimony can be assessed

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87 *Supra* note 54 at 896-97. See also *Arndt, supra* note 71 at para. 16, Cory J.

88 For an excellent discussion on point, see V. Black & D. Klimchuk, "Torts—Negligent Failure to Warn—Causation: *Arndt* v. *Smith*" (1997) 76 Can. Bar Rev. 569.

89 La Forest J. satisfied himself as to the existence of subjective causation only after critically assessing Ms. Hollis' testimony in light of objective evidence. In that regard, he relied heavily on the defendants' expert evidence regarding the manner in which differently situated patients typically react to warnings. (Ironically, much of that testimony actually supported the plaintiff's claim that, unlike many women, she would not have consented to receive the implants if she had been properly informed.) Although Sopinka J. insisted, in dissent, that his colleague's reliance on objective evidence highlighted weaknesses inherent in the subjective approach and illustrated the need for the reasonable person test, that argument falsely assumed that only subjective evidence is relevant under a subjective inquiry: *Hollis, supra* note 70 at paras. 64-68. In fact, La Forest J.'s technique enhanced, rather than undermined, the subjective test. It allowed the Court to better determine whether or not the plaintiff's testimony was honest and accurate and hence, whether or not she would have acted differently in the absence of a breach. (Ironically, Sopinka J. supported that very reasoning two years later in the context of an action against a physician: *Arndt, supra* note 71 at paras. 26-27; see also McLachlin J. at paras. 42-44.)

in light of evidence pertaining to the circumstances of the case, and the manner in which patients generally react when informed of a particular risk. Consequently, even if a claimant honestly believes that she would have withheld her consent if given an opportunity to do so, a court should be able to determine whether or not that (mis)perception is born of her anger at having been injured and her desire to receive compensation. The Canadian legal system is premised on the notion that truth can be revealed by adversarial means, and there is no reason why the arts of examination and cross-examination are not adequate fact-finding tools in any failure to warn dispute.[90]

3. Protecting Physicians

The preceding analysis reveals that the leniency afforded to doctors by means of the reasonable person test cannot be defended on evidentiary grounds. Significantly, the decision in *Hollis* also suggests that the real rationale for the objective approach lies in the perceived social desirability of protecting doctors from liability.[91] That suggestion emerges from the majority's contrasting treatment of physicians and manufacturers: while affirming a form of constructive reasoning that fictitiously *denies* the existence of a causal link between a doctor's carelessness and a patient's injury, La Forest J. introduced another form of constructive reasoning that fictitiously *establishes* the existence of a causal link between a manufacturer's carelessness and a consumer's injury.

Dow Corning argued that it could have discharged its disclosure obligation to Ms. Hollis by informing Dr. Birch of the risks associated with the prosthetic. The Court agreed. Given that the product was intended to reach the consumer only through her physician, the "learned intermediary" rule relieved the company of the need to warn Ms. Hollis directly.[92] Dow Corning then sought to extend the

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90 *Arndt, supra* note 53 at paras. 91-92, Wood J.A. (B.C. C.A.). In jurisdictions in which a subjective test is employed, the courts have not found the task of assessing the plaintiff's credibility to be insurmountable: *Chatterton* v. *Gerson*, [1981] 1 Q.B. 432; *Ellis* v. *Wallsend District Hospital* (1989), 17 N.S.W.L.R. 553 at 581 (C.A.); *Arena* v. *Gingrich*, 733 P. 2d 75 at 78-79 (Or. C.A. 1987).

91 Support for that proposition can be drawn from the fact that the Supreme Court of Canada, on several occasions, has formulated tort rules that protect physicians. As previously noted, an action based on a failure to warn must generally be framed in negligence, rather than battery or breach of fiduciary obligation: *Reibl, supra* note 54; *Arndt, supra* note 71 at paras. 36-38, McLachlin J. Moreover, the Court refused to shift the burden of proof in *Snell, supra* note 1 at 326-27, partly for fear of intolerably increasing the incidence of medical malpractice liability. Finally, the trier of fact's ability to find that a physician breached the standard of care with respect to matters of treatment (as opposed to disclosure of risks) is severely restricted: *ter Neuzen* v. *Korn*, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577.

