FACTUAL CAUSATION IN THE LAW OF MANUFACTURER FAILURE TO WARN

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In two recent decisions, the Supreme Court of Canada held that a subjective standard must be applied in order to resolve factual causation in any action alleging manufacturer failure to warn. Plaintiffs, in other words, must prove that they would have acted differently in the presence of an adequate warning, whether by foregoing the use of the product altogether or by heeding the precautions that should have been given to them.

In this article, the author critically reviews the most important of the two precedents, Hollis v. Dow Corning Corporation. He argues that the majority judgment overlooks a number of considerations raised by adjudicating causation on this basis -- difficulties that are not solved by the objective standard proposed in the dissent. Two considerations are analysed in detail, namely, the relationship between the duty to warn and factual causation, and the special nature of cause-in-fact in the context of product warnings. According to the author, courts should adopt a pragmatic approach to factual causation in order to prevent the issue from being over litigated by manufacturers anxious to escape liability for their negligence. In particular, the author argues that the subjective standard adopted in Hollis v. Dow Corning Corporation should be implemented with the help of a presumption that consumers normally read and act upon product labels designed with their safety in mind.

Selon deux jugements récents de la Cour suprême du Canada, un critère subjectif détermine la causalité factuelle lorsqu'un fabricant manque à son devoir de mettre en garde sa clientèle au sujet des risques associés à ses produits. Ainsi la partie demandresse doit prouver qu'elle aurait agi d'une façon différente en la présence d'une mise en garde, soit en refusant d'utiliser le produit, soit en suivant les directives que le fabricant aurait dû lui fournir.

Dans cet article, l'auteur critique la plus importante décision en la matière, l'affaire Hollis c. Dow Corning Corporation. Il allègue que le jugement majoritaire néglige un bon nombre de questions soulevées par la mise en application d'un tel critère : des problèmes que l'approche objective proposée en dissidence ne peut résoudre. L'auteur analyse deux de ces questions, soit la relation entre le devoir d'avertir et la causalité factuelle et le caractère distinctif de la causalité dans le contexte des mises en garde. Selon lui, les tribunaux doivent aborder la causalité factuelle de façon pragmatique de sorte à prévenir qu'elle ne devienne une échappatoire pour les fabricants coupables de négligence. En particulier, l'auteur allègue que le critère subjectif adopté dans Hollis c. Dow Corning Corporation devrait être appliqué avec l'aide d'une présomption selon laquelle les consommateurs et les consommatrices ont l'habitude de lire et de donner suite aux mises en garde visant à les protéger.

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I. INTRODUCTION

This article deals with factual causation[1] in the law of manufacturer failure to warn, an issue that has received relatively little attention in Canadian case-law and doctrine.[2] The Supreme Court of Canada has spoken on a number of occasions about the duty of product manufacturers and suppliers to give adequate warnings to consumers and other users of their products.[3] In 1972, the Court unanimously held that a manufacturer has a common law duty to warn consumers of known dangers associated with the use of its products, including the risk posed by vapours of a flammable floor-sealer, if not kept away from open flames such as furnace pilot lights.[4] In 1974, the Court unanimously held that this duty to warn is continuous. The manufacturer must warn consumers not only of dangers known at the time of supply, but also of dangers discovered once the product has entered the market, including the risk presented by a known design defect in the mounting of a crane.[5] In 1995, the Court unanimously held that a manufacturer may discharge its duty by warning intermediate suppliers instead of ultimate consumers, provided the former are experts in their respective fields and consumers are expected to rely on their expertise, rather than on product labels, for information with respect to the risks inherent in the use of a given product.[6] A manufacturer of breast implants, accordingly, can satisfy its common law duty by giving warnings of known dangers to physicians, the intermediaries whose expert opinions represent the necessary link between supply and consumption. Most recently, in 1997, the Court unanimously held that a manufacturer's duty to warn extends to all foreseeable users who may reasonably be affected by its products, regardless of whether

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[1] The focus of this article is factual causation, that is, the historical inquiry into *what actually happened* to the plaintiff as a result of the defendant's negligence. The legal inquiry into the *extent* of the defendant's liability for damages attributable to his or her fault, namely proximate cause or remoteness of damages, will only be discussed peripherally. In this article, I use the terms "factual causation," "cause-in-fact" and "causation" interchangeably, and none of them are intended to extend to issues of proximity or remoteness. On the distinction between factual causation and proximate cause, see J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Co. Ltd., 1992) at 193; A.M. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 325-27. On the importance of proximate cause in products liability, see D.A. Fischer, "Products Liability -- Proximate Cause, Intervening Cause, and Duty" (1987) 52 Missouri L. Rev. 547.

[2] In the United States, this issue has been addressed on a number of occasions. For the most recent surveys of the case-law, see M. Geistfeld, "Inadequate Product Warnings and Causation" (1997) 30 U. Mich. J. Law Reform 309; D.A. Fischer, "Causation in Fact in Products Liability Failure to Warn Cases" (1995) 17 J. Products & Toxic Liability 271.

[3] In this article, the terms "manufacturer" and "consumer" are used generically, and they should not be construed as limiting the class of potential defendants and plaintiffs to those who, respectively, make products and purchase them.

[4] *Lambert v. Lastoplex Chemicals Co. Ltd.*, [1972] S.C.R. 569, 25 D.L.R. (3d) 121 [hereinafter *Lambert* cited to S.C.R.].

[5] *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530 [hereinafter *Rivtow Marine* cited to S.C.R].

[6] *Hollis* v. *Dow Corning Corporation*, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 [hereinafter *Hollis* cited to S.C.R.].

or not they are party to a contract of sale.[7] The Court also held that a user's knowledge may amount to a defence, if the degree of his or her awareness is such "that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product".[8] Despite the fact that, in all four cases, the defendant manufacturer was held liable to the plaintiff consumer, factual causation has received express recognition at the Supreme Court only recently. In *Lambert* and *Rivtow Marine*, as in most lower court decisions following their pronouncements, the question of whether an adequate warning would have made a material difference to the *plaintiff* -- as opposed to being relevant information to *consumers* -- is not openly discussed. In *Hollis* and *Bow Valley Husky*, however, causation is a focal point of the reasons for judgment, and is the issue on which the Court's consensus on principle begins to fade.

At the outset, it should be noted that factual causation in the law of manufacturer failure to warn involves two distinct concepts.[9] The first may be described as "injury causation", that is, the link between the *risk* inherent in the defendant's product and the *damages* suffered by the plaintiff. This is the most basic form of causation and it is a *sine qua non* of liability in tort. Indeed, plaintiffs cannot succeed under this branch of products liability unless they can establish, on a balance of probabilities, that the danger they were allegedly unaware of actually materialized. For example, in *Lambert*, the plaintiff successfully established a causal relationship between, on the one hand, the volatility and flammability of the defendant's product and the pilot lights left open in his basement and, on the other hand, the fire that caused damages to his home. In *Rothwell* v. *Raes*, however, the plaintiff failed to establish a causal link between the vaccine administered during his first five months of life and the disabilities developed shortly thereafter.[10] Injury causation, sometimes referred to as "scientific causation",[11] is truly a factual inquiry. The fact that the claim is founded on a negligent omission or nonfeasance does not make any difference at this stage. In principle, this aspect of the causal inquiry is not any more difficult than it is in a negligent action or misfeasance case. Accordingly, injury causation receives the same

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[7] *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 [hereinafter *Bow Valley Husky* cited to S.C.R.].

[8] *Ibid.* at 1230.

[9] See A. D. Twerski & N.B. Cohen, "Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation" [1988] U. Ill. L. Rev. 607 at 617-18 and 621-26. These authors and I borrow the terms "injury causation" and "decision causation" from A. Meisel & L.D. Kabnick, "Informed Consent to Medical Treatment: An Analysis of Recent Legislation" (1980) 41 U. Pitt. L. Rev. 407 at 438-39.

[10] (1988) 54 D.L.R. (4th) 193, 66 O.R. (2d) 449 (H.C.), affirmed by (1990) 76 D.L.R. (4th) 280, 2 O.R. (3d) 332 (C.A.) [hereinafter *Rothwell* cited to D.L.R.]. See also *Royal Canadian Legion, Humboldt Branch No. 28* v. *Britz* (1987), S.J. No. 832, 62 Sask. R. 225 (Q.B.), where the plaintiff's action was dismissed because the court found that its damages were caused by a risk mentioned in the defendant's warnings and not, as suggested by the plaintiff, by an omitted risk.

[11] See *e.g.* S.M. Wexler, "Case Comment: *Hollis* v. *Dow Corning* and *Buchan* v. *Ortho Pharmaceuticals*" (1994) 22 Man. L.J. 426 at 436.; P. Peppin, "Drug Vaccine Risks: Patient Decision-Making and Harm Reduction in the Pharmaceutical Company Duty to Warn" (1991) 70 Can. Bar. Rev. 473 at 499-500.

treatment by fact finders in failure to warn cases as does causation in any tort action. Namely, it is specifically addressed when problematic in view of the evidence, whereas it is either implied or briefly noted when the evidence is straightforward. This article not concerned with this specific aspect of causation.

"Decision causation", on the other hand, refers to the relationship between the defendant's *fault* and the plaintiff's *choice* to use the product at all, or to use the product in a specific manner. By convention, decision causation is described as a form of cause-in-fact. However, unlike injury causation, this element requires a counterfactual inquiry of a non-scientific nature.[12] In essence, the fact finder must speculate about what might have been, if selected historical conditions had been different.[13] It is a form of "hypothetical causation",[14] particular to cases where a failure to provide information constitutes the basis of the cause of action.[15] The principle is simple. If the plaintiff would have behaved the same, with or without the warning, the defendant's failure to warn cannot be the actual cause of his or her injury, regardless of whether the undisclosed risk did in fact materialize. If Mr. Lambert paid little attention to product labels, for example, the defendant's omission of the three words "including pilot lights" in its warning against using the product near open flames would have made no material difference in preventing the fire that damaged the plaintiff's home. Likewise, in *Rothwell*, if the plaintiff had received immunisation doses after birth, even if his parents had been warned about the adverse reactions associated with the administration of the vaccine, his damages could not be attributed to the defendant's fault. Although decision

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[12] In *Arndt* v. *Smith*, [1997] S.C.J. No. 65, 2 S.C.R. 539 at 563 [hereinafter *Arndt* cited to S.C.R.], a precedent involving the law of informed consent to medical treatment, McLachlin J. expresses the view that decision causation is "a factual, not a hypothetical, inquiry" -- albeit a problematic factual inquiry. This author prefers the view that a difference in kind, not merely a difference in ease of implementation, distinguishes injury causation from decision causation. See R.N. Strassfeld, "If...: Counterfactuals in the Law" (1992) 60 Geo. Wash. L. Rev. 339 at 340-341:

> [W]hen we talk about what might have been but did not happen, we leave the domain of facts. We are talking, instead, about fictions. Whatever status we give to these imaginative creations, we are certain that they differ in kind from facts. Facts are "hard," "solid," and "substantial like physical matter." They possess "definite shape, and [a] clear persistent outline -- like bricks," and we may "pile them up" for use. They are verifiable, or amenable to empirical testing. Might-have-beens, on the other hand, are "pure conjecture," "mere guess and speculation," "fanc[i]ful suppositions," "fictional constructs" or "figments." They are the antithesis of facts; they are counterfactual.

[13] Strassfeld, *ibid.* at 343.

[14] A.C. Becht & F.W. Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (St. Louis: Washington University Studies, 1961) at 21-25. Becht and Miller divide factual causation in two general categories, namely "simple causation" for cases involving negligent actions or misfeasances, and "hypothetical causation" for cases involving negligent omissions or nonfeasances. See also H.L.A. Hart & T. Honoré, *Causation in the Law*, 2d ed. (Oxford: Oxford University Press, 1985) at 60-61.

[15] For instance, this form of causation is also prevalent in the law of informed consent to medical treatment. See *e.g. Reibl* v. *Hughes*, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1 [hereinafter *Reibl* cited to S.C.R.]; *Ciarlariello* v. *Schacter*, [1993] S.C.J. No. 46, 2 S.C.R. 119 [hereinafter *Ciarlariello* cited to S.C.R.]; *Arndt, supra* note 12.

causation is easy to describe and seems like a reasonable limit on liability, this element raises serious concerns at the stage of implementation. The difficulty was aptly summarised by Professors Henderson and Twerski who state: "The good causation case and the bad are remarkably alike."[16] How can fact finders assess the plaintiff's probable behaviour, but for an inadequate warning? Plaintiff testimony is the evidence most germane to this question, yet it is also inherently self-serving and of questionable reliability. On the other hand, expert testimony and external indicia of reasonable behaviour are less problematic, from a credibility standpoint, yet they invariably substitute an inquiry of what the plaintiff *should* have done for an inquiry of what the plaintiff *would* have done. In sum, whereas the facts determine whether injury causation is a live issue in any given case, decision causation is always open to debate.

In the context of manufacturer failure to warn, the dilemma inherent in decision causation is typically avoided. Cases tend to be viewed as "good" ones, to use Henderson and Twerski's description.[17] Indeed, once a plaintiff proves duty, breach, proximate damages and injury causation, it is generally assumed that an adequate warning would have made a difference to this consumer. *Lambert* is a classic example of this pragmatic approach. In that pivotal case, the Supreme Court makes no mention of the relation between the manufacturer's failure to disclose and the plaintiff's subsequent conduct. Decision causation was simply assumed in light of the evidence, in particular, in light of the fact that the plaintiff had taken several precautionary measures in handling the product in question. Presumably the plaintiff would have taken the additional step of turning off the pilot lights of his furnace and water heater, had an adequate warning been given to this effect. Would the plaintiff, in fact, have behaved this way but for the defendant's failure to warn? One can only speculate, given the counterfactual nature of this inquiry. Yet triers of fact rarely stumble over statements about what might have been in this area of products liability.[18] Perhaps, as noted by Professor Strassfeld, "[t]hat we typically do not think of such [counterfactual] statements as unusual or problematic suggests that most of the statements we make about what might have been are uncontroversial and readily accepted by the listener or

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[16] J.A. Henderson & A.D. Twerski, "Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn" (1990) 65 N.Y.U. L. Rev. 265.

[17] However, there are some precedents prior to *Hollis* that find in favour of manufacturers on the basis of decision causation: see *Moffatt* v. *Witelson* (1980), 111 D.L.R. (3d) 712 (H.C.), 29 O.R. (2d) 7; *Davidson* v. *Connaught Laboratories* (1980), O.J. No. 153, 14 C.C.L.T. 251, 5 L. Med. Q. 131 (Ont. H.C.) [hereinafter *Davidson* cited to C.C.L.T.]; *Baker* v. *Suzuki Motor Co.* (1993), 17 C.C.L.T. (2d) 241, 8 W.W.R. 1 (Alta. Q.B.).

[18] See *e.g. Smithson* v. *Saskem Chemicals Ltd.* (1986), 34 C.C.L.T. 195, 1 W.W.R. 145 (Sask. Q.B.); *Meilleur* v. *U.N.I.-Crete Can. Ltd.* (1985), 32 C.C.L.T. 126, 15 C.L.R. 191 (Ont. H.C.) [hereinafter *Meilleur* cited to C.C.L.T.]; *Siemens* v. *Pfizer C. & G. Inc.*, (1988), 49 D.L.R. (4th) 481, 3 W.W.R. 577 (Man. C.A.); *Pirie and Pirie* v. *Merck Frosst Canada Inc.* (1989), 243 A.P.R. 337, 96 N.B.R. (2d) 181 (N.B Q.B.) [hereinafter *Pirie* cited to N.B.R.]; *Chase* v. *Goodyear Tire & Rubber Co.* (1991), 291 A.P.R. 181, 115 N.B.R. (2d) 181 (N.B Q.B.). The *Meilleur* case is particularly revealing since, on the one hand, the court finds the plaintiff contributorily negligent in not wearing protective glasses while using the defendant's liquid concrete additive under pressure and, on the other hand, also finds that the defendant's negligence in failing to warn consumers about the possible risk of blindness was a factual cause of the plaintiff's injuries.

reader."[19]

This being said, assumptions about consumer behaviour are increasingly under review in civil litigation. Relying on developments in the area of informed consent to medical treatment, manufacturers have uncovered a causation debate in products liability. Their motivation in this respect should be evident. Decision causation had a chilling effect on the doctrine of informed consent, recognised in *Reibl*.[20] Manufacturers are likely anxious to import a similar principle into products liability in order to take away, on the issue of causation, what the courts have been giving for years on the duty to warn issue.[21] Thus, in *Buchan* v. *Ortho Pharmaceutical (Canada) Ltd.*[22] a manufacturer of contraceptive pills argued, first, that decision causation is a live issue in failure to warn actions and, second, that an "objective" reasonable consumer standard should be used in order to resolve this question. Although the latter part of this submission was rejected by the Ontario Court of Appeal in *Buchan* and subsequently by the Supreme Court in *Hollis*, both Courts opting for a "subjective" standard, the importance of decision causation was never questioned by either court. Moreover, the ongoing debate at the Supreme Court about the relevance of *Reibl* in the context of products liability, only secures the view that this aspect of causation is fundamental to liability for breaching a duty to warn. This is shown in *Bow Valley Husky* where one of the dissenting justices in *Hollis* wrote unanimous reasons purporting to apply both a subjective and an objective approach in addressing decision causation.[23] Accordingly, the number of failure to warn cases raising this particular aspect of causation will likely rise, as triers of fact are reminded by our highest court to (somehow) sort the "good" causation cases from the "bad".[24] Pursuant

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[19] Strassfeld, *supra* note 12 at 341.