92 *Lambert* v. *Lastoplex Chemical Co. Ltd.*, [1972] S.C.R. 569, 25 D.L.R. (3d) 121.

effect of the "learned intermediary" rule by relying on evidence that suggested that, even if they had properly informed Dr. Birch, he would not have conveyed the message to his patient. Assuming that evidence to be accurate, an orthodox relationship of factual causation did not exist: but for the manufacturer's breach, the plaintiff's injury would still have occurred.[93] La Forest J., however, simply recoiled at the manufacturer's proposal.[94]

> Adopting such a rule would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a doctor who had not been negligent with respect to the information that he or she *did* have; yet she also would not be able to recover against a manufacturer who, despite having failed in its duty to warn, could escape liability on the basis that, had the doctor been appropriately warned, he or she still would not have passed the information on to the plaintiff. Our tort law should not be held to contemplate such an anomalous result.[95]

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93 In *Buchan*, supra note 84 at 682-83, Robins J.A., the Ontario Court of Appeal endorsed such reasoning in *dicta*. Curiously, La Forest J. believed that even if the evidence adduced by the manufacturer was accurate, it would merely pertain to the apportionment of liability between Dow Corning and Dr. Birch: see *Hollis, supra* note 70 at para. 59. However, as Sopinka J. noted in dissent at para. 72, apportionment presumes liability and liability presumes causation. Unless a causal nexus was established between the manufacturer's carelessness and the consumer's injury, the company should not have been required to contribute anything toward compensation.

94 While La Forest J. also sought to justify his decision by reference to *Cook, supra* note 2, Sopinka J.'s dissenting opinion refuted that purported analogy: *Hollis, supra* note 70 at paras. 57, 77. As previously explained, *Cook* v. *Lewis* merely relieves a plaintiff of the need to establish causation if a defendant's negligent conduct rendered such proof "difficult if not impossible": see Section II.A., above. The rationale of that rule lies in the obvious injustice of allowing a careless act to both inflict an injury *and* deprive a victim of any opportunity to establish a cause of action. In *Hollis*, however, the manufacturer's failure to issue an adequate warning did not destroy the relevant evidence. Ms. Hollis remained free to examine Dr. Birch on the question of whether or not he would have re-conveyed such information.

95 *Hollis, supra* note 70 at para. 60 [emphasis in original]. By way of contrast, assume that: (i) Dow Corning satisfied the "learned intermediary" rule and discharged its duty to Ms. Hollis by properly informing Dr. Birch of the dangers inherent in breast implant, (ii) Dr. Birch carelessly failed to convey that information to his patient, and (iii) Ms. Hollis suffered an injury that she would have avoided if properly informed because, on the basis of some irrational belief, she would have withheld her consent to the procedure if she had known of the dangers. Now re-consider the quotation that appears in the text, modified only to reflect the test in *Reibl* v. *Hughes*, rather than Dow Corning's proposed extension of the "learned intermediary" rule.

Two points arise. First, although the decision to impose liability upon Dow Corning may be defensible as a matter of practical justice,[96] it must rely on a causal nexus that is constructive rather than actual.[97] Second, that decision appears to arise from the presumed societal desirability of exposing manufacturers to, but shielding physicians from, liability. In that regard, it is useful to recall La Forest J.'s contrasting characterization of the two types of defendants:

> Adopting such a rule [as the "reasonable person" test] would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a [manufacturer] who had not been negligent with respect to the information that [it] *did* have; yet she also would not be able to recover against a [doctor] who, despite having failed in its duty to warn, could escape liability on the basis that [a reasonable person would have consented to the treatment even if fully informed]. Our tort law should not be held to contemplate such an anomalous result.

The fact that La Forest J. subscribed to the original quotation, but not to the revised version, creates an ironic juxtaposition. While the Supreme Court of Canada may be willing to impose liability upon a manufacturer in the *absence* of factual causation, it may not be willing to impose liability upon a physician in the *presence* of factual causation. To use La Forest J.'s words, that surely is an "anomalous result" that "[o]ur tort law should not be held to contemplate."

96 The decision to impose liability seems defensible as a matter of practical justice, despite the absence of a causal link between the manufacturer's actions and the consumer's damage, if: (i) Dow Corning's breach deprived Ms. Hollis of both an opportunity to avoid injury and an opportunity to receive compensation in the event that she did suffer an injury, *and* (ii) Ms. Hollis would have successfully availed herself of either opportunity if it had presented itself. In other words, Dow Corning should have been permitted to avoid liability, notwithstanding its breach, if Ms. Hollis would probably have suffered non-compensably the same injury regardless of the defendant's wrong. On either formulation, the issue is the same: was the consumer adversely affected by the manufacturer's careless omission?

That issue can be resolved through a counter-factual analysis. If Dow Corning had discharged its obligation by means of the "learned intermediary" rule, two possibilities would have arisen. First, Dr. Birch might have conveyed the manufacturer's warning to his patient. If so, Ms. Hollis would have avoided injury if she (subjectively) would have refused the procedure. Second, Dr. Birch might have breached his disclosure obligation by withholding the manufacturer's warning from his patient. If so, Ms. Hollis would have been entitled to compensation from her physician if, according to *Reibl* v. *Hughes*, the reasonable person (objectively) would have refused the procedure and thereby avoided injury. Unfortunately, the trial judge addressed neither the subjective question nor the objective question. Consequently, although La Forest J. accepted the plaintiff's testimony and found that Ms. Hollis would have refused the procedure if adequately informed, it appears that Sopinka J. was correct in arguing that neither question could properly be resolved by an appellate court. The Supreme Court of Canada is not an appropriate forum in which to assess credibility and weigh conflicting evidence.

97 For an intriguing argument to the contrary, see V. Black & D. Klimchuk, "Torts—Negligent Failure to Warn—Learned Intermediary Rule—Causation—Appellate Court Powers: *Hollis* v. *Dow Corning Corp.*" (1996) 75 Can. Bar Rev. 355.

> [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....The manufacturer, on the other hand, can be expected to act in a more self-interested manner. In the case of a manufacturer...there is a greater likelihood that the value of a product will be overemphasized and the risk underemphasized.[98]

On that basis, La Forest J. concluded that it was "highly desirable from a policy perspective to hold [presumptively rapacious manufacturers] to a strict standard"[99] and to deny them the benefit of the anomalously lenient causal test to which presumptively beneficent physicians are entitled. Interestingly, however, the facts of *Hollis* do not support the Court's stereotyping: the doctor was as callous as the manufacturer. Ms. Hollis, a shy woman, did not actively seek the breast implants and was not "pre-sold" on the procedure. While she realized that her breasts were unusual, she never believed that medical intervention was necessary or that her appearance would affect her personal relationships. Moreover, she was referred to the plastic surgeon, Dr. Birch, only at the instigation of her family doctor, who noticed her breasts during a routine check-up. Finally, she agreed to the treatment only after Dr. Birch convinced her that her breasts were "deformed", and only after he failed to disclose the possibility of post-operative complications. Even aside from the fact that she eventually suffered injury, it is hard to accept that Ms. Hollis enjoyed "the best medical advice and service" available in the circumstances.

While defending the rule in *Reibl*, largely on the basis of unpersuasive evidentiary arguments, Cory J. also took the opportunity in *Arndt* to reiterate and expand on the policy arguments that appeared in *Hollis*. Thus, he stressed that the key to the objective test lies in its disregard of idiosyncratic fears which, although honestly held by a plaintiff, should not be attributed to the "reasonable person".[100] Despite conceding that a subjective test "is the most logical"[101] approach to the causal inquiry, he insisted that judicial consideration of a claimant's irrational concerns "would bring inequitable and unnecessary pressure to bear upon the overburdened medical profession"[102] and might "unnecessarily add to the high cost of providing medical care."[103] That *may* be true. Unfortunately, Cory J.

98 *Hollis, supra* note 70 at para. 46.

99 *Ibid.*

100 *Supra* note 71 at para. 14.

101 *Ibid.* at para. 17.

102 *Ibid.* at para. 16.

103 *Ibid.* at para. 12. Interestingly, while generally insisting upon an objective standard, Cory J. held that a subjective test would govern the causal inquiry if evidence established that a plaintiff, unlike a reasonable person, would have consented to

offered no evidence in support of his analysis and left many critical questions unanswered. On what basis is the medical profession "overburdened"? How often would patients recover compensation under a subjective test—even though they would fail under an objective test—because they would have refused treatment on irrational and idiosyncratic grounds? In what sense would the increased incidence of liability expose physicians to "inequitable and unnecessary pressure"? To what extent would additional liability "unnecessarily add to the high cost of providing medical care"?[104] Is the societal interest in compensating patients injured by medical carelessness outweighed by the societal interest in marginally limiting the medical profession's exposure to liability? If public policy is to override orthodox tort principles so as to skew the issue of causation in favour of physicians, surely such questions must be resolved on the basis of something more than guesswork.