[20] See *e.g.* G. Robertson, "Informed Consent Ten Years Later: The Impact of *Reibl* v. *Hughes*" (1991) 70 Can. Bar Rev. 423 at 435: "In summary, despite the Supreme Court's adoption of the reasonable patient standard of disclosure and the fairly liberal way in which that standard has been interpreted, plaintiffs in informed consent cases are almost always unsuccessful, and often this is because of the requirement of causation."

[21] For a review of the Canadian case-law interpreting a manufacturer's duty to warn, see Peppin, *supra* note 11 at 475-486; D.W. Boivin, "Negligence, Strict Liability, and Manufacturer Failure to Warn: On Fitting Round Pegs in a Square Hole" (1993) 16 Dalhousie L.J. 299 at 316-38.

[22] (1986), 25 D.L.R. (4th) 658, 54 O.R. (2d) 92 (Ont. C.A.) [hereinafter *Buchan* cited to D.L.R.].

[23] *Supra* note 7 at 1237-38: "I am satisfied that causation is established, on either a subjective or an objective standard.... I conclude that a reasonable plaintiff or Bow Valley Husky Bermuda Ltd. itself would have either declined to use Thermaclad or taken steps to deal with its inflammability had it been warned."

[24] Some recent cases addressing the issue of decision causation include: *Double Bar Ranching Ltd* v. *Bayvet Corp.*(1997), 148 Sask. R. 195, [1996] 10 W.W.R. 673 (C.A.) [hereinafter *Double Bar* cited to Sask. R.]; *Wheeler* v. *Muri*, (1997), 32 C.C.L.T. (2d) 180, 3 W.W.R. 287 (Sask. Q.B.); *Mowrey* v. *Pitman-Moore Inc.*, [1996] A.Q. No. 4446, [1997] R.R.A. 17 (C.S. Qué); *Zaba* v. *Saskatchewan Institute of Applied Science and Technology*, [1997] 8 W.W.R. 414, 38 C.C.L.T. (2d) 312 (Sask. C.A.). In all four cases, the court found for the defendant on the issue of cause-in-fact.

to the majority view in *Hollis*, triers of fact may no longer rely exclusively on general assumptions about consumer behaviour -- they must find that the plaintiff would have behaved differently but for the defendant's failure to warn. Does the plaintiff read and understand both official languages, that is, the languages used by manufacturers to communicate their warnings to Canadian consumers? Does the plaintiff usually read product labels? Would the plaintiff have remembered the warning, assuming it was read weeks, months or years prior to using the product? Does the plaintiff usually act upon every single piece of information contained in a product label or manual of instruction? These questions may seem odd, but they are clearly material once a subjective test to causation is adopted, as was done by the majority of the Supreme Court.

In this article, I argue that the test adopted by the majority in *Hollis* raises a number of difficulties at the stage of implementation. Although the subjective approach to decision causation is, in theory, friendly to plaintiffs' interests, express speculation about what might have been misallocates judicial resources and diverts attention from more important legal issues. In view of this criticism, this article urges courts to adopt a pragmatic approach to factual causation in the law of manufacturer failure to warn -- an approach that conforms to the spirit of the Supreme Court's decision, while narrowly defining the circumstances where decision causation should be a subject of debate.

II. HOLLIS

Naturally, I begin with a review of *Hollis*. This part will illustrate the problematic nature of decision causation in the context of liability for failure to warn. Moreover, since *Hollis* also raises an issue of informed consent to medical treatment, this part will outline the conflicting approaches taken by the Supreme Court with respect to causation, and the problems that may be caused thereby.

A. Factual Background

The plaintiff, Ms. Hollis, was diagnosed in 1983 as suffering from a congenital deformity of the breasts. Although she had suspected a problem for many years prior to this diagnosis, she did not feel her condition was serious enough to warrant medical attention. Nonetheless, on the advice of a plastic surgeon, Dr. Birch, the plaintiff decided to undergo breast implant surgery in October of 1983. This decision was made in the absence of any warning with respect to the risks of post-chirurgical complications, such as the possibility that the implants might accidentally rupture following surgery. Her physician himself had been advised by the manufacturer of the "Silastic I" implants, Dow Corning Corporation (hereinafter "Dow"), that a risk of rupture from "abnormal squeezing" or "trauma" was possible, but was given no warning whatsoever about the risk of rupture due to normal activities until two years following the initial surgery.

The operation went smoothly and Ms. Hollis recovered in a normal fashion. However, her condition returned by the spring of 1984, thereby requiring a second operation. An examination conducted by Dr. Birch following this corrective surgery discovered no problems and Ms. Hollis returned to her usual activities, including her attendance at a baker's course which involved upper body and arm movements. Shortly thereafter, Ms. Hollis developed lumps in her right breast and, following the recommendation of an expert in breast surgery, she underwent yet another operation in

order to remove the implants altogether. The expert feared that the lumps were due to the downward slippage of the implants. In fact, the surgeon in charge of the third operation, Dr. Quayle, discovered that the right implant had ruptured, resulting in a leakage of silicone gel. The gel was removed, along with the left implant, but the surgeon was unable to find the silicone envelope which was supposed to contain the gel of the right implant. The exact cause of the rupture remained undetermined.

Over the next two years, Ms. Hollis again developed lumps in her right breast and continued to experience pain in her right breast and armpit. In February 1987, she underwent surgery for a fourth time. Her new plastic surgeon, Dr. Courtemanche, discovered inflammatory nodules in her right breast, but did not find any free silicone. On his recommendation, Ms. Hollis had a subcutaneous mastectomy performed and, in June 1987, she chose to receive two "Silastic II" implants, also manufactured by Dow, for cosmetic reasons. No further complications surfaced since the last operation.

Ms. Hollis was permanently scared and she believed that a silicone envelope remained in her body. The plaintiff sued Dr. Birch, Dr. Quayle, Dow and Dow's Canadian sales agent for damages. The plaintiff advanced a number of legal arguments ranging from negligent design on the part of Dow to breach of an implied warranty on the part of Dr. Birch. For the purposes of this article, only two causes of action are relevant. First, the plaintiff alleged that Dr. Birch failed to disclose the material risk of breast implant rupture associated with normal day-to-day activities, and second, the plaintiff alleged that Dow failed to adequately warn consumers about this risk.

B. *Lower Court Opinions*

The trial judge rejected the first claim on the ground that Dr. Birch owed no duty to disclose at the time of the first operation since the risk of non-traumatic rupture was not prevalent in 1983.[25] Chief Justice McEachern, of the British Columbia Court of Appeal, echoed the views of the trial judge on this point, concluding that Dr. Birch had "nowhere near the amount of information the corporate defendant had about the risk of spontaneous rupture" and had insufficient information "to impose an obligation upon him to warn the plaintiff of this risk".[26] His two colleagues disagreed. Both Prowse and Southin JJ.A. held that the trial judge erred in this particular finding since the evidence showed that the risk of implant rupture was known in the medical community by 1983.[27] Madam Justice Southin would go no further, however, in the absence of findings of fact with respect to the material nature of the risk and to causation.[28] She concluded that a new trial was required on these two points and, in the interests of resolving the appeal, McEachern C.J.BC. agreed.[29] In dissent, Prowse J.A. felt that a new trial for the plaintiff's claim against Dr. Birch was unnecessary. She made her own findings on the evidence, holding that the risk of rupture was indeed material and that a reasonable woman, in the plaintiff's position, would not have undergone the first operation had the

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[25] [1990] B.C.J. No. 1059 (S.C.).

[26] (1993), 81 B.C.L.R. (2d) 1 at 38, 16 C.C.L.T. (2d) 140 (C.A.)

[27] *Ibid.* at 29 and 35.

[28] *Ibid.* at 35.

[29] *Ibid.* at 38.

defendant satisfied his duty.[30] In reaching the latter conclusion, Prowse J.A. placed "particular reliance on the fact that this reasonable woman did not require such surgery, had not actively sought out such surgery and was not the 'pre-sold' woman referred to"[31] in the evidence. The physician did not appeal the majority's order for a new trial on the issues of materiality and causation.

The trial judgment is silent with respect to the second cause of action, the claim for failure to warn against the manufacturer. Indeed, Bouck J. found in favour of the plaintiff by using another theory of liability, namely that the corporate defendant had negligently manufactured the breast implant.[32] According to a unanimous Court of Appeal, the trial judge committed serious errors in arriving at this conclusion. These errors included the fact that he relied on the maxim *res ipsa loquitur* despite the presence of an alternative explanation for the rupture, supported by the evidence, that is, pressure or trauma placed on the breast by the plaintiff during her baker's course.[33] However, a majority did confirm the finding of liability on the basis that Dow had knowledge, prior to 1983, about the risk of post-surgical rupture associated with normal activities and yet failed to adequately warn the medical community until 1985. Even though the number of ruptures from a statistical point of view was low, the "risk of 'unexplained' ruptures was significant in terms of potential harm to the patient".[34] For the reasons outlined in the previous paragraph, Prowse J.A. and McEachern C.J.B.C. concluded that the manufacturer's negligence was the cause of the plaintiff's injury, as a reasonable woman would not have consented to the surgery if adequately informed of the inherent risks.[35] In dissent, Southin J.A. would have ordered a new trial for the claim against Dow.[36] The trial judge made no findings of fact with respect to the steps taken by Dow to inform the medical community and with respect to causation.[37] Therefore, Southin J.A. refused to draw her own conclusions from the evidence. In particular, she noted that "[v]ery little evidence was adduced as to what other women have decided to do when warned of all known risks" and that such evidence "would be most helpful" in determining causation.[38] She speculated that many women "who would consider themselves reasonable, would undertake [the surgery] with all the risks identified in the evidence" while many other reasonable women, in the same position, would reject any notion of elective surgery.[39]

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[30] *Ibid.* at 21-25.

[31] *Ibid.* at 25.

[32] Although the trial judge did not comment on Dow's liability for failure to warn, given his finding that the implant was negligently manufactured, he did comment on the duty of Dow's Canadian sales agent to warn consumers of known or reasonably foreseeable defects. On this point, Bouck J. found that Dow's Canadian distributor had insufficient knowledge to impose such a duty: *supra* note 25.

[33] *Supra* note 26 at 14, 34 and 38

[34] *Ibid.* at 21.

[35] *Ibid.* at 25 and 38.

[36] *Ibid.* at 37-38.

[37] *Ibid.* at 34.

[38] *Ibid.* at 37.

[39] *Ibid.* at 36.

C. *Holdings of the Supreme Court*

Before the Supreme Court of Canada, Dow challenged the Court of Appeal's ruling on two fronts. First, the manufacturer argued that the warnings given to the medical community, including Dr. Birch, were adequate for the purposes of informing learned intermediaries of the risks of implant rupture. In the alternative, Dow argued that its failure to warn was not the cause of the plaintiff's damages because, on the one hand, Dr. Birch would not have behaved any differently in informing the patient of the risks associated with the surgery, while on the other hand, even if Dr. Birch had disclosed the risk of accidental rupture, Ms. Hollis would still have consented to the procedure. These arguments are identical to those raised by the manufacturer in *Buchan*[40] and, for reasons similar to the ones given by the Ontario Court of Appeal therein, the Supreme Court rejected both lines of reasoning.

With respect to the negligence issue, the Court was unanimous in holding that Dr. Birch was not a "learned intermediary" in the circumstances of this case, since Dow failed to adequately warn him and other physicians of the risks of post-surgical rupture.[41] The manufacturer only began warning the medical community about the risk of rupture due to normal activity, as opposed to the risk associated with "abnormal squeezing" or "trauma", two years after Ms. Hollis' first operation.[42] This delay occurred despite the fact that Dow had specific knowledge of this risk prior to the operation,[43] as well as knowledge about the adverse effect of the silicone gel on the human body if leaked. It is interesting to note that Dow now warns physicians not only about the risks of accidental rupture, but it also recommends that patients should alter their lifestyles in order to minimize this risk.[44] Thus, the failure to warn on the part of the manufacturer was clearly material. As noted by La Forest J., "a more accurate warning could quite reasonably have affected [the plaintiff's] choice of profession and her resulting exposure to unnecessary risk".[45] Stated somewhat differently, the risk of rupture associated with normal activity is information that a reasonable woman, having her own personal security in mind, would want to possess prior to consenting to breast implant surgery. Dow kept this information to itself until it was too late for Ms. Hollis or her physicians to control the risk. It had already materialized.

With respect to the manufacturer's causation arguments, the Supreme Court was split. Writing for the majority, La Forest J. rejected the approach adopted by the British Columbia Court Appeal, that is, the *Reibl* modified objective standard of causation. The question is not whether a reasonable woman, in the plaintiff's position, would have consented to the breast implant surgery had the manufacturer given adequate warnings to the medical community. Instead, the majority opted for the subjective standard adopted in *Buchan*, namely, whether the plaintiff herself would have

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[40] *Supra* note 22.

[41] *Supra* note 6 at 662 and 686.

[42] *Ibid.* at 664-65.

[43] By 1983, Dow had received 48 reports of "unexplained" ruptures, that is, ruptures not associated with surgery or trauma, *ibid.* at 667.

[44] See the 1985 warning, *ibid.* at 665.

[45] *Ibid.* at 666.

used the product, but for the defendant's breach.[46] The advantages of this approach are many fold according to the Court, even though the recognition of two standards -- one for products liability and one for informed consent -- may seem anomalous. First, unlike in the doctor-patient relationship, the interests of manufacturers in supplying a product are not necessarily coextensive with the interests of consumers in using the product.[47] In the name of deterrence, it is better to encourage manufacturers to make full disclosure of the risks associated with their products rather than to place evidentiary hurdles to recovery, such as a standard of causation that does not let the plaintiff decline a product that a reasonable person would use. Second, and again at a policy level, manufacturers are experts in their field not only as compared to consumers, but also when compared to physicians who prescribe their products.[48] In other words, there is an imbalance between the knowledge possessed by these experts, on the one hand, and the knowledge possessed by both consumers and physicians, on the other. Third, La Forest J. correctly observed that the standard adopted in *Reibl* is in fact an exception to the causation approach used elsewhere in tort law, including products liability.[49] The corporate defendant failed to present any convincing reason, in either principle or in policy, for extending this exception to the law of manufacturer failure to warn. The most serious concern raised by Dow, in this respect, was the danger of fraud. However, somewhat anomalously, the majority is of the view that the potential for deceit on the part of plaintiffs may be reasonably contained by cross-examination and a weighing of the evidence, unlike in the context of informed consent![50] Finally, La Forest J. observed that most products liability cases do not involve physicians as "learned intermediaries".[51] Hence, the chances of anomalous results, such as the absence of objective causation against the physician and the presence of subjective causation against the manufacturer, are greatly diminished. Applying the subjective standard to the case at bar, La Forest J. emphasised that Ms. Hollis testified that she would not have had the procedure, and no findings attacking her credibility were made.[52] Although this conclusion seems determinative with respect to causation, La Forest J. went further and found what Southin J.A. would only speculate upon: there was medical evidence supporting the view that *some* women would change their minds following a full disclosure of the risks, and that such a reaction was quite normal and *reasonable.*[53]

With respect to the other causation argument, the question of whether or not Dr. Birch would himself have behaved differently, the majority judgment is equally dismissive. In essence, La Forest J. concludes that requiring the plaintiff to prove a hypothetical involving her doctor's behaviour, in addition to duty, breach, causation

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[46] *Ibid.* at 674-75.

[47] *Ibid.* at 675.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.* In *Reibl, supra* note 15 at 898, Chief Justice Laskin was evidently more concerned with the issue of fraud: "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."

[51] *Hollis, ibid.*

[52] *Ibid.* at 676.

[53] *Ibid.* at 676-80.

(injury and decision) and damages would be unfair.[54] It is one thing to require proof of decision causation, as it relates to the conduct of the plaintiff, it is quite another to require proof of decision causation involving a third party. The majority places considerable reliance on *Cook* v. *Lewis*[55] in dismissing the manufacturer's argument. It is noted that Ms. Hollis, like the plaintiff in *Cook*, played no role in creating the set of causal conditions leading to her injuries.[56] She has proven the defendant's fault and some causal connection between this negligence and her damages, in the form of both injury causation and decision causation. Not unlike *Cook*, it would be unfair to ask her to prove, in addition, a fact over which her "power of proof" is at best limited -- in *Cook*, the identity of the shooter, in the case at bar, the hypothetical behaviour of her attending physician.[57] On a related point, La Forest J. implicitly rejects the approach taken by the Ontario Court of Appeal in *Buchan*, namely, adopting a presumption that the physician would warn the patient, subject to proof to the contrary.[58] According to him, there should be no debate whatsoever on this issue: a manufacturer *cannot* be absolved by showing that the physician prescribing its product would not have warned patients in any event, "except in cases where some extraneous conduct by the doctor would have made the failure to give adequate warning irrelevant".[59] This question can go to apportioning liability between the two, if both are negligent in failing to warn.[60] With respect to liability, however, the only options are to perform according to the standard of care or to attack the plaintiff's credibility. Perhaps the most compelling reason given by the majority for rejecting a requirement of physician decision causation is that, on the assumption that the doctor would *not be liable* in withholding a material risk from the plaintiff, then plaintiffs would have no remedy despite being the victim of the manufacturer's negligence.[61]

As a statement of policy about manufacturer liability the majority's judgment in *Hollis* is hard to criticize. As a statement of principle about causation, however, the reasons given by La Forest J. are, on their face, difficult to reconcile with the position upheld by the Supreme Court on numerous occasions in the context of informed consent to medical procedures.[62] In their respective reasons, the justices themselves seemed to recognize the weaknesses and strengths of the plaintiff's position. Simply compare, for instance, the labels used by La Forest J. and by Sopinka J. to identify the nature of the issue in dispute. On more than one occasion, La Forest J. insinuates that the link between the defendant's failure to warn and the plaintiff's injuries is a question of *proximate* cause, a concept that connotes policy considerations akin to those which

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54 *Ibid.* at 682 and 685.

55 [1951] S.C.R. 830 [hereinafter *Cook*].

56 *Supra* note 6 at 683-84.

57 *Ibid.*

58 *Supra* note 22.

59 *Supra* note 6 at 684.

60 *Ibid.*

61 *Ibid.* at 685.

62 See *e.g.* the cases listed *supra* note 15.

prevail in many duty of care analyses.[63] For instance, at the beginning of his reasons, he indicates that "I will consider whether Dow's failure to warn was a proximate cause of Ms. Hollis' injuries".[64] On the other hand, in his dissenting reasons, Sopinka J. perceives the question as being whether the manufacturer's negligence was the cause *in fact* of the plaintiff's damages. For instance, he emphasizes the expression "the cause" throughout his reasons.[65] With this in mind, the essence of the dissent in *Hollis* is relatively predictable.

Writing dissenting reasons for McLachlin J. and himself, Sopinka J. makes four criticisms about the approach adopted by the majority with respect to decision causation, as it relates to the plaintiff's hypothetical behaviour. First, he echoes the comments made by Laskin J. in *Reibl* about a subjective approach to causation; this standard allows inherently unreliable and self-serving assertions to serve as *the* basis of judgment.[66] He adds that the problem is not only one of credibility, but also one of allowing the plaintiff to offer opinion evidence to which the defendant cannot answer.[67] Second, Sopinka J. expresses the view that an objective approach, similar to the one adopted by the Court of Appeal in the case at hand, would be more reliable than the approach put forward by the majority. In other words, asking what a reasonable woman would have done in the circumstances gives a more accurate indication of what *in fact* would have happened but for the defendant's breach.[68] The superior reliability of the objective method is illustrated by the fact that La Forest J. himself refers to expert evidence in order to determine the causation issue[69] -- evidence that is, according to Sopinka J., immaterial under a purely subjective standard.[70] Third, the dissenters take issue with the majority's references to policy, in justifying a stricter approach towards manufacturers, than towards physicians.[71] True, manufacturers have a strict duty to warn consumers of the dangers inherent in the use of their products. However, as noted by Sopinka J., the plaintiff's probable conduct has nothing to do with the standard expected from manufacturers.[72] In essence, the dissenters remind the Court that it is possible to find a manufacturer *wrongful* in its practices, by adopting a strict standard of care, without necessarily holding the manufacturer *liable* to a particular plaintiff. The deterrent value of such a finding would arguably be the same as if liability was imposed. Indeed, the defendant would be placed on notice by the court to modify its behaviour or face the consequences of a future, less favourable, set of facts. In other words, the dissenters remind the Court that the standard of care, and not the standard of causation,

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[63] J.G. Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can. Bar Rev. 471.; Fleming, *supra* note 1 at 202-04; Linden, *supra* note 1 at 326.

[64] *Supra* note 6 at 652.

[65] *Ibid.* at 692 and 693.

[66] *Ibid.* at 688.

[67] *Ibid.*

[68] *Ibid.* at 689-90.

[69] *Ibid.* at 676-80.

[70] *Ibid.* at 690.

[71] *Ibid.*

[72] *Ibid.* at 690-91.

is the vehicle through which policy goals such as deterrence and accident prevention are achieved.[73] Lastly, Sopinka J. criticizes the majority for finding as a matter of fact that the plaintiff would not have consented to the surgery but for the manufacturer's breach. The trial judge made no findings on this point and the expert evidence relied on, in part, by La Forest J. is conflicting. According to Sopinka J., Ms. Hollis' testimony should not be confused for a finding of fact with respect to decision causation, even if a subjective standard is adopted.[74]

With respect to decision causation, as it relates to the hypothetical behaviour of Dr. Birch, the dissenters are even harsher in their criticism.[75] Essentially, Sopinka J. contends that the majority eliminates a fundamental requirement of liability -- that of factual causation -- in the name of policy.[76] According to Sopinka J., without proving that the physician would have warned Ms. Hollis about the risks of accidental rupture, you cannot establish that the injury was in fact caused by the lack of warning.[77] By dismissing this part of Dow's submission, as a matter of law, the majority proceeds to analyze the issue of causation on an artificial basis, that is, without one of the crucial links within the causal chain of events. As a matter of principle, it is indeed difficult to see how the conduct of a learned *intermediary* becomes *immaterial* in assessing the causal connection between the supplier of a product and its consumer. Sopinka J. also rejects the contention that the hypothetical behaviour of the physician can be used in apportioning liability between a manufacturer and a doctor, if both are found negligent.[78] Simply put, without causation, there can be no liability and hence nothing to apportion! Moreover, the dissenters reject the analogy made by La Forest J. between *Cook* and the case at hand. Unlike in the former case, the defendant here does not control the evidence needed to establish the hypothetical behaviour of Dr. Birch, nor has Dow destroyed said evidence.[79] In support of the dissenters' position in this respect, it should be noted that causation in *Hollis* involves a counterfactual inquiry (*i.e.* "what would have happened if..."), whereas causation in *Cook* involved a purely factual inquiry (*i.e.* "what did in fact happen..."). In the case at hand, it is difficult to see how the plaintiff is in a worse position than the defendant for *speculating* about the conduct that a third party would exhibit under a different set of circumstances. Moreover, as noted by Sopinka J., the impact of *Cook* is merely to presume causation -- not to render causation immaterial to liability. Lastly, Sopinka J. observes that the rebuttable presumption recognized in *Buchan* to the effect that the doctor would have warned, but for the

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[73] But see G. Calabresi, "Concerning Cause and the Law of Torts" (1975) 43 U. Chi. L. Rev. 69 at 77-91 for a discussion of how concepts such as cause-in-fact and causal linkage, as opposed to proximate cause, play an important role in achieving the deterrence goals usually associated with the law of torts.

[74] *Supra* note 6 at 703-4.

[75] For another critique addressing this part of *Hollis*, see N. Rafferty & P.A. Rowbotham, "Recent Developments in Contract and Tort Law: The 1995-96 Term" (1997) 8 Sup. Ct L. Rev. 137 at 164-66.

[76] *Hollis, supra* note 6 at 692.

[77] *Ibid.*

[78] *Ibid.* at 692-93.

[79] *Ibid.* at 695.

manufacturer's breach, is also a departure from well established tort principles.[80] In any event, if the presumptions of causation recognized in either *Cook* or *Buchan* are applied to the facts, there is "abundant" and "conflicting" evidence about Dr. Birch's behaviour but for the breach.[81] Thus, according to Sopinka J., a new trial is required on this point.[82]

III. IMPLEMENTING A SUBJECTIVE APPROACH TO DECISION CAUSATION

Despite their points of disagreement, the majority and dissenters in *Hollis* share a common objective. Both start with the proposition that, in order to establish factual causation between the plaintiff's injuries and the defendant's breach, it is necessary to determine the behaviour of the former but for the negligence of the latter. Although La Forest J. loosely refers to the concept of "proximate cause" in describing this link and Sopinka J. criticizes him for ultimately sanctioning liability without cause, it is clear that the objective of the majority, like the dissenters, is to assess the connection that exists *in fact* between Ms. Hollis' damages and Dow's failure to warn. La Forest J. asked, "[W]ould Ms. Hollis have consented to the operation even if properly warned of the risk?"[83] Clearly, this is not a question of proximity or one of remoteness -- it does not question the *extent* of the defendant's liability for the consequences of its negligence, but the very *existence* of said liability.[84] Using the label "proximate cause" may make the policy content of the majority's reasons less objectionable, but it does not in itself change the nature of the inquiry conducted by the Court. For his part, Sopinka J. notes that in resolving the issue of causation "the Court attempts to determine what the plaintiff's response would have been on the assumption that the appropriate warning has been given".[85] Thus, although the majority takes a "minimal" approach to causation in comparison to the "maximal" approach adopted in dissent,[86] both address the same question. They simply differ in opinion about whether to ask the plaintiff or the reasonable woman for input -- a debate that somehow resurfaces in *Bow Valley Husky*.

The problem with *Hollis* lies precisely in the nature of this inquiry. The Court unanimously assumes that in order to find a manufacturer liable for failure to warn, a fact finder *must* speculate about the choices the plaintiff would make if faced with a warning commensurate with the risk that materialized. A finding of fact is required in this respect. Both justices invoke the conventional "but for" test in order to resolve the causation issue, yet neither of them seriously questions the appropriateness of this

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[80] *Ibid.* at 695-96.

[81] *Ibid.* at 697 and 703-05.

[82] *Ibid.* at 706.

[83] *Ibid.* at 672 and 680.

[84] See Linden, *supra* note 1 at 326.

[85] *Supra* note 6 at 691.

[86] S.N. Pincus, "Progress on the Causal Chain Gang: Some Approaches to Causation in Tort Law and Steps Toward a Linguistic Analysis" (1986) 24 Osgoode Hall L.J. 961 at 985-99, where the author defines "causal maximalism" as an approach to causation placing a strict emphasis on the facts, and "causal minimalism" as an approach infusing causation with a minimum of factual content and a maximum of legal policy.

standard in the context of the manufacturer's failure to warn. The majority evidently struggles with the "but for" test, as shown by the importance given to policy considerations and by the analogy made with *Cook* in rejecting the manufacturer's invitation to speculate, in addition, about the physician's behaviour. However, La Forest J. stops short of condemning the nature of the causation inquiry, preferring instead to give full attention to the views of individual plaintiffs in applying a conventional "but for" approach. As for the dissent, Sopinka J. merely argues that a more reliable method of applying the test is to ask the reasonable person, not the plaintiff, what he or she would have done but for the breach. In the remainder of this article, I will argue that the assumption underlying the reasons of both the majority and dissent is flawed. Although causation is essential to liability, the "but for" test is a weak proxy when liability is based on a manufacturer's failure to warn. In short, a gap exists between the question posed by the Supreme Court in *Hollis* and the answer fact finders can reasonably be expected to give.

At the outset, it should be noted that this article does not recommend liability without causation in the field of products liability. This author does not take issue with the proposition that a manufacturer should not be liable unless his or her fault is a cause, in fact, of the plaintiff's damages. Noting the exceptions of *Sindell* v. *Abott Laboratories*,[87] its progeny in the United States,[88] and *Cook*,[89] it can be argued that cause-in-fact is currently the most important element in establishing a claim for damages in tort. Stated somewhat differently, although fault is occasionally immaterial[90] and damages are sometimes presumed[91] proof of a causal connection between the defendant's actions (whether negligent or not) and the plaintiff's loss (whether tangible or not) is truly a *sine qua non* to liability for damages at common law. Thus, the question posed herein is not whether the common law should make a radical departure from precedent and embark down the 'slippery slope' into the abyss of absolute

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[87] 607 P.2d 924 (Cal. 1980) [hereinafter *Sindell*]. The plaintiff was a cancer victim, whose mother had taken diethylstilboestrol (DES) during pregnancy. The plaintiff could prove that her cancer was caused by DES, but could not establish which company had manufactured the drug ingested by her mother. She sued the major pharmaceutical companies, that is, the manufacturers responsible for 90% of the DES sold at the relevant time. Approximately 195 smaller producers had not been sued. The court found the defendants negligent and held each liable in proportion to its share of the market, unless it could prove that it had not manufactured the DES that caused the plaintiff's cancer.

[88] For the development of market share liability, before and after *Sindell*, see A.R. Klein, "Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation" (1994) 68 Tul. L. Rev. 883 at 888-912; J.J. Ortego, "Market Share Liability Theory of Product Liability Litigation" (1996) SB16 ALI-ABA 155 (WESTLAW).

[89] *Supra* note 55.

[90] The rule in *Rylands* v. *Fletcher* (1868), [1861-1873] All E.R. Rep 1, L.R. 3 (H.L.), for instance, offers the classic illustration of strict liability within the Canadian context. Other established areas in which indicia of strict liability are found include the law pertaining to dangerous animals, the doctrine of vicarious liability and the law of nuisance. See Fleming *supra* note 1 at 357, 366 and 424 respectively.

[91] For instance, damages are presumed in the torts derived from the writ of trespass to the person, that is, battery, assault and false imprisonment. See L.N. Klar, *Tort Law*, 2d ed. (Scarborough: Carswell, 1996) at 26. Libel is also actionable *per se*: *ibid.* at 553.

liability".[92] Rather, the issue is whether the conventional "but for" test provides valuable indicia of factual causation, in circumstances where a manufacturer breaches its duty to warn. As recently observed by the Supreme Court, the "but for" test is "[t]he general, but not conclusive, test for causation" because it is "unworkable in some circumstances".[93] In the author's opinion, the conceptual and practical difficulties raised by adjudicating decision causation on this basis, in the context of manufacturer failure to warn, outweigh this test's potential for insight.

A. *The Relationship Between Duty and Causation*

A preliminary criticism of the subjective approach adopted in *Hollis* is that it views causation in isolation. There is an inherent link between the legal issue of duty and the factual issue of causation. Because only the tortious aspect of the defendant's conduct is relevant for the purposes of causation,[94] the manner in which courts fashion a defendant's duty of care has a direct impact on the causal link between breach and damages. Simply stated, if the definition of duty is specific, the set of causal conditions that may lead to liability will be narrow, and vice versa. Therefore, our starting point is the obligations of manufacturers towards their consumers. As will be shown, courts make general assumptions of a causal nature in determining whether or not a duty to warn arises in a given situation. In short, a duty to convey information exists only when the information is material to the plaintiff's interests, that is, when a reasonable consumer would have expected the disclosure prior to purchasing or using the product. Thus, if a trier of fact reaches the issue of decision causation, a finding of law already links the defendant's breach to the plaintiff's damages, at least at a conceptual level: the failure to warn is material because it might have influenced the behaviour of a reasonable person such as the plaintiff.

Why does the common law require manufacturers to warn consumers of the risks associated with the use of the products they supply? The answer involves *risk management.* Warnings enable consumers to control, for themselves, the degree of risk their person and property will inevitably encounter when using a product. It is important to note that risk management is a multidimensional process. Control can be exercised at all stages of contact with a product. The greatest form of control occurs when a consumer decides to neither purchase nor use a product because of the risks associated

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[92] E.C. Price, "Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault" (1994) 61 Tenn. L. Rev. 1277 at 1349.

[93] *Athey* v. *Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 [hereinafter *Athey* cited to S.C.R]. The limits usually associated with the 'but for' test are outlined in M. Stanch, "Causation, Risk and Loss of Chance in Medical Negligence" (1977) 17 Oxford J. Leg Stud. 205 at 207-213. See also M. McInnes, "Causation in Tort law: Back to Basics at the Supreme Court of Canada" (1997) 35 Alta L. Rev. 1013.

[94] Fleming, *supra* note 1 at 194-95: "What we are interested in is whether his negligence rather than his general conduct was the cause." For a detailed analysis of the tortious aspect principle, see R.W. Wright, "Causation in Tort Law" (1985) 73 Cal. L. Rev. 1737 at 1759-74; R.E. Keeton, *Legal Cause in the Law of Torts* (Columbus: Ohio State University Press, 1963) at 3-24.

with its use. In *Buchan*[95] and *Hollis*,[96] for example, the plaintiffs argued that the defendant manufacturers had, in essence, taken away their freedom to opt against using the contraceptive pill and breast implant that eventually caused their injuries. The analogy between manufacturer failure to warn and physician failure to disclose is strong when the plaintiff's theory of the case focuses on this basic form of risk management. However, this analogy fades rapidly when we move to the next stage of control. Unlike patients undergoing surgery, consumers have an alternative choice when faced with an inherently dangerous product: they can monitor their consumption in order to decrease the probability that any risk will materialize. For example, the plaintiff in *Lambert*[97] could have turned off the pilot lights in his basement before using the defendant's floor sealer, had he been aware of the danger that these open flames presented. In other words, warnings also allow consumers to use a product safely, by advising them of the conditions under which the product's risks are greater or lesser than average. Finally, control can be exercised by a consumer even after a given risk has materialized. Case law in the United States suggests that complete warnings give consumers enough information, not only to decide whether to buy a product and how to use it, but also to determine what specific procedures should be taken in the event of an accident in order to mitigate damages. For example, in *Ayers* v. *Johnson & Johnson*,[98] a 15 month old child suffered irreparable brain damage after inhaling baby oil. The parents did read the product label after discovering the incident, but found no warning with respect to ingestion. Accordingly, they thought the only effect would be diarrhea. A complete warning, according to the theory of the case, would have allowed the plaintiffs to control the risk at two distinct levels: first, they would have placed the product out of the child's reach; second, they would have appreciated the urgency of the situation, assuming a failure of the former measure. In sum, the function of a manufacturer's duty to warn is to enable consumers to become better risk managers when buying a product, when using a product and when faced with emergencies arising from the use of a product.

Risk management, as a general goal, is not usually highlighted in the literature dealing with liability for failure to warn. In fact, a commonly held view is that the function of the manufacturer's duty to warn is really twofold: accident prevention and consumer personal autonomy.[99] Professors Henderson and Twerski, for instance, note that the case-law in this field of products liability can be divided under two distinct labels, "risk-reduction warnings" and "informed-choice warnings".[100] This distinction has been incorporated into the proposed final draft of the *Restatement (Third) of Torts* --

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[95] *Supra* note 22.

[96] *Supra* note 6.

[97] *Supra* note 4.

[98] 818 P.2d 1337 (Wash. 1991). See also *Stone* v. *Sterling Drug Inc.*, 2 Prod. Liab. Rep. 10,580 (N.Y. App. 1985).

[99] See *e.g.* Henderson & Twerski, *supra* note 16 at 285-86; Peppin, *supra* note 11 at 474; M.A. Pittenger, "Reformulating the Strict Liability Failure to Warn" (1992) 49 Wash. & Lee L. Rev. 1509.

[100] Henderson & Twerski, *ibid.* See also A. Twerski *et al.* "The Use and Abuse of Warnings: Products Liability - Design Defect Litigation Comes of Age " (1976) 61 Cornell L. Rev. 495 at 519.

Products Liability.[101] In the former category, the plaintiff's theory of the case is that he or she would have used the product in a different and hence safer manner, but for the inadequate warnings given by the manufacturer. Stated differently, the consumer was not given enough information to prevent an *avoidable* accident. In this type of case, of which *Lambert* is an example, imposing liability on the manufacturer recognizes that product warnings help to achieve tort law's overall goal of reducing the social costs of accidents, provided they are accessible, read, understood and obeyed. In the second category, the theory of the case is that the plaintiff would have foregone consumption altogether in light of the risks inherent in the product's use. The consumer, in other words, was not given enough information to make an informed decision about whether or not to be exposed to the *unavoidable* risks inherent to the product. Imposing liability in this type of case, as was done in *Buchan*, sends the message that consumers, not unlike patients, have a right to personal autonomy and integrity in decision making. Accessible information about hazards to person and property, according to this view, promotes this right by allowing consumers to decide whether or not, and to what extent, they wish to use products manufactured for consumption purposes that nonetheless pose unavoidable dangers.

The problem with the categories advanced by Henderson and Twerski is one of implementation.[102] The floor-sealer involved in *Lambert* and the contraceptive pill involved in *Buchan* are relatively easy examples from a classification standpoint. The former product presented an avoidable risk, whereas the latter presented an unavoidable one. It is therefore logical to view the first case as one of accident prevention, and the second case as one of informed choice. However, in what category should *Hollis* be placed? With respect to causation, the plaintiff and the Supreme Court both chose *Buchan* as the appropriate analogy, but is this the only classification possible? Consider the warning requested. As discussed above in Part II, the essence of the plaintiff's argument is that the manufacturer failed to warn of the risks of an accidental rupture, that is, a rupture not associated with traumatic activities. According to the plaintiff's argument with respect to causation, but for the defendant's breach she would have foregone the surgery altogether. Yet it is also conceivable that the plaintiff, or another woman in her position, would have chosen the surgery while monitoring her behaviour in order to reduce the risk of accidental rupture. With respect to duty, the Supreme Court alludes to this point by concluding that "a more accurate warning could quite reasonably have affected her choice of profession and her resulting exposure to unnecessary risk".[103] Stated somewhat differently, although the risk at issue in *Hollis* could have been avoided by rejecting the product altogether, as argued by the plaintiff with respect to causation, this risk could also have been reduced. Accordingly, the duty to warn in this case is difficult to categorize as promoting exclusively "risk-reduction"

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[101] *Restatement (Third) of Torts: Products Liability* (Proposed Final Draft, April 1997), s. 2, comment i. Professors Henderson and Twerski are the Reporters of the *Restatement (Third) of Torts: Products Liability*: see A.D. Twerski, "Inside the Restatement" (1997) 24 Pepp. L. Rev. 839 at 839.

[102] For a similar criticism, see Pittenger, *supra* note 99.

[103] *Supra* note 6 at 666. This conclusion addresses a finding made by the Court of Appeal, to the effect that the evidence presented at trial offers many explanations for the rupture, including the plaintiff's own decision to follow a baker's course; *Supra* note 26 at 10-12.

or "informed-choice". The warning requested would contribute to the initial process of decision-making, but it would also allow consumers, such as the plaintiff, to minimize the chances of an accidental rupture. Thus, a better view is that risk management is the overriding function of a manufacturer's duty to warn. This approach eliminates the need for categorizing the case-law, based on whether or not the risk at issue was avoidable or unavoidable -- an exercise that is academic at best and misleading at worse. Instead, this approach concentrates on the *process* of risk management; a process that may vary in degree from one set of circumstances to another, but not in kind.[104]

This being said, in what circumstances will the common law impose, on a manufacturer, a duty to warn consumers about a risk associated with its product -- for example, the risk that the vapours of a floor-sealer may come into contact with a pilot light and ignite? It is tempting to answer this question by referring to the general approach adopted by the Supreme Court, with respect to duty of care, in other areas of negligence law. In essence, this view holds that a defendant owes a duty of care to a plaintiff provided, on the one hand, that the damage caused to the latter was a foreseeable risk associated with the former's conduct at the time of the accident and, on the other hand, that the policy implications of recognizing a duty are reasonably manageable.[105] This two-tier approach, based on the famous (at least in Canada) speech delivered by Lord Wilberforce in *Anns* v. *Merton London Borough Council*,[106] has been used by our highest court to resolve numerous duty of care issues, including whether a driver owes a duty to ensure that passengers below the age of 16 wear their seatbelts, even when accompanied by their parents,[107] and whether a building contractor owes a duty to subsequent owners to avoid causing them pure economic loss.[108] By analogy, the manufacturer in our example owes a duty to warn consumers, (1) provided the *risk* that vapours of its product will come into contact with an open flame, such as a pilot light, is known by the manufacturer or reasonably foreseeable, (2) provided the *plaintiff* is a known user of the product or a reasonably foreseeable one, and (3) provided that

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[104] A similar view is advanced in American Law Institute, *Reporter's Study: Enterprise Responsibility for Personal Injury*, vol. 2 (1991) at 66, where the purpose of product warnings is described as follows: "[T]o provide users with information about risk levels so that users can harmonize their use preferences with their safety preferences in an informed way, to provide users with information about safe and dangerous use so that they can choose optimal risk reduction strategies, *or to provide both types of information.*" [emphasis added]

[105] For a recent example of this general approach, see *Stewart* v. *Pettie*, [1995] 1 S.C.R. 131, 3 W.W.R. 1. In England, the House of Lords has rejected the two-tier approach in favour of an incremental one, based on precedent and distinct categories of liability for negligence. For instance, in *Caparo Industries plc* v. *Dickman*, [1990] 2 A.C. 605, [1990] 1 All E.R. 568 at 587 (H.L.) , in rejecting an invitation to formulate a general principle of law to determine the circumstances in which a duty of care is owed, Lord Oliver echoed the sentiments of his colleagues by noting: "Perhaps, therefore, the most that can be attempted is a broad categorization of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy." See generally Klar, *supra* note 91 at 133-50.

[106] [1978] A.C. 728 (H.L.).

[107] *Galaske* v. *O'Donnell*, [1994] 1 S.C.R. 670, [1994] 5 W.W.R. 1.

[108] *Winnipeg Condominium Corporation No 36* v. *Bird Construction Co.*, [1995] 1 S.C.R. 85, [1995] 3 W.W.R. 85.

such a *duty* does not lead to liability indeterminate in class, amount or time, to paraphrase another famous opinion.[109] The reasons given by Laskin J. in *Lambert*[110] and by La Forest J. in *Hollis*[111] lend support to this view, especially with respect to the importance of the defendant's foreseeability of the risk. The analysis in the latter case begins as follows: "It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge."[112] In a similar fashion, the Supreme Court recently stressed the importance of the defendant's foreseeability of the plaintiff and, at least in cases of pure economic loss, of policy considerations. In *Bow Valley Husky*, McLachlin J. observed that when a duty to warn is alleged, the issue is "whether the defendants ought reasonably to have foreseen that the plaintiffs might suffer loss as a result of use of the product about which the warning should have been made".[113] Moreover, when the plaintiff's loss is purely economic, McLachlin J. adds that policy considerations can either negate or confirm the existence of a duty to warn based on a relationship of proximity or neighbourhood.[114]

However, this approach views the issue of duty exclusively from the defendant's perspective. If the defendant could have foreseen the risk and the plaintiff, then the defendant should have warned the plaintiff absent any relevant policy considerations. Yet there is an important element missing between these two propositions: the materiality of the failure to warn. Would this added information have allowed the plaintiff and other consumers, to manage the risk associated with the defendant's product more effectively? In other words, could a warning have made a meaningful difference to the consuming public? The common law does not impose duties of care lightly. It does so on the footing that the defendant exposed the plaintiff to an unreasonable risk; not only a danger that the defendant *could* have avoided because it was foreseeable, but a danger that the defendant *should* have avoided because it was material to the plaintiff's interests. In a typical tort case, where the defendant's behaviour is imposed directly on the person or property of the plaintiff, such as when the defendant omits to ensure that a child wears a seatbelt or builds an apartment building without due care, the two issues are usually merged into one. In such a case, it is clear that the defendant's behaviour should be avoided in the future (materiality), but it is not clear whether the defendant is liable to the plaintiff (foreseeability). However, in a case where the negligent aspect of the defendant's behaviour is a failure to convey information to the plaintiff that would allow him or her to have greater control over the risks associated with a product, the two questions remain distinct. Because the

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[109] *Ultramares Corp.* v. *Touche*, 174 N.E. 441 at 444, Cardozo C.J. (N.Y. 1931).

[110] *Supra* note 4 at 574-75: "Where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger (in this case, by reason of high inflammability), although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user."

[111] *Supra* note 6.

[112] *Ibid.* at 652.

[113] *Supra* note 7 at 1248.

[114] *Ibid.* at 1239-46 and 1249-52.

plaintiff's will interposes itself between the defendant's conduct and the subsequent damage, in such a case, the common law cannot simply assume that the defendant's conduct is material to the plaintiff's interests. Irrespective of whether or not the defendant could have anticipated this result, it remains to be determined whether or not the defendant should, as a matter of law, have acted differently.

I shall illustrate the previous point by using a simple example. Suppose a consumer is injured when cleaning, by hand, the blade of a brand new blender. Suppose also that the manufacturer gave no warning about the dangers of cleaning a sharp blade without using some form of skin protection.[115] Is this risk foreseeable to a reasonable manufacturer and is the plaintiff someone that the defendant ought to have in contemplation? Although the answers are clearly "yes", it is equally evident that the manufacturer would escape liability for not warning consumers about the said danger. Most importantly, this result can be explained without referring to policy considerations. Some risks inherent in the use of a product are commonly known to all reasonable people -- a sharp blade has the potential of injuring its user if not handled with care! When a danger is obvious to reasonable consumers, it is clear, no duty to warn arises.[116] This principle has nothing to do with knowledge or foresight on the part of defendants, however, as manufacturers of blenders, for instance, are as much alive to the risk of injury as consumers themselves. Nor is this principle based on policy considerations anymore than the requirement of foreseeability is itself justified on such factors. The true rationale for the case-law dealing with obvious dangers is the fact that requiring manufacturer warnings, in such circumstances, would be immaterial.[117] The consumer

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[115] If this example seems far-fetched, see *Kirby* v. *Canadian Tire Corp.* (1989), 57 Man. R. (2d) 207 (Q.B.) [hereinafter *Kirby*].

[116] See G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1989) at 10: "What the law is concerned with is dangers which would not be appreciated by, or known to the ordinary user or consumer of the product, dangers which are foreseeable by the manufacturer or other transferor but not expected by the ultimate user or consumer." For example, in *Kirby*, *ibid.* the court held that there is no duty to warn that a blade located at the bottom of a food processor is sharp and should be handled with caution. See also *Yachetti* v. *John Duff & Sons Ltd.*, [1943] 1 D.L.R. 194, [1942] O.R. 682 (Ont. H.C.) (there is no duty to warn that pork must be cooked properly before being served); *Schulz* v. *Leeside Dev. Ltd.* (1978) 90 D.L.R. (3d) 98, 5 W.W.R 620 (B.C.C.A.) (there is no duty to warn of the well known dangers of riding on the bow of a boat); *Moffat* v. *Witelson* (1980), 111 D.L.R. (3d) 712, 29 O.R. (2d) 7 (H.C. Ont.) (eye doctors have no duty to warn about the risks of wearing spectacles during a touch football game); *Deshane* v. *Deere & Co.* (1993), 15 O.R. (3d) 225, 17 C.C.L.T. (2d) 130 (Ont. C.A.), (no liability where plaintiff fell into unguarded harvester machine while using it dangerously). Recently, in *Tabrizi* v. *Whallon Machine Inc.* (1996), 29 C.C.L.T. (2d) 176 at 189 (B.C.S.C.), it was observed that there is no duty to warn if the danger is "so clearly evident so as to make any warning silly". In the United States, the rule that no duty is owed to warn of obvious and generally known dangers is supported by an overwhelming majority of jurisdictions: *Glittenberg* v. *Doughboy Recreational Industries*, 491 N.W.2d 208 at 214 (Mich. 1992).

[117] The rationale is explained in *Restatement (Third) of Torts: Products Liability*, *supra* note 101, s. 2, comment i: "[W]arnings must be provided for inherent risks that reasonably foreseeable product users and consumers would deem material or significant in deciding whether to use or consume the product. Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those

of a blender, for instance, already possesses sufficient information, in the form of common sense, to enable him or her to manage the risks associated with cleaning the product's blade. Stated somewhat differently, the nature of the product should speak for itself. Requiring the manufacturer of a blender to give additional warnings to those already implicit would thus serve no meaningful function. Reasonable consumers have, before the fact, sufficient information to exercise control at all stages, from initial purchase to mitigation of damages.[118]

The role of materiality in shaping duty is prominent in the common law of informed consent, the area of law most analogous to the one under review. Like failure to warn, the negligent aspect of the defendant's conduct in cases such as *Reibl*[119] is a failure to convey information to the plaintiff. Like failure to warn, disclosure of this information is aimed at giving the plaintiff greater control over the risks he or she will likely encounter -- although this control is usually limited to the initial stage of decision-making. Like failure to warn, the consequences of the defendant's conduct are not imposed directly on the plaintiff, but require the participation of the patient's own will. Thus, like failure to warn, the issues of whether the defendant could have acted differently (foreseeability) and whether or not the defendant should have acted differently (materiality) remain conceptually distinct. Indeed, in determining whether or not a physician owes a duty to disclose the risks associated with a medical intervention prior to obtaining the patient's consent, the concept of foreseeability has played a secondary role in the case-law, in comparison to the materiality of the non-disclosure. In most reported decisions it is clear, based on the evidence, that the defendant either knew of the risk which materialized or should have known of its existence,[120] and that the defendant ought to have had the plaintiff in contemplation

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reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption."

[118] The doctrine of obviousness should be distinguished from the case-law holding that the plaintiff has either assumed the risk or has contributed to his or her damages, on the basis of knowledge possessed by the plaintiff. See *e.g. Labrecque* v. *Saskatchewan Wheat Pool* (1980), 110 D.L.R. (3d) 686, 3 W.W.R 558 (Sask. C.A.) (plaintiff contributorily negligent in planting his crops of flax too deep); *Meilleur*, *supra* note 18; (plaintiff contributorily negligent in not wearing protective eye-wear when handling a product known to be dangerous); *Pirie*, *supra* note 18 (plaintiff contributorily negligent in not preventing bacterial soft rot from spreading to non-sprayed potatoes); *Bow Valley Husky*, *supra* note 7 at 1230 (*in obiter*, the Court observes that the plaintiff's knowledge of the risk may be such as to make the maxim *volenti non fit injuria* applicable). In these cases, the focus is on the specific consumer before the court and the question is whether, in some manner, he or she was aware of the risk associated with the product which materialized and caused damage. If the plaintiff had such knowledge and nonetheless proceeded to use the product without taking proper precautions, the impact of the manufacturer's failure to warn will be reduced or extinguished altogether. The doctrine of obviousness, however, focuses on the knowledge and foresight of the reasonable consumer. If the risk is readily apparent to any reasonable person, no duty will be owed to anyone using the product -- period.

[119] *Supra* note 15.

[120] In *Hollis*, *supra* notes 25 and 26, the trial judge and McEachern C.J.B.C. agreed that the plastic surgeon had insufficient knowledge with respect to the risk of non-traumatic rupture to give rise to a duty to disclose. However, the majority at the Court of Appeal concluded that this risk should have been known in light of the available scientific data. This question was not

given the nature of their relationship. Yet the analysis of the physician's duty of care does not proceed to an open-ended policy analysis. Instead, the central issue becomes whether the alleged non-disclosure was material to the patient's assessment of the proposed medical treatment. As noted recently in *Ciarlariello*, "[t]he crucial question in determining the issue [of materiality] is whether a reasonable person in the patient's position would want to know of the risk."[121] If the information is immaterial, no duty of care arises in the circumstances, irrespective of the defendant's actual or presumed knowledge of the risk and plaintiff.[122] Accordingly, like the duty to warn, the duty to disclose focuses on the relationship between the information withheld and the plaintiff's interest in risk management.

The concept of materiality is also prominent in establishing the limits of the duty to disclose associated with insurance contracts. It is trite law that an insured owes a duty of utmost good faith to his or her insurer, including a duty to disclose all material risks in negotiating the insurance contract.[123] What risks are material? The test of materiality is what would influence the judgment of a prudent insurer in accepting the risk. As noted in *MacGillivray & Parkington on Insurance Law*, a material fact is "any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk".[124] What is meant by the expression "influence the judgment"? A bare majority of the House of Lords recently rejected the submission that a material risk is one that would have a "decisive effect" on the judgment of the reasonable insurer, noting the problems associated with implementing such a requirement.[125] Instead, the majority reasons in *Pan Atlantic Insurance* adopt the more flexible "effect on the mind" standard. Simply stated, the question is whether or not the reasonable insurer would have taken the information into account when assessing the risk, that is, when speculating about the risk.[126] Thus, the insured's duty is defined by reference to the objective reasonable insurer, a standard that questions the relationship between the undisclosed information and the process of risk management inherent to the insurance market.

These analogies do not suggest that decision causation is irrelevant once a determination of materiality is made. The plaintiff, in an informed consent case, must

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before the Supreme Court of Canada. Thus, the matter was sent back to trial in order to assess the materiality of the physician's non-disclosure and the issue of causation.

[121] *Supra* note 15 at 133. See also Linden, *supra* note 1 at 165-66.

[122] *Davidson*, *supra* note 17.

[123] *Carter* v. *Boehm* (1766), 97 E.R. 1162 (K.B.); *Coronation Insurance Co.* v. *Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622; C. Brown, *Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 1997) at 106.

[124] M. Parkington, gen. ed., *MacGillivray & Parkington on Insurance Law*, 8th ed. (London: Sweet & Maxwell, 1988) at 605. See also *Ontario Metal Products* v. *Mutual Life Insurance Co.*, [1925] 1 D.L.R. 583, [1925] 1 W.W.R. 362 (P.C.); *Henwood* v. *Prudential Insurance Co. of America*, [1967] S.C.R. 720, (1967), 64 D.L.R. (2d) 715 (S.C.C.).

[125] *Pan Atlantic Insurance Ltd.* v. *Pine Top Insurance Ltd.*, [1994] 3 W.L.R. 677 [hereinafter *Pan Atlantic Insurance*].

[126] *Ibid.* at 702, Lord Mustill (Lord Goff and Lord Slynn concurring). Lord Berwick and Lord Templeton believe that the "decisive effect" standard is a better reflection of the common law.

convince the trier of fact that a reasonable person, in the plaintiff's position, would not have consented to the medical treatment, but for the defendant's failure to disclose the material risks -- a "modified objective test to causation" recently confirmed by the Supreme Court in *Arndt*.[127] Moreover, in the insurance context, if the failure to disclose a material circumstance did not *in fact* induce the making of the insurance contract on the terms in question, the insurer is not entitled to rely on it as a ground for avoiding the contract. Stated differently, the insurer must prove actual inducement (causation) in addition to materiality (duty).[128] It should be noted that the House of Lords is ready to adopt a presumption of causation in the context of insurance law. In other words, the *insured* has the onus of proving that the insurer invoking a material non-disclosure would, in fact, have accepted the risk on identical terms but for the insured's failure to disclose.[129] As will be argued in another section, a similar approach should be adopted in the context of manufacturer failure to warn. For now, suffice it to say that, the duty to disclose imposed on both health care professionals and the insured is defined primarily with reference to risk management. In both instances, the duty is confined to material facts, that is, circumstances that a reasonable patient or insurer would want to know in assessing the risks associated with his or her choices. In both instances, general assumptions with respect to human behaviour are already made at the stage of duty; the duty to disclose is imposed because it *may* influence the judgment of *some* reasonable patients and insurers. Simply stated, in both instances the analysis of decision causation begins long before the question is posed.[130]

Returning to products liability, it is arguable that foreseeability of risk, foreseeability of plaintiff and policy factors are not the only relevant considerations in fixing the limits of a manufacturer's duty to warn. First and foremost, the information requested from the defendant must be material to the plaintiff's interest in risk management. The warning must convey some piece of information that reasonable consumers do not already possess given the nature of the product and its contemplated use. In other words, the sought-after warning must convey information that is somehow useful, once read and understood. To be sure, materiality has not yet achieved the same

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[127] *Supra* note 12 at 554. The test was originally formulated in *Reibl*, *supra* note 15 at 898-900. For a critical comment on *Arndt*, see D. Klimchuk & V. Black, "Torts -- Negligent Failure to Warn -- Causation: *Arndt* v. *Smith*" (1997) 76 Can. Bar Rev. 569.

[128] Lord Mustill *in Pan Atlantic Insurance*, *supra* note 125 at 713. On the "actual inducement" requirement, the House of Lords is unanimous.

[129] *Ibid.* at 714. See also H.N. Bennett, "Utmost Good Faith in the House of Lords" (1995) 111 L.Q. Rev. 181 at 185.

[130] Similar observations can be made with respect to the law of fiduciaries, another area where the concept of "materiality" is prominent. Consent is a well established defence to breach of a fiduciary duty: D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 1009. In order to be effective, however, the beneficiary's consent must be informed, that is, given "with full knowledge of what the beneficiary was concurring in and of his or her rights and all material facts": A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (Toronto: Carswell, 1992) at 760. As noted by Waters, *ibid.* at 1010, the extent of this disclosure requirement is measured principally from the plaintiff's perspective: "It would follow that it is irrelevant that the trustee was himself ignorant of any particular fact; it is the state of mind of the beneficiary that is in question."

status in products liability as it has in insurance law and in the law of informed consent, that is, materiality is not regularly viewed as an independent mechanism for controlling duty.[131] The growing popularity of the failure to warn theory,[132] however, will inevitably bring about changes in this respect. Simply consider the situation in the United States. A virtual flood of litigation has motivated American courts and legal scholars to develop new limits to liability for failure to warn, including materiality, since the conventional concept of foreseeability is clearly insufficient.[133] Canadian courts will likely move in the same direction given the "obvious danger" precedents that exist in products liability[134] and the similarities between the failure to warn theory and the failure to disclose theories found in both insurance law and medical liability.

The material nature of the warning not only reinforces the concept of foreseeability, but also serves to bridge the gap between duty of care and factual causation. Suppose a risk is material, but that it was not known to the defendant at the relevant time nor foreseeable to a reasonable manufacturer -- for instance, the risk of lung cancer associated with prolonged exposure to asbestos dust. Unless strict liability is the norm by which to judge the defendant's responsibility, holding a manufacturer liable in such circumstances offends one of the basic tenets of our civil system, namely, that liability should not be imposed irrespective of fault. If the defendant had knowledge of the risk or could have foreseen it, the defendant *chose* to act accordingly and a trier of fact can assess the defendant's choice in light of the prevailing community standards of safety. If the risk was unknown and unforeseeable, however, the defendant's actions are simply that; they are not true choices and there is nothing for the trier of fact to evaluate, beyond the *consequences* of the defendant's actions. In short, liability for fault is liability based on choices, actually or presumably informed, and not liability based on results. Now suppose a risk is known or foreseeable to the defendant,

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[131] However, some recent products liability cases are referring to materiality in this sense: see *Double Bar*, *supra* note 24 at 206.

[132] An increasing number of reported products liability cases involve allegations of failure to warn, alone or in combination with allegations of defects in design or manufacture: see L.N. Klar, "Recent Developments in Canadian Law: Tort Law" (1991) 23 Ottawa L. Rev. 177 at 224-25; S.M. Waddams, *Products Liability*, 3d ed. (Toronto: Carswell, 1993) at 37; Linden, *supra* note 1 at 597.

[133] Following a relatively uncontroversial beginning, the law of failure to warn became the focus of many critical accounts during the last decade, all lamenting the ease with which plaintiffs can successfully establish the necessary elements of a cause of action: see *e.g.* P.W. Huber, *Liability: The Legal Revolution and its Consequences* (New York: Basic Books, 1990) at 51-58; G.L. Priest, "Products Liability Law and the Accident Rate" in R.E. Litan & C. Winston, eds., *Liability: Perspectives and Policy* (Washington: Brookings Institute, 1988) at 217-20; A. Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis" (1988) 97 Yale L.J. 353 at 398; Henderson & Twerski, *supra* note 16; American Law Institute, *supra* note 104 at 38-92; M.S. Jacobs, "Toward a Process-Based Approach to Failure-to-Warn Law" (1992) 71 N. Car. L. Rev. 121 at 127-65. For a different perspective on failure to warn, see M. McLaughlin Hager, "Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law is Wrong" (1994) 61 Tenn. L. Rev. 1125; E. Wertheimer, "Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back" (1992) 60 Cin. L. Rev. 1183.

[134] *Supra* note 116.

but immaterial with respect to optimal risk management -- for instance, the risk associated with manually cleaning a knife's blade. In this scenario, the defendant has chosen to supply a product without giving a warning about a known and foreseeable danger associated with the product's use. Accordingly, it is possible in theory to evaluate the defendant's conduct and to determine whether or not the manufacturer acted negligently in making this choice. Yet, such a factual determination would be unnecessary because, as a matter of law, the only justifiable conclusion is one absolving the manufacturer of liability. Indeed, the alternative would offend another basic tenet of our civil system, namely, liability should not be imposed for consequences not actually caused by the defendant's actions or omissions. Given the nature of the product and its contemplated use, the allegedly undisclosed risk is, in reality, out in the open for any reasonable person to appreciate. The risk is obvious, not hidden. Since an implicit warning has already been given by the condition of the product, thereby allowing consumers to manage for themselves the risks associated with the said product, the only reasonable conclusion is that an additional warning would not have made any difference whatsoever. The plaintiff would, without a reasonable doubt, have behaved in the exact same way if a detailed warning about the sharpness of the knife's blade had been given. Lastly, suppose the risk posed by a product is both foreseeable and material -- for instance, the risk that a breast implant may rupture during non-traumatic activities. This conclusion implies that a reasonable woman would have wanted to know about the danger, not simply for the purpose of knowing, but for the purpose of personally managing the risk inherent in the product's use. This assumption is causal in nature. The duty to warn imposed on the manufacturer, in these circumstances, is a finding that adequate warnings could influence the choices of some women, whether at the stage of purchase or thereafter.

To summarize this section, the standard of causation adopted by the Supreme Court views decision causation in isolation. The subjective approach limits the potential of "materiality", a concept that shapes a manufacturer's duty to warn in accordance with general assumptions about consumer behaviour. Materiality in itself can resolve most inquiries with respect to factual causation -- it is reasonable to assume that the plaintiff would have somehow managed the risk differently in the presence of an adequate warning. Stated somewhat differently, it is reasonable to assume that the plaintiff is not a marginal consumer, but one that acts in conformity with the information aimed at protecting his or her own interests. Additional speculation about the plaintiff's particular behaviour should remain the exception, rather than become the norm.

B. Special Nature of Decision Causation

The relationship between duty of care and factual causation is, of course, not limited to areas of the common law dealing with disclosure of material information. A legal duty is never recognized in a vacuum, without reference to the link between an alleged breach and subsequent damages. For instance, drivers must not operate their vehicles under the influence of alcohol or narcotics. This imperative, as far as the law of torts is concerned, is based exclusively on generalizations about the causal connection between alcohol and automobile accidents. With plenty of evidence in support, our society assumes that drunk drivers are a threat to the security of other people who use public highways. Criminal law may offer additional reasons for recognizing this duty, since it can intervene regardless of whether or not a risk actually materialized. Tort law, however, proceeds on the ground that a breach of duty is indeed material to the plaintiff's interests. This being said, the fact that a notion of materiality is behind all private law duties of care does not excuse the plaintiff from establishing

factual causation. In our example, we assume that the defendant's condition *may* be related to the plaintiff's injury, so as to justify a duty of care. The plaintiff must still prove, however, that the defendant's condition was *in fact* the cause of the plaintiff's damages. Why should the plaintiff in an action based on a manufacturer's failure to warn be treated differently? Assuming that the defendant did indeed fail to convey information material to the plaintiff's interests, why should the plaintiff be relieved from establishing that he or she would have acted on said information had it been given?

Three characteristics define decision causation. These features distinguish a manufacturer's failure to warn from other forms of negligence and, more importantly, they justify treating factual causation in this area of the common law with a high degree of pragmatism. The first characteristic relates to the counterfactual nature of the inquiry. When someone operates a vehicle under the influence of alcohol, for instance, it is possible in theory, and often in practice, to establish causation with scientific certainty. The analysis is factual, and thus subject to proof beyond all reasonable doubt. We know the defendant was driving under the influence. We know the plaintiff was injured in an automobile accident. In order to resolve factual causation, we simply *remove* alcohol from the equation (*i.e.* remove a fact) and ask whether or not the accident would have happened in any event. This analysis is speculative, yet it can be based on evidence demonstrating with certainty the *actual effect* of the alcohol on the judgement of the defendant at the time of the accident.

The nature of the causal inquiry is fundamentally different in an action for failure to warn. Simply put, there is no way of establishing in theory, let alone in practice, a scientific link between the tortious aspect of the defendant's conduct and the damages of the plaintiff. We know that the manufacturer failed to warn of a material risk associated with the use of its product. We know that the plaintiff was injured while using the product. In order to resolve factual causation, we must *add* an adequate warning to the equation (*i.e.* add a hypothesis) and ask whether or not the accident would have happened in any event. This analysis is entirely speculative, because no evidence whatsoever can establish with certainty the *actual effect* of the missing warning on the behaviour of the plaintiff at the time of the accident. This distinction does not imply that courts should abstain from speculating about causation in omission cases, as they must do. The point is simply that decision causation is counterfactual in nature and, as such, it is fundamentally different from the causal inquiry involved in other tort actions.[135] More importantly, the distinction is not one of degree, as suggested recently by McLachlin J.,[136] but one of kind. Scientific certainty with respect to causation is achievable in a negligent action or misfeasance case, even though such a standard is not required by law. Scientific certainty with respect to causation is impossible in a negligent omission or nonfeasance case, regardless of the circumstances. Stated somewhat differently, there is a fundamental difference between a *scientific fact* and an *educated guess*, the respective best case scenarios in both contexts.

In *Hollis*, unfortunately, the Supreme Court fails to mention the counterfactual nature of decision causation. As already noted, both the majority and dissent proceed on the basis that usual tort principles apply to an action for failure to warn, namely, that the plaintiff must establish that his or her damages would not have occurred but for the defendant's inadequate warning. The debate between La Forest J. and Sopinka J. with respect to the appropriate standard for establishing causation and its application to the facts at hand is the only sign, from the Supreme Court, that causation is problematic in

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[135] See Strassfeld, *supra* note 12 at 340.

[136] *Arndt*, *supra* note 12 at 563.

this context. This debate is a testament to the reality perceived by Henderson and Twerski, namely, that the "good" decision causation case is remarkably similar to the "bad" decision causation case.[137] In fact, when both standards are compared, neither the objective approach nor the subjective approach offers a more reliable mechanism for speculating about what might have been.[138] A guess based on a plaintiff's testimony is not any more or any less educated than a guess based on assumptions about the mythical reasonable person -- they simply address different hypotheses. The true distinguishing feature between both standards, is the amount of cases that will likely succeed at trial; the objective approach offers an independent means to control liability, whereas the subjective approach relegates this control to existing rules of evidence.

In an article entitled "Causation in Fact in Omission Cases", Professor Fischer explains that omission cases create intractable proof problems with respect to causation, in light of the counterfactual and hypothetical nature of the inquiry.[139] He argues that courts "can solve these problems satisfactorily only by reference to policy; pure factual analysis simply does not provide an adequate answer".[140] Professor Strassfeld makes a similar observation in his review, "If...: Counterfactuals in the Law", concluding that regardless of what the common law says, it is impossible to know what might have been in the same way as we know hard facts.[141] Unlike Professor Fischer, however, he argues that it is still possible for courts to make intelligible and well-supported assertions about what might have happened, provided that they do so in an express manner; that is, provided that they clearly identify the counterfactual questions posed and explain why certain answers are chosen over others.[142] Although the subjective approach to causation was likely *adopted* by La Forest J. for reasons of policy,[143] the subjective test still requires that a trier of fact *resolve* individual disputes in factual terms. The Supreme Court defined the starting point for the analysis, but did nothing to solve the problems of proof that arise when one speculates about what might have been. In short, the Court should have been more sensitive to the counterfactual nature of decision causation.

The second distinguishing feature of decision causation is the involvement of the plaintiff, between the defendant's fault and the resulting damages. A counterfactual analysis is required in all omission cases in order to resolve cause-in-fact. When an employer negligently fails to equip scaffolds with adequate railings, for instance, we must speculate about what would have happened, but for this breach of duty. If an employee working on the said scaffold fails to advise his employer about his epileptic condition, has an attack and falls to his death, as in *Cork* v. *Kirby MacLean Ltd.*,[144] we must also speculate about the effect of the employee's own omission. The same applies when a commercial host fails to take measures for ensuring the safety of a client who

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[137] *Supra* note 16.

[138] But see Sopinka J. in *Hollis*, *supra* note 6 at 689-90.

[139] D.A. Fischer, "Causation in Fact in Omission Cases" [1992] Utah L. Rev. 1335 at 1335 and 1342-43.

[140] *Ibid.* at 1335. See also R.E. Keeton, "Warning Defect: Origins, Policies, and Directions" (1997) 30 U. Mich. J. Law Ref. 367 at 382-83.

[141] *Supra* note 12 at 340.

[142] *Ibid.*

[143] *Supra* notes 46-53 and accompanying text.

[144] [1952] 2 All E.R. 402, 2 T.L.R. 217 (C.A.) [hereinafter *Cork* cited to All E.R.].

is under the influence of alcohol, like in the famous cases *Jordan House* v. *Menow*[145] and *Crocker* v. *Sundance Resorts*.[146] Scientific evidence cannot establish with certainty the actual effect of such omissions. Instead, triers of fact must rely on general assumptions about human behaviour and the laws of nature.

In *Cork*, for instance, the trial judge found that only the employer's fault was a cause-in-fact of the employee's death, but the Court of Appeal took an opposite view. Lord Denning believed that the employer's conduct was "more doubtful a cause"[147] of the accident, when compared to the employee's own fault -- "clearly one of the causes of his death".[148] According to him, "but for" the former fault, the accident *might* not have happened, whereas "but for" the latter fault, the accident *would* not have happened, as "he would never have been on this platform at all and would never have fallen".[149] With respect, the analysis of Lord Denning is flawed because he fails to appreciate that *both* statements are counterfactual in nature, and thus entirely speculative. Lord Denning camouflages his assumptions about the effect of the employee's fault behind a finding of fact, including the view that an employer would never knowingly force an employee to work under dangerous conditions. However, this conclusion is no less speculative than Lord Denning's statements about the effect of the employer's fault. To be sure, one hypothesis may be more plausible than another -- although such an evaluation can be highly subjective in a case such as *Cork*. The important point is that neither statement about what might have been can achieve the status of fact, as there is no way of verifying the actual impact of either omission in the circumstances at hand.

When the defendant's omission consists of a failure to convey material information to the plaintiff, another dimension is involved. In the three decisions noted above, *Cork*, *Jordan House* and *Crocker*, the duty of care imposed on the employer and commercial hosts is material to the plaintiffs' interests, irrespective of the beliefs and attitudes shared by employees and invitees as groups. The duty is material because the common law assumes, based on a mixture of common sense and science, that an obligation to provide safe scaffolds and to control drunken guests will reduce the risks associated with work and alcohol respectively. This goal of accident prevention can be advanced, regardless of whether or not employees and clients are aware of such safety measures. A duty to warn, on the other hand, is purely academic without the active involvement of consumers. The extent of the duty is shaped in conjunction with the reasonable expectations of consumers. More importantly, communicating material dangers, by itself, does nothing to advance risk management unless consumers actually read, understand, remember and act on the warnings furnished. Decision causation is itself a recognition of this distinction. In *Cork*, *Jordan House* and *Crocker*, for instance, asking what the respective plaintiffs would have done, but for the defendants' negligence, is unnecessary given the basis for the duty of care.[150] Simply put, decision causation is irrelevant unless the plaintiff's will is the element joining the defendant's fault and the resulting damages.

This being said, the counterfactual analysis in a failure to warn context is

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[145] [1974] S.C.R. 239, 38 D.L.R. (3d) 105 [hereinafter *Jordan House* cited to S.C.R.].

[146] [1988] 1 S.C.R. 1186 [hereinafter *Crocker*].

[147] *Supra* note 144 at 407.

[148] *Ibid.*

[149] *Ibid.*

[150] See *e.g. Crocker*, *supra* note 146, where the Court rejects an invitation to speculate about the probable behaviour of the plaintiff, but for the ski centre's failure to take steps to prevent him from participating in a dangerous sporting activity while intoxicated.

particularly challenging. The trier of fact cannot simply add one hypothesis to the equation (*i.e.* an adequate warning) and ask what would have happened but for the defendant's breach. The trier of fact must add another hypothesis regarding the plaintiff's own behaviour in light of the warning. The ultimate question can be stated as follows: assuming that the warning was (1) adequate *and* (2) read, understood and remembered at the relevant time, would the plaintiff have heeded the warning and made a different choice? This highlights another problem with the subjective approach adopted in *Hollis*. By asking triers of fact to make specific findings about what might have been, the Supreme Court is effectively offering manufacturers an avenue for escaping liability. Defendants may challenge the validity of this second hypothesis, in addition to challenging the plaintiff's testimony. Neo-Canadians who do not understand English and French, for example, cannot benefit from the failure to warn theory of liability under a purely subjective approach.[151] In cases involving prescription-based medical products, such as *Hollis*, this concern may be overstated. Indeed, it is difficult to challenge the assumption that the learned intermediary prescribing the product would have communicated and explained the risks to the consumer/patient, had they been properly disclosed by the manufacturer. The Ontario Court of Appeal adopted a rebuttable presumption to this effect in *Buchan*[152] and the Supreme Court of Canada, in *Hollis*, made this presumption virtually irrefutable.[153] In all other cases, however, the subjective approach to decision causation may have an unwanted side-effect. This approach may justify *ex post facto* attacks on the plaintiff's behaviour, similar to those that occur when a defendant pleads contributory negligence. Yet the consequences of a failure to read, understand or remember a product warning may be greater than the consequences of negligence. Under a subjective test, such a failure is evidence that there is no decision causation between the defendant's negligence and the plaintiff's damages.

The third characteristic of decision causation, in the law of manufacturer failure to warn, stems from the distinctiveness of product warnings as a means for communicating information. The observations made above, with respect to the involvement of the plaintiff and the counterfactual nature of the causal analysis, apply *mutatis mutandis* to other areas of law requiring disclosure of material information. In the law of informed consent to medical treatment, for example, the patient must make a choice of his or her own volition following disclosure and when this choice is not adequately informed, courts must speculate about the likely conduct of a reasonable person in the patient's position in order to assess the causal link between the physician's fault and the patient's damages.[154] Likewise, an insurer is never forced to accept a risk. Between an insured's failure to disclose all material circumstances and a subsequent claim, the insurer made a decision of its own volition to accept coverage. Here again, the common law requires evidence of a counterfactual nature before granting a remedy to the uninformed party. The insurer must prove actual inducement in addition to materiality, that is, the insurer must prove that its own decision, like that of a reasonable insurer, would have been different but for the insured's failure to communicate all material risks.[155] This being said, there is an important distinction between a

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[151] See generally T.H. Lee, "A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers" (1994) 47 Vand. L. Rev. 1107.

[152] *Supra* note 22.

[153] *Supra* note 6 at 684-85.

[154] See *Reibl, supra* note 15; *Ciarlariello, supra* note 15; *Arndt, supra* note 12.

[155] See *Pan Atlantic Insurance, supra* note 125.

manufacturer's duty to warn, on the one hand, and the duty to disclose imposed on health care professionals and the insured, on the other; the medium used for communicating risks.

In the medical context, risks are disclosed face-to-face. The physician has an opportunity to assess whether or not the patient understands the benefits and corresponding dangers and the patient has an opportunity to ask any questions deemed relevant. The treatment normally follows this conversation and when a longer delay occurs, the disclosure can easily be repeated.[156] In the insurance context, risks are disclosed during pre-contractual negotiations. The insurance industry creates standard application forms for various insurance categories. These forms contain the questions deemed relevant by the industry. During the negotiation process, the insurer is usually represented by an insurance agent or an employee who may ask additional questions. This expert has the opportunity to review the insured's application and ask for clarifications, when deemed appropriate. Moreover, the application form is usually reviewed by the insurer prior to acceptance. At common law, the duty to disclose does not apply to changes in material circumstances that follow the signature of the insurance contract.[157] However, this extension is recognised by legislation[158] and, in any event, most insurance contracts are short-term, thereby reviving the duty to disclose upon renewal. A product warning, on the other hand, is a unilateral method of communication that loses much of its effectiveness with the passing of time. Product warnings are generic and impersonal. They are given to consumers as a class rather than communicated to consumers as individuals. Unlike the relationships described above, there is no personal communication between manufacturers and consumers. Even recalls of defective products and post-sale warnings are somewhat impersonal, as consumers are difficult to trace unless they are known users, such as registered first-hand users. Unlike the relationships described above, the manufacturer has no opportunity to assess the consumer's understanding of the risk, or to ensure that the warning is read and remembered at the relevant time. There is even less opportunity for ensuring that the warning is heeded. Moreover, the consumer has no opportunity to ask questions that are not covered by the warning, although he or she may often call a toll-free number for additional information. Finally, a product warning has a limited life. Instruction manuals, labels and engravings can all disappear long before a product becomes obsolete or ceases to function. In such a case, the effectiveness of the warning is measured by the memory of the user, assuming that said user had a previous opportunity to read the warning. Of course, constraints of a practical nature explain most of the differences between the disclosures that occur in medicine, insurance, and products liability. These justifications aside, the fact remains that a warning is less a process than an episode in products liability.[159]

How are the observations made in the previous paragraph relevant to decision causation? At the outset, I am not suggesting that warnings are ineffective means for communicating risks or, stated differently, that warnings fail to accomplish their general goal of risk management. Some scholars have argued that product labels play a relatively minor role in informing the choices made by consumers when purchasing a

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[156] See *e.g. Ciarlariello, supra* note 15, where the plaintiff was informed of the risks a total of six times.

[157] Brown, *supra* note 123 at 121.

[158] *Ibid.* at 122-25.

[159] For the view that a product warning *should* be viewed as a process, see Jacobs, *supra* note 133.

product, when using a product in a given manner, and when faced with sudden emergencies;[160] a thesis that has not gone without challenge.[161] However, for the purposes of this article, it is sufficient to note that a choice can be informed from a legal standpoint without necessarily being informed from a functional standpoint. Consider the duty to disclose applicable to health care professionals and the insured. In both settings, disclosure is immediately followed by a period reserved for decision-making. Both the patient and insurer have a specific opportunity to decide whether or not to undergo the recommended treatment or to accept coverage. Assuming that all material circumstances are disclosed, this decision will be informed from a legal standpoint. This does not mean that the patient and insurer *actually* weighed *all* of the information in reaching their respective decisions, that is, that they conducted a thorough cost/benefit analysis, but simply that they possessed enough information to make a legally binding choice. *A fortiori* the same is true in products liability, where there is no period of time earmarked for decision-making. Consumers can only make informed choices, with respect to a given product, once adequate warnings are given. Yet the physical presence of a label does nothing, in itself, to ensure that consumers actually manage the risk to which they are exposed. In practice, the only effect that is guaranteed is that the manufacturer will be absolved from liability. Stated somewhat differently, warnings contribute to risk management by giving consumers an *opportunity* for assessing the risks associated with a product or an intended use.

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[160] See H. Latin, "'Good' Warnings, Bad Products, and Cognitive Limitations" (1994) 41 U.C.L.A. L. Rev. 1193. Product warnings that meet the legal standard of "adequacy" often prove ineffective, according to Professor Latin, because consumers often fail to read product warnings, they often fail to understand the warnings they read and they often fail to follow the warnings that are both read and understood. A number of factors explain each failure as shown by the following outline of Latin's article. *Failure to read product warnings*: (1) functional illiteracy; (2) predictably inattentive or incompetent user groups; (3) misplaced or unavailable directions; (4) reliance on explanations by intermediaries; (5) reliance on general knowledge and experience; (6) information overload; and (7) competing demands on time and attention. *Failure to understand adequate warnings*: (1) imperfect tradeoffs among detail, clarity, and impact; (2) textual ambiguity; (3) uncertainty about the consequences of misuse; (4) inadequate evaluative expertise; (5) individual variations in capabilities, motivations and, beliefs; (6) cognitive heuristics and biases; and (7) competing demands on time and attention. *Failure to follow adequate warnings*: (1) imperfect memory; (2) overconfidence; (3) reflexive actions during emergencies; (4) disregard of low-probability risks; and (5) lack of manufacturer credibility. See also Twerski & Cohen, *supra* note 9 at 626-41, outlining a number of factors that demonstrate, in their view, that the legal system is unable to predict how information can influence a person's decision. These factors include the illogical processing of information, the manner in which said information is presented, the prior beliefs and information of the decision maker, and a broad range of psychiatric factors which help shape decision making. Twerski and Cohen conclude that decision causation is non justiciable. See also L. Noah, "The Imperative to Warn: Disentangling the 'Right to Know' from the 'Need to Know' About Consumer Product Hazards" (1994) 11 Yale J. on Reg. 293 at 381-91, arguing that indiscriminate and cumulative warnings about trivial risks are counterproductive because they dilute more important warnings and encourage some consumers to overreact. See generally N.K. Malhotra, "Reflections on the Information Overload Paradigm in Consumer Decision Making" (1984) 10 J. Consumer Res. 436; D.L. Scammon, "'Information Load' and Consumers" (1977) 4 J. Consumer Res. 148.

[161] See *e.g.* K.I. Weissman, "A 'Comment J' Parry to Howard Latin's 'Good' Warnings, Bad Products, and Cognitive Limitations" (1996) 70 St. John's L. Rev. 629 at 643-82; D.M. Grether *et al.*, "The Irrelevance of Information Overload: An Analysis of Search and Disclosure" (1986) 59 S. Cal. L. Rev. 277 at 288-94; P.D. Rheingold & S.B. Feinglass, "Risk-Utility Analysis in the Failure to Warn Context" (1997) 30 U. Mich. J. Law Ref. 353 at 360-61.

This being said, it is important to approach decision causation in a realistic manner. Given the debate about the functionality of product labels, it seems somewhat artificial to speculate, on a case-by-case basis, about the plaintiff's behaviour but for the defendant's failure to warn, as the subjective approach adopted by the Supreme Court requires. The risk has materialized and, since causation is essential to liability, it is difficult to imagine why anyone bringing an action for damages would testify against his or her interests. More importantly, the plaintiff's credibility offers no means for distinguishing a good causation case from a bad one. After the event, consumers can believe with utmost good faith that they would have used the opportunity given to them by product labels even if, as a general rule, they merely glance at product labels and hope that none of the specified risks materialize, as many reasonable people undoubtedly do. The subjective standard is particularly odd, given that the common law adopts approaches to decision causation in the fields of insurance law and informed consent to medical procedures that rely less on a counterfactual analysis, even though disclosure in both areas involves an actual process of communication. Indeed, by asking what a reasonable patient would have done in the plaintiff's position if properly informed,[162] the modified objective standard adopted in the medical context recognizes the limits of the fact finding process. Following an objective approach, the inquiry focuses less on the actual impact of the defendant's fault, than on the reasonability of holding the defendant liable for the plaintiff's losses. The plaintiff can recover only if it is reasonable to assume, given the circumstances, that he or she would have made a different decision but for the defendant's fault. In other words, the counterfactual question is never actually answered in medical liability -- because it is never actually posed. The same can be said about disclosure in the insurance context. Recently, the House of Lords held that an insurer cannot avoid a contract on the ground of a material misrepresentation if the said insurer was not actually induced by the insured's failure to disclose.[163] In other words, both materiality (*i.e.* what would a reasonable insurer have done) and decision causation (*i.e.* what would the plaintiff have done) must be proved. Although this approach relies on a subjective standard with respect to actual inducement, the House of Lords also suggested that it is reasonable to assume that a given insurer would behave according to industry standards.[164] Thus, once the insurer proves materiality, the onus is then on the insured to prove that his or her insurer would *not* have rejected the risk or required a higher premium. In essence, this holding suggests that decision causation, although an important element, will rarely be litigated in the insurance context given the evidential difficulties associated with challenging the premise that insurers generally follow industry practices. Materiality will remain the front on which most failure to disclose battles will be won and lost. Having said this, why should products liability address a counterfactual question, when such an analysis is clearly avoided in other analogous areas? From a logical standpoint, given the relatively sporadic manner in which product labels transmit information to consumers, courts ought to be less anxious to question the plaintiff's probable behaviour, than they are in medical liability and insurance law.[165]

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[162] See *Reibl*, *supra* note 15; *Ciarlariello*, *supra* note 15; *Arndt*, *supra* note 12.

[163] *Pan Atlantic Insurance*, *supra* note 125.

[164] *Ibid.* at 714; Bennett, *supra* note 129 at 185.

[165] Courts also avoid speculation in the law of fiduciary duties. As previously noted, fiduciaries must disclose all material facts to their beneficiaries in order to rely on consent as a defence for their actions: *supra* note 130. In *Brickenden* v. *London Loan & Savings Co.*, [1934] 3 D.L.R. 465 at 469, 2 W.W.R. 545 at 550-551 (P.C.), the Privy Council held that the sole issue

To summarize this section, the relationship between duty and factual causation is distinct in the field of liability for failure to warn. First, in order to establish that what is material to consumers (duty) would have been material to the plaintiff (decision causation), a trier of fact must conduct a counterfactual analysis, as opposed to a factual analysis. Thus, this form of causation is always an issue for litigation. Second, the hypothesis that must be verified in order to establish decision causation in this field, namely, that the warning would have been read, understood, remembered and acted on, is particularly open to challenge. This is so, given the plaintiff's necessary involvement between breach and damages and given the number of variables that determine the actual impact of a warning on any individual. Third, there is an important distinction between a warning's adequacy and a warning's functionality. This gap is relatively wide in products liability because disclosure, in this area, does not involve any form of actual communication and because there is no period of time earmarked for decision-making. In light of these features, is it worthwhile to scrutinize a consumer's probable behaviour, but for the manufacturer's failure to warn? I submit that causation should be litigated in exceptional cases, where it is plainly unreasonable to impose liability on a manufacturer for a given loss. Stated differently, instead of treating decision causation as a question of fact that must be resolved in every case, the common law should identify the specific circumstances that either warrant or negate liability for failure to warn.

C. Towards a Pragmatic Approach to Decision Causation

At this point, it is useful to restate the issue. Assume a manufacturer has failed to warn a consumer about a material risk associated with the use of one of its products. This finding implies that reasonable consumers would have wanted greater information in order to manage, for themselves, the dangers they would have inevitably encountered when using this product. Assume also that the said consumer was injured or suffered property damage when the risk in question materialized and that these damages were a

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in determining a fiduciary's duty, in this respect, concerns the material nature of the information withheld:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, *he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction*, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. *Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.* [Emphasis added]

Essentially, the Privy Council held that "decision causation" or "inducement" are not required elements, when a fiduciary fails to disclose material information. This finding has been described as going "a bit too far" in the name of disclosure: J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 129, n. 9. More recently, some courts have softened this rule by suggesting that a presumption of decision causation exists in this area, and that the burden of disproving causation is placed on the fiduciary: *Commerce Capital Trust Co.* v. *Berk* (1989), 68 O.R. (2d) 257 at 261, 57 D.L.R. (4th) 759 at 763-4 (Ont. C.A.); *Huff* v. *Price* (1990), 76 D.L.R. (4th) 138 at 173, 46 C.P.C. (2d) 209 at 249 (B.C.C.A.). In both cases, however, it is implicit that compelling evidence is required to prove that the beneficiary would not have modified his or her behaviour, but for the fiduciary's failure to disclose and that speculation will not suffice.

reasonably foreseeable consequence of the defendant's negligence. These findings imply that both injury causation and remoteness are beyond dispute. Thus, the issue addressed in this article and in *Hollis* is whether a negligent manufacturer should escape liability for damages caused by a product supplied to the public and found to be defective. According to the Supreme Court of Canada, the manufacturer should not be found liable unless the plaintiff can prove, as a matter of fact, that he or she would have managed the risk differently, had the warning been adequate. As previously noted, the reasons for judgment given by the majority do highlight a number of policy considerations, when opting for a subjective approach to decision causation instead of an objective approach. However, by focussing on these alternate standards, the Court fails to acknowledge that other avenues exist for limiting liability for failure to warn and that strong considerations point in their direction. As will be shown in this section, academics have suggested a number of alternatives to the *status quo* that, with one exception, have gone unnoticed by the Supreme Court.[166] To be sure, none of these solutions are free of difficulties. However, the debate that they uncover is further evidence that, in the final analysis, the best approach to resolving the dilemma inherent in decision causation is to acknowledge its existence and to proceed with caution on a case-by-case basis.

The first point to emphasize is that decision causation is only one of two forms of factual causation.[167] In order to succeed at trial, a plaintiff must prove that his or her damages are attributable to a risk inherent in the product's use that is both foreseeable and material. For instance, in *Buchan*, there was considerable debate at the trial level about whether the plaintiff's stroke and subsequent paralysis was caused by her ingestion of the defendant's contraceptive pill.[168] The trial judge reviewed the conflicting expert evidence and found, on a balance of probabilities, that the pill was a material cause-in-fact of the stroke.[169] The fact that the Court of Appeal refused to alter this finding[170] and later adopted a subjective approach to decision causation[171] does not limit, in any way, the possibility of a successful challenge to injury causation in a different set of circumstances. Indeed, regardless of whether a plaintiff's theory is based on an alleged manufacturing defect, design defect, or failure to warn, the defendant is free to submit evidence questioning the causal link between its *product* and the plaintiff's *damages*.

Should injury causation be sufficient to establish liability for failure to warn, assuming the defendant has given an inadequate warning about a foreseeable and material risk? A number of academics have argued that factual causation should focus solely on the link between the manufacturer's product and the plaintiff's losses or, stated

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[166] See generally Strassfeld, *supra* note 12 at 352-71, discussing the various "techniques of avoidance" and "attempts to resolve" the counterfactual question.

[167] *Supra* note 9 and accompanying text.

[168] (1984), 46 O.R. (2d) 113, 8 D.L.R. (4th) 373 (H.C.).

[169] *Ibid.* at 123: "Based on a consideration of all of the evidence and weighing the evidence of the haematologists, epidemiologists and neurologists, I have come to the conclusion that Mrs. Buchan's use of oral contraceptives probably caused or, at the very least, materially contributed to her stroke."

[170] *Supra* note 22.

[171] *Ibid.*

somewhat differently, on the link between *supply* and damages.[172] Consider the facts in *Hollis*. On the one hand, the product supplied by the defendant was defective, in the sense that it did not contain an adequate warning with respect to the risks of accidental rupture. On the other hand, the plaintiff was injured as a result of using the defendant's product, in a manner compatible with the information provided by the latter. For some, these facts are sufficient to establish causation since, without the defendant's breach of duty, the plaintiff would not have been injured by a *defective* product. This approach has some merit, as it forces manufacturers to assume responsibility for the presence of their defective products in the marketplace. The supply of consumer products is, first and foremost, a profit making venture for those involved. By disregarding decision causation altogether, this approach treats product related damages as part of the costs of doing business in an unsafe manner. Simply put, the *potential* inequity of holding manufacturers liable for failure to warn irrespective of how their consumers would otherwise have behaved, is outweighed by the *definite* inequity of allowing manufacturers to escape liability and thus profit from marketing practices that fail to meet minimal standards of safety thereby exposing many people to risk. Moreover, by forcing manufacturers to internalize the costs of *all* accidents associated with their defective products, including those that may have occurred but for their warnings, the common law would promote the policy goals generally associated with products liability, namely, deterrence, loss distribution, compensation and fairness towards those who rely on consumer products.[173]

This being said, predicating liability on injury causation, without more, involves an express departure from established tort theory. As Professor Fleming observes, factual causation concerns itself with whether the defendant's *negligence*, rather than his or her general conduct, is the cause of the plaintiff's losses.[174] What makes a manufacturer negligent, in our context, is the failure to convey information about risks inherent in the use of its products. Arguably, injury causation never addresses the fundamental question regarding factual causation, namely, whether the inadequate warning is itself linked to the subsequent losses; injury causation merely distinguishes a regime of civil liability from one of insurance. Stated somewhat differently, products are dangerous regardless of the warnings given and, unless their dangers stem from independent manufacturing or design defects, a causal link between risk and loss is insufficient to uphold a regime of liability *based on* fault. Such a regime implies that defendants should not be found liable without fault *and* that they should only answer for the actual consequences of said fault. The same would apply in a regime of strict liability, where liability must nevertheless be *based on* a defect in

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[172] See *e.g.* Price, *supra* note 92 at 1346-53, arguing in favour of liability based on causation between the defendant's product and the plaintiff's damages, regardless of fault or defect; Green, "Strict Liability Under Sections 402A and 402B: A Decade of Litigation" (1976) 54 Tex. L. Rev. 1185 at 1190-91, arguing that in strict products liability, it is the supply of the product that must cause injury; Phillips, "Product Misrepresentation and the Doctrine of Causation" (1974) 2 Hofstra L. Rev. 561 at 562-63, arguing that when a consumer is injured as a result of using a product in a manner that is consistent with the safety information provided, then the supply of the product has caused the injury; Pittenger, *supra* note 99, arguing that the causal nexus should be between the risk and the injury, rather than between the failure to warn and the injury.

[173] See *e.g.* Price, *ibid.* at 1353-55; Green, *ibid.*; Phillips, *ibid.*

[174] Fleming, *supra* note 1 at 194-95; Wright, *supra* note 94 at 1750-74; Keeton, *supra* note 94 at 3-24.

manufacture, design or information.[175] Thus, although there are strong policy considerations for basing liability on injury causation alone, such an approach challenges tort law's perceived coherence.[176]

To avoid this problem, other commentators have recommended changing the way courts characterize the plaintiff's damages in an action for failure to warn.[177] As previously noted, the overriding function of warnings is to give consumers an opportunity to personally manage the risks encountered when using products. When this opportunity is taken away by manufacturers, according to this view, consumers suffer damages that warrant redress; perhaps not physical damages, but clearly a loss of personal autonomy. This approach seemingly eliminates the need for speculating about the plaintiff's probable behaviour. Indeed, the plaintiff's *freedom* of choice would clearly not have been impaired, but for the defendant's breach, regardless of how said freedom would have been used. Here, a parallel can be made with the thesis advanced by some commentators, mostly in the areas of medical and environmental negligence, that liability should attach for exposing another to risk, regardless of whether or not said risk actually materializes.[178] This claim, like the previous one, is an attempt to circumvent practical difficulties associated with the burden of proving factual causation -- difficulties that, in the context of medical and environmental negligence, stem less from the nature of the causal inquiry, than from limits inherent in scientific evidence.

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[175] If, under the guise of strict products liability, manufacturers are held responsible for consequences unrelated to the actual defects in their products, the next logical step would be to impose liability irrespective of defect. Such a regime is neither workable, nor desirable: see J.A. Henderson & A.D. Twerski, "Closing the American Products Liability Frontier: The Rejection of Liability Without Defect" (1991) 66 N.Y.U. L. Rev. 1263.

[176] On the importance of coherence in tort law, see E.J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) at 12: "[P]rivate law values and tends towards its own coherence. In sophisticated legal systems, private law is not an aggregate of isolated and unrelated emanations of official power. Rather, private law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules, and standards." See also *ibid.* at 29-46.

[177] See *e.g.* Twerski & Cohen, *supra* note 9 at 609, arguing that instead of applying the conventional "but for" test, courts "should identify and value the decision rights of the plaintiff which the defendant destroyed by withholding adequate information"; Klar, *supra* note 91 at 283, arguing that a possible solution for resolving decision causation in failure to warn cases is to "alter the language of causation...by arguing that the manufacturer's failure to inform 'increased the risk' that the plaintiff would not be informed"; 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 at 374-75, arguing that the requirements of factual causation are met when, in the absence of proof to the contrary, "the defendant's tortious action, by its nature, substantially increases the risk of the occurrence of some event, the risk of whose occurrence is the ground for the action being one from which the plaintiff had a duty to refrain and that event occurs".

[178] See *e.g.* J.H. King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences" (1981) 90 Yale L.J. 1353; B. Coote, "Chance and the Burden of Proof in Contract and Tort" (1988) 62 Aust. L.J. 761; D. Gerecke, "Risk Exposure as Injury: Alleviating the Injustice of Tort Causation Rules" (1990) 35 McGill L.J. 797. Some of the case-law supporting a risk exposure theory of liability is reviewed in J.G. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar Rev. 661; J.G. Fleming, "Probabilistic Causation in Tort Law: A Postscript" (1991) 70 Can. Bar Rev. 136. In *Athey, supra* note 93 at 474, the Supreme Court of Canada left open the question of whether or not this theory, labelled the "loss of chance doctrine", should be recognized in Canadian tort law.

This claim, like the previous one, distinguishes "harm", a question of liability, from "damages", a question of assessment, and adopts a relaxed interpretation of the former.

One problem with both approaches, however, involves precisely the assessment of damages.[179] Returning to products liability, how does the trier of fact assess the value of a lost opportunity to manage risk? Nominal damages or presumed damages could be awarded, but the question then becomes: why should this plaintiff succeed, and not all users of the defective product? As often noted, a finding that the warnings given to the plaintiff are inadequate implies that the whole line of products manufactured by the defendant, according to the same specifications, is defective.[180] Accordingly, by adopting a liberal interpretation of harm for the purposes of establishing liability, this approach dramatically increases the class of potential plaintiffs. To be sure, the people most likely to initiate legal actions are those who suffer consequential physical losses, such as personal injury or property damage. These losses cannot be compensated, however, unless it is established that they are truly a result of the plaintiff's lost opportunity to exercise control. If the plaintiff would have exercised this right in the same manner, regardless of warnings, then by definition his or her physical damage is not consequential. Thus, in the end, this approach does not resolve the problems inherent in decision causation -- it simply delays them.

When assessing damages in reference to future contingencies, the common law adopts a relatively flexible approach to factual causation. For example, when plaintiffs unreasonably refuse to undergo medical treatments that may reduce their damages, courts discount their damages by percentages that correspond to the probability that said treatments would have been effective.[181] In other words, despite their failure to mitigate damages, plaintiffs remain entitled to compensation for the risks associated with treatment failure -- even when the probability of materialization is lower than 50%. Some commentators have recommended that, in failure to warn cases, a similar approach should be taken with respect to decision causation.[182] Simply stated, instead of asking whether or not the inadequate warning did influence the plaintiff's behaviour -- an "either or" approach -- courts should simply reduce the plaintiff's damages by a percentage corresponding to the likelihood that his or her conduct would have been the same. Thus, even when the probability of decision causation is lower than 50%, the plaintiff would receive some compensation for the injuries or property damage caused by the defendant's product. This approach benefits both consumers and manufacturers, at least those consumers who would otherwise receive nothing and those manufacturers who would otherwise be fully liable. Decision causation becomes less problematic under such an approach because the stakes are reduced for both plaintiffs and

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[179] For a recent critique of the risk exposure theory, in the context of medical negligence, see Stanch, *supra* note 93 at 223.

[180] See *e.g.* R.A. Epstein, *Modern Products Liability Law* (Westport: Greenwood Press, 1980) at 69, noting that defects in design and marketing practices expose manufacturers to greater liability than manufacturing defects, since the latter affect only exceptional units, whereas the former affect a whole line of products; J.A. Henderson & A.D. Twerski, "A Proposed Revision of Section 402A of the *Restatement (Second) of Torts*" (1992) 77 Cornell L. Rev. 1512 at 1515, noting that "if the design or marketing of a product is defective, every unit in the product line is defective".

[181] See *e.g. Janiak* v. *Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1.

[182] See *e.g.* A. Gershonowitz, "What Must Cause Injury in Products Liability" (1986) 62 Ind. L.J. 701 at 729-33, arguing in favour of "comparative causation" for failure to warn, an approach that would apportion damages between the defendant and the plaintiff based on the likelihood that their conduct was a contributing factor to the plaintiff's injuries.

defendants.

However, apportioning damages raises greater concerns than both the "supply as cause" and "risk as harm" alternatives described above. Assuming for the sake of argument, on the one hand, that consumers successful under an "either or" approach would be willing to give up their right to full compensation for the benefit of consumers unable to prove decision causation on a balance of probabilities and, on the other hand, that it is possible to calculate the probability of decision causation in any given case with a reasonable degree of accuracy, an important hurdle remains. This approach overlooks the "fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events".[183] The latter need not be proven on a balance of probabilities, and will be considered in assessing damages so long as there is a real and substantial possibility that they will occur.[184] On the other hand, past events, such as whether the defendant acted negligently and whether his or her negligence caused the plaintiff's damages, "must be proven, and once proven they are treated as certainties".[185] More importantly, there is no reason in principle or logic for singling-out decision causation for reform. Regardless of the plaintiff's theory of liability, he or she may encounter difficulties proving fault and causation on a balance of probabilities. If courts take one step towards adopting comparative decision causation in failure to warn actions, there is no reason why they should not take fifty. Thus, like the argument that injury causation is sufficient for establishing causation, this approach may undermine tort law's coherence.

A seemingly less drastic option for addressing decision causation is to render the plaintiff's own testimony inadmissible. On the one hand, speculation is the sole foundation upon which counterfactual analyses are conducted, including the analysis of how the plaintiff would have behaved, had the defendant's warning been adequate. On the other hand, plaintiffs are unlikely to speculate against their own interests if asked how they would have behaved in different circumstances. Thus, although the plaintiff's testimony is material and relevant evidence with respect to factual causation, some commentators and courts claim that it should be excluded on the grounds that it is self-serving and inherently unreliable.[186] In short, the prejudicial impact of this evidence on the adjudicative process, it is said, outweighs its probative value. The question then

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[183] *Athey, supra* note 93 at 470.

[184] *Schrump* v. *Koop* (1977), 18 O.R. (2d) 337, 4 C.C.C.T. 74 (C.A.); *Graham* v. *Rourke* (1990), 74 D.L.R. (4th) 1, 75 O.R. (2d) 622 (Ont. C.A.).

[185] *Athey, supra* note 93 at 471. See also *Mallett* v. *McMonagle*, [1969] 2 All E.R. 178 at 190 -191, [1970] A.C. 166 at 176 (H.L.):

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[186] This was the basis of Sopinka J.'s dissent in *Hollis, supra* note 6, as well as a consideration noted by Laskin C.J. in *Reibl, supra* note 15. See also Phillips, *supra* note 172 at 578-80; Note, "Informed Consent -- A Proposed Standard for Medical Disclosure" (1973) 48 N.Y.U. L. Rev. 548 at 550.

becomes how to measure decision causation in the absence of the plaintiff's personal speculations. Although this evidence is, in some respects, the worst evidence of decision causation because of its source, it remains the best evidence for the exact same reason. Indeed, the most direct way of determining what someone would have done in different circumstances is to ask him or her. If the answer to this question is inadmissible, however, the only way of ascertaining what the plaintiff *would* have done, but for the failure to warn, is to ask ourselves what the plaintiff *should* have done. In other words, decision causation is established by first assuming the answers the plaintiff would undoubtedly give and, second, by assessing them by reference to an objective standard. In view of the circumstances, including the risks associated with use and the benefits foregone by abstention, is it reasonable for the plaintiff to suggest that he or she would have behaved differently, if the manufacturer had given adequate warnings? An objective approach changes the focus of the counterfactual analysis from the plaintiff to the reasonable person and, in so doing, it discretely substitutes an inquiry into the reasonable nature of the plaintiff's hypothetical behaviour, for one of factual causation.

Having said this, adjudicating decision causation on an objective standard undermines the liability standard,[187] in the sense that the victim is displaced at a stage when the focus should properly be on him or her. Factual causation has the function of particularizing the plaintiff in relation to the defendant,[188] that is, of explaining why a given individual should receive a sum of money from another. By adopting an objective approach, however, the plaintiff's story is seriously edited. The plaintiff is entitled to present evidence relevant to damages, but his or her testimony about the connection between said loss and the defendant's wrong is trivialized. Instead, the focus is placed on expert evidence and indicia of reasonable behaviour that give little weight to the plaintiff's personal attributes. The common law postulates that defendants must take their victims as they find them, regardless of their pre-existing financial, physical and emotional conditions.[189] Injuring a plaintiff in circumstances that would leave most unaffected is no defence to a claim for damages. Yet, an objective approach to decision causation recognizes such an excuse by allowing a manufacturer to escape liability simply on the basis of how *someone else* would have been affected by its negligence.[190]

A more important criticism of the objective approach is that it offers a false sense of certainty. As previously noted, the distinguishing feature of this standard is that it is an independent means of controlling liability for failure to warn, whereas the subjective approach relies on the traditional safeguards of the evidential process, namely the oath and cross-examination. In theory, since the reasonable consumer is shaped by considerations other than the personal attributes of the plaintiff and his or her own testimony, it should be possible to apply this standard universally and to predict future outcomes. Arguably, this has been the result in medical liability, where the objective standard has clearly offered a form of protection to physicians.[191] Yet, *in products*

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[187] See Twerski & Cohen, *supra* note 9 at 614; D.E. Seidelson, "Lack of Informed Consent in Medical Malpractice and Product Liability Cases: The Burden of Presenting Evidence" (1986) 14 Hofstra L. Rev. 621 at 623-24.

[188] E.J. Weinrib, "Causation and Wrongdoing" (1987) 63 Chi.-Kent L. Rev. 407 at 414.

[189] Fleming, *supra* note 1 at 204-06.

[190] For a similar argument in the context of medical liability, see Black & Klimchuk, *supra* note 177 at 362-365.

[191] See Robertson, *supra* note 20 at 435; Osborne, *supra* note 20 at 143. For a critical account of the "judicial deference to medical professionals" evidenced by the objective standard, see M. Lewans, "Subjective Tests and Implied Warranties: Prescriptions for *Hollis* v. *Dow*

liability, the objective approach is ill-equipped for the task of controlling liability for failure to warn. At this point, it is useful to recall that the function of warnings is to encourage risk management, and that it is possible to exercise control in a number of different ways from purchase to consumption. When the objective standard is applied at the consumption end of the spectrum, it is redundant.[192] On the facts in *Lambert*, would a reasonable consumer turn off pilot lights before applying inflammable floor sealer in the vicinity? Of course a person of ordinary prudence would, for the very same reason that the risk was found material in the first place. In fact, it is difficult to imagine a finding that a reasonable consumer would *not* follow directions of use designed to minimize risk given that, after the accident, the costs of heeding safety labels usually appear much lower than the risks involved. Thus, in cases where the plaintiff's theory is that a better warning would have encouraged the adoption of precautions, either before or after the accident, an objective approach to causation goes nowhere. This problem does not exist in medical liability cases, since the spectrum of risk management that patients can exercise is comparatively limited -- their choice is usually limited to consent.[193] On the other hand, when this standard is applied at the purchase end of the spectrum it is unpredictable. The problem is simple: the same fact pattern can support two different, *yet compatible*, conclusions. The *Buchan* case illustrates this difficulty although the same observation applies to *Hollis*. Considering the risks associated with the defendant's contraceptive pill, the safer alternatives in the market, and the costs associated with not using this product, a trier of fact would be justified in concluding that a reasonable woman would not have used the defendant's product, had a better warning been given. Indeed, it is difficult to imagine an appellate court overturning such a finding. However, without any doubt, many women of ordinary prudence continue to use contraceptive pills despite improved warnings and it would be absurd to question the rationality of their behaviour. Hence, another trier of fact would be justified in reaching the opposite conclusion. To be sure, courts can also disagree when applying the reasonable person standard to the defendant's conduct at the breach stage of the inquiry. The difference, in the latter case, is that both conclusions are mutually exclusive: on any given facts, the defendant either behaved as a reasonable person, or did not. With respect to decision causation, however, both purchase and abstention can be defended as reasonable in the same set of circumstances.[194] Thus, in cases where the plaintiff's theory is that a better warning would have discouraged use altogether, an objective approach to causation is unpredictable at best, and arbitrary at worst. This problem is less prominent in medical liability, perhaps because there are fewer alternatives to medical intervention and because the costs associated with abstention tend to be higher in this field.

An increasing number of jurisdictions in the United States have adopted a compromise between a subjective approach and objective approach to decision

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Corning and *ter Neutzen* v. *Korn*" (1996) 60 Sask. L. Rev. 209.

[192] See also Geistfeld, *supra* note 2 at 339-41.

[193] *Supra* notes 95-98 and accompanying text.

[194] In her reasons for judgment in *Hollis*, *supra* note 26 at 36, Southin J.A. alludes to the unpredictable nature of objective decision causation:

> Many reasonable women would reject any notion of surgery for such a defect even if it had no risk or only the common risk of complication from the anaesthetic. But many others, who would consider themselves reasonable, would undertake it with all the risks identified in the evidence.

causation. Simply put, many courts are willing to *presume* that the plaintiff would have acted differently, but for the defendant's failure to warn.[195] For example, in *Coffman* v. *Keene Corp.*,[196] a failure to warn action by an employee against the manufacturer of the asbestos product to which he had been exposed, the New Jersey Supreme Court adopted a rebuttable presumption that the plaintiff would have read and heeded an adequate warning, had one been given by the defendant.[197] The "read and heed" or "heeding" presumption is sometimes justified on a liberal reading of comment j, § 402A, of the *Restatement (Second) of Torts*, which provides in part that when an adequate warning is given, "the seller may reasonably assume that it will be read and heeded". Comment j is clearly aimed at foreclosing an analysis of a product's overall safety, if it contains an *adequate* warning and is safe for use if said warning is followed. Yet some courts have interpreted comment j as supporting, by necessary extension, a heeding presumption with respect to *inadequate* warnings. Such a leap in logic has not gone unnoticed[198] and the trend is to justify a presumption of decision causation on grounds of procedural fairness to the plaintiff, as well as on public policy grounds.[199] Relieving consumers of the difficult burden of proving a negative, it is said, will enhance consumer safety by encouraging manufacturers to supply an optimal amount of information regarding their products -- since their marketing practices will be under greater scrutiny if causation is presumed.[200] Moreover, this presumption resolves a

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[195] See *e.g. Stanback* v. *Parke, Davis & Co.*, 657 F.2d 642 at 645 (4th Cir. 1981); *Reyes* v. *Wyeth Laboratories*, 498 F.2d 1264 at 1281 (5th Cir. 1974) [hereinafter *Reyes*]; *Seley* v. *G.D. Searle & Co.*, 423 N.E.2d 831 at 838 (Ohio 1981). See generally B.J. Jones, "Presumption or Inference, in Products Liability Action Based on Failure to Warn, That User of Product Would Have Heeded an Adequate Warning Had One Been Given" (1996) 38 A.L.R. 5th 683 at 701:

> Although there are decisions in some jurisdictions denying that a "heeding presumption" exists in products liability failure-to-warn cases, the plurality of decisions in those jurisdictions where the question has been presented hold that where a product has not been designed or manufactured in a defective manner, but is instead inherently dangerous if not used correctly, and where there has been a failure to warn or to warn adequately, that there is in fact a presumption created by law, often based on comment j to s. 402(a) of the *Restatement (Second) of Torts*, that had an adequate warning been given it would have been read and heeded and the injury would not have occurred.

[196] 628 A.2d 710 (N.J. 1993) [hereinafter *Coffman*].

[197] For commentaries, see K.J. O'Connor, "New Jersey's Heeding Presumption in Failure to Warn Product Liability Actions: *Coffman* v. *Keene Corp.* and *Theer* v. *Philip Carey Co.*" (1994) 47 Rutgers L. Rev. 343; M.H. Daaleman, "Heeding Presumption Doctrine Adopted in New Jersey Product Liability" (1994) 161 N.J. Law 6.

[198] See *e.g.* Henderson & Twerski, *supra* note 16.

[199] See O'Connor, *supra* note 197 at 364-77; *Coffman*, *supra* note 196.

[200] See *e.g.* American Law Institute, *supra* note 104 at 79: "To deny liability on the ground that the plaintiff would not have read a better warning eliminates the incentive of some victims -- the non-readers -- to challenge defective warnings, and so reduces the number of occasions on which courts can enforce the requirements of products liability law. Hence the efficiency theory implies the rule creating a rebuttable presumption." See also T.M. Schwartz, "Prescription Products and the Proposed *Restatement (Third)*" (1994) 61 Tenn. L. Rev. 1357 at 1372; A. Schwartz, "Causation in Private Tort Law: A Comment on Kelman" (1987) 63 Chi.-Kent L. Rev. 639 at 644, arguing that the presumption is good because "it will encourage people to sue and thus police the adequacy of warnings"; Geistfeld, *supra* note 2 at 312, arguing that without the presumption, "tort liability would not give product sellers a sufficient incentive to provide adequate warnings".

number of problems associated with the objective and subjective standards. First, the focus of the causal inquiry remains the individual plaintiff bringing the lawsuit, rather than the reasonable consumer. Thus, the liability standard is preserved and results are predictable, if not friendly to manufacturers interests. Second, the presumption renders the plaintiff's self-serving testimony unnecessary. The plaintiff may testify, but this evidence is no longer determinative. In fact, even if the plaintiff lacks credibility on the witness stand, a court may still rely on the presumption in order to make a finding of decision causation. In other words, the manufacturer must go beyond attacking the self-serving nature of the plaintiff's testimony in order to rebut this presumption. To satisfy its burden, the manufacturer must present fresh evidence, such as the fact that the plaintiff knew of the risk in question, from an alternative source of information. Lastly, some courts have justified the heeding presumption by saying it would be unfair to deny recovery to a plaintiff injured as a result of using a product marketed in a negligent manner suggesting that, in the final analysis, injury causation is perhaps the true basis for imposing liability.[201]

The heeding presumption has not been endorsed by everyone. Some jurisdictions have limited its use to so-called risk-reduction cases, that is, to warnings designed to encourage safe use of a product.[202] Professors Henderson and Twerski, the current reporters of the *Restatement (Third) of Torts: Products Liability*,[203] have published an influential article criticizing most elements used in determining liability for failure to warn, including duty, adequacy and causation.[204] They argue that a presumption of factual causation is based upon an illogical reading of comment j of the *Restatement (Second) of Torts*, and that it is unfair to manufacturers.[205] According to them, the heeding presumption used in many jurisdictions should be abandoned "in favour of a more fact-intensive approach", under which the trier of fact would evaluate cause-in-fact in light of all the relevant evidence and not favour any pre-determined assumption with respect to human behaviour.[206] In a similar way, Professor Jacobs has described failure to warn as "a doctrinal body with almost no working parts".[207] He argues that the concepts of "risk" and "adequacy", which surface during the duty inquiry and the breach inquiry respectively, are defined in such a liberal fashion as to offer little

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[201] See *e.g. Reyes*, *supra* note 195 at 1274-75.

[202] See *e.g. Thomas* v. *Hoffman LaRoche Inc.*, 949 F.2d 806 at 811 (5th Cir. 1994).

[203] *Supra* note 101.

[204] Henderson & Twerski, *supra* note 16.

[205] *Ibid.* at 278-79. See also Gershonowitz, *supra* note 182 at 712: "The [heeding] presumption is often unfair because it will require manufacturers to pay for more injuries than they caused." A similar point was made by Seidelson, *supra* note 187 at 650:

> It could be argued that favouring (sic) the plaintiff at trial with a rebuttable presumption is consistent with the theory of placing the economic loss on the party with the deeper pocket. But if trial procedure must be manipulated to accomplish that purpose, why bother with any element of plaintiff's case other than the fact that plaintiff was injured after utilizing defendant's product or service and, therefore, defendant should pay?

Professor Seidelson argues that unless the plaintiff testifies that his or her conduct would have been different, but for the defendant's inadequate warning, the plaintiff's case must fail as a matter of law: *ibid.* at 650-51.

[206] Henderson & Twerski, *supra* note 16. They make a similar recommendation in Henderson & Twerski, *supra* note 180 at 1522.

[207] Jacobs, *supra* note 133 at 199.

in terms of safeguards for defendants, and little in terms of hurdles for plaintiffs. These problems are only compounded, according to him, when courts adopt lenient approaches to factual causation, such as the read and heed presumption and the subjective belief standard.[208] As an alternative, Professor Jacobs recommends a process-based approach to failure to warn, focussing on the procedures used by manufacturers prior to adoption of the warning label, in order to determine manufacturer liability. This approach renders the question of causation immaterial: by re-characterizing the tortious aspect of the defendant's conduct, Professor Jacobs attempts to eliminate the issue of decision causation altogether. A very different criticism of the heeding presumption can be deduced from Professor Latin's article on adequate warnings.[209] As previously noted, Latin attempts to demonstrate that product warnings often prove ineffective in allowing consumers to manage risks, even when the warnings are legally adequate.[210] Based on his findings, he then argues that it is unrealistic, inefficient and unfair to presume that an adequate warning would be read, understood and followed, so as to preclude judicial evaluation of a product's overall safety.[211] In his view, courts should adopt theories of liability that are compatible with actual consumer behaviour, such as one stating that adequate warnings can be supplements, but not substitutes, for safer products.[212] Although Professor Latin's article addresses a different issue altogether, one can deduce from his analysis the argument that manufacturers should not be allowed to *rebut* a heeding presumption by speculating about the probable behaviour of consumers. The *Proposed Final Draft* of the *Restatement (Third) of Torts: Products Liability*, presented by the American Law Institute in April of 1997, says little about decision causation. Section 15, the general rule governing causal connection between product defect and harm, simply provides that "[w]hether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort".[213] Moreover, a comment to section 2, the provision defining the categories of defect, provides in part that "[n]otwithstanding the defective condition of the product in the absence of adequate warnings, if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings is not a legal cause of that plaintiff's harm".[214] It has been suggested that the combined effect of this comment and section 15 is a rejection, albeit a subtle one, of the heeding presumption adopted in many jurisdictions.[215]

In my view, presuming decision causation in failure to warn actions is an efficient response to the implementation concerns outlined in this article. The strongest

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[208] *Ibid.* at 160: "Instead of cushioning the impact of the risk and adequacy problems by adding to a plaintiff's burden of proof on causation, courts have erred in the opposite direction."

[209] *Supra* note 160.

[210] *Ibid.*

[211] *Ibid.* at 1257-81 and 1294-95. Such a presumption is based on comment j of the *Restatement (Second) of Torts*, which reads in part: "Where [an adequate] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous". As noted earlier, many jurisdictions invoke this comment in support of a heeding presumption with respect to decision causation, a question that is clearly different from whether or not an adequate warning precludes an analysis of the product's overall safety.

[212] Latin, *ibid.* at 1281-94.

[213] *Restatement (Third) of Torts: Products Liability, supra* note 101, s. 15.

[214] *Ibid.*, s. 2, comment i.

[215] Geistfeld, *supra* note 2 at 311; Schwartz, *supra* note 200 at 1371-72.

argument in its favour concerns its candour, when compared to the *status quo*. This approach acknowledges that decision causation is most often an artificial exercise, resolved on the basis of policy considerations. If this is the case, why not simply change the starting point of the analysis, by presuming that the plaintiff would have read and heeded the warning, had it been sufficient, as done in insurance law and in the law of fiduciary relationships? Changing the starting point ensures that this form of causation will be litigated in exceptional cases, where it is plain and obvious that the plaintiff did not actually rely on labels in deciding whether or not, and how, to use the defendant's product. For example, if the plaintiff had *actual* knowledge of the risk from an alternative source, it seems unwarranted to force a manufacturer to answer for damages caused by an otherwise properly manufactured and properly designed product.[216] In such a case, the plaintiff took a calculated risk and lost. In *Bow Valley Husky*, the Supreme Court holds that knowledge does not negate a duty to warn, but should instead be used, in appropriate cases, to find for the defendant on the basis of *volenti non fit injuria*.[217] Whether the plaintiff's actual knowledge is framed as being relevant with respect to decision causation or with respect to voluntary acceptance of risk is somewhat semantical. The important point is that the burden of proof should be consistent from one case to another, since the impact on the case is identical. The manufacturer should have the burden of establishing that the plaintiff knew of the risk in question and that, for this reason, a finding of liability would not enhance the risk management function of warnings.

IV. CONCLUSION

In products liability for failure to warn, there is an important gap between what the common law considers essential to liability, and what fact finders can reasonably expect to uncover. According to conventional wisdom, as confirmed in *Hollis*, fact finders need to assess whether the plaintiff would have modified his or her use of the product or would have declined use altogether, but for the defendant's inadequate warning. However, as discussed in this article, an educated guess is the most that can be expected from them on this point. Unlike with other questions of fact, including breach, injury causation