C. STRATEGIC PRACTICE

As the objective approach to causation is deficient, the Supreme Court of Canada should have availed itself of the opportunity presented by *Arndt* to reverse *Reibl* and adopt a subjective test for all failure to warn cases. Unfortunately, with respect to claims against physicians, Cory J.'s majority opinion entrenched the reasonable person standard for the foreseeable future. How, then, should the practitioner proceed with respect to a client who, because of some idiosyncrasy, "unreasonably" would have withheld consent if properly informed of the risks attendant upon a certain form of medical treatment? Settlement, of course, is the preferred option, but even if compromise is not possible, the situation is not necessarily hopeless. Ironically, one of the great weaknesses of the objective test may prove to be its saving grace in any particular case.

The reasonable person does not exist—he or she must be judicially constructed. And in constructing such a person, a judge must take into account *some* of the plaintiff's personal circumstances.[105] (Were

a form of treatment even if appropriately informed of the attendant risks. In other words, a physician is entitled to whichever test is more harmful to a patient's case.

104 Interestingly, although English and Australian courts employ a subjective test of causation with respect to a physician's failure to warn, they have not experienced excessive liability: *Chatterton, supra* note 90; *Ellis, supra* note 90. And while it is true that English law limits the availability of relief by means of a restrictive duty of disclosure, Australian law employs essentially the same standard of care as was developed in *Reibl* v. *Hughes*: *Sidaway* v. *Governors of the Bethlem Royal Hospital*, [1985] A.C. 871 (H.L.); Rogers v. Whitaker (1992), 175 C.L.R. 479 (H.C. Aus.).

105 Although Laskin C.J.C. spoke simply of an "objective test" in *Reibl* v. *Hughes*, the Supreme Court of Canada more recently has referred to the reasonable person test as a "modified objective" standard: see *e.g. Hollis, supra* note 70 at para. 44; *Arndt, supra* note 71 at para. 6. The "modification" purportedly lies in the fact that the reasonable person is judicially formulated so as to reflect some of the

it otherwise, the causal inquiry would intolerably undermine patient autonomy, even on the Supreme Court of Canada's restrictive view of that value.[106]) The problem, however, is that the cases provide scant guidance as to *which* of the plaintiff's personal circumstances should be attributed to the reasonable person. Advice that has been given on this point is generally open-ended, cryptic, or anecdotal.

In *Reibl*, Laskin C.J.C. stated that a "patient's particular situation" and "special considerations" must be taken into account unless they pertain to "unreasonable" concerns,[107] but he did little to clarify the meaning or content of each of those criteria. Rather, he merely: (i) formulated a hypothetical situation in which a patient who relied on good eyesight for employment purposes might be entitled to relief if misled as to the dangers that a certain procedure posed to his or her vision, and (ii) held on the actual facts of the case that a reasonable person in Mr. Reibl's position would have been influenced by the desire to avoid surgical risks that threatened his ability to work for such time as would allow his pension to vest. Cory J. considered the issue at greater length in *Arndt*, but arguably added little substance. Positively, he devised two scenarios in which a patient's recreational interests (preparing gourmet meals and listening to operatic sopranos) might be attributed to the reasonable person and he observed that both "objectively ascertainable circumstances, such as age, income, marital status, and other factors" and subjective factors such as "reasonable beliefs, fears, desires and expectations" should be taken into consideration.[108] Negatively, he stressed that unreasonable fears and concerns "which do not relate directly to the material risks of a proposed treatment" must be disregarded.[109] By way of explanation,

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plaintiff's actual circumstances and characteristics. However, as Black and Klimchuk persuasively argue, there really is no middle ground between a purely subjective test and a purely objective test: Black & Klimchuk, "Torts—Negligent Failure to Warn—Causation", *supra* note 88. A causal inquiry that focuses on the manner in which the *plaintiff* would have reacted to a particular situation is subjective; one that does not is objective. Mere attribution of some of the claimant's characteristics to the reasonable person does not render the exercise subjective in any meaningful sense if the ultimate question is whether a *hypothetical person* would have reacted if properly informed of the risks attendant upon a certain procedure.

106 See Section III.A.1, above. As Black and Klimchuk note, an assessment of reasonableness is necessarily fact-specific. For example, while it may be reasonable for a surgeon to refuse a form of medical treatment that may minimally diminish manual dexterity, it may not be reasonable for a law professor to similarly withhold consent. The professor, unlike the surgeon, does not rely upon fine motor skills: Black & Klimchuk, "Torts—Negligent Failure to Warn—Causation", *supra* note 88 at 574.

107 *Supra* note 54 at 898-900.

108 *Arndt, supra* note 71 at para. 9.

109 *Ibid.* at para. 14, paraphrasing *Reibl, supra* note 54 at 899-900, Laskin C.J.C.

Cory J. opined that the terms of a causal inquiry could not reflect a claimant's irrational conviction that a temporary red rash indicated the presence of evil spirits.[110]

Conceivably, when compared to the decision in *Reibl*, the length and general tone of the majority's comments in *Arndt* might be interpreted as endorsing a more expansive attitude toward importing subjective factors into the objective test. Although Cory J. did not expressly state that courts should adopt a relatively relaxed approach to the construction of the reasonable person, he did indicate a willingness to consider a broad range of "reasonable" idiosyncrasies. Ultimately, however, it seems likely that lower courts will approach *Arndt* in much the same manner as they approached *Reibl*: flexibly and perhaps instrumentally. Indeed, the very nature of the test may preclude any other possibility. As in other areas of tort law, the reasonable person standard requires a judge to exercise discretion and may allow a judge (consciously or subconsciously) to tailor reasons to support a just result. And as the case law emerging from *Reibl* indicates, the resulting test has been applied both broadly and narrowly, depending upon the circumstances of a case.[111]

The practical lesson, then, seems clear. For both parties, persuasive advocacy is at a premium under the reasonable person test. In difficult cases, defendant's counsel should argue that *Arndt* merely reaffirmed *Reibl*, build upon the many instances in which liability was denied under the objective test prior to 1997[112] and characterize the plaintiff's circumstances as involving irrational idiosyncrasies. In contrast, plaintiff's counsel should, in similar circumstances, stress the range of factors that Cory J. endorsed in *Arndt*, appeal to the court's sense of compassion, and portray any peculiarities pertaining to the claimant's situation as being reasonable.

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110 Interestingly, while the patients in Cory J.'s positive illustrations asked questions pertaining to their idiosyncrasies during pre-operative consultations, the patient in his negative illustration did nothing to forewarn the physician about his irrational belief in evil spirits. It is unclear, however, if Cory J. thereby intended to suggest that forewarning is relevant to the causal inquiry (as opposed to the content of the standard of care). Logically, it is not. Assuming that a doctor breached the duty of disclosure by failing to discuss a material risk, causation factually exists if a patient would have withheld consent if properly informed, regardless of whether or not the reason for that decision was revealed to the physician at the outset. As a matter of policy, however, a patient's forewarning may be important insofar as it may clearly draw a doctor's attention to the type of information that ought to be disclosed. Implicitly, then, Cory J. may have introduced a requirement of disclosure by a *patient* as a means of limiting the likelihood of liability.

111 Osborne, *supra* note 72 at 133-40.

112 Robertson, *supra* note 60 at 433-35.

IV. CONCLUSION

During the past decade, the Supreme Court of Canada's approach to causation in personal injury actions has been inconsistent. The general trend, as evidenced by the decisions in *Snell* v. *Farrell*, *Fontaine* v. *British Columbia* and *Athey* v. *Leonati*, has been toward simplification. The mysteries surrounding *McGhee* v. *National Coal Board* have been dispelled, the maxim of *res ipsa loquitur* has been abolished, and common sense has been reaffirmed as the touchstone of the orthodox rules of causation. Those developments are welcomed. At the same time, however, as part of an effort to protect certain defendants from liability, the Court has further entrenched the objective test of causation in cases arising from a physician's failure to warn. That approach is indefensible, not only because it prefers constructive fiction over actual fact, but also because it has not been proven necessary on either evidentiary or policy grounds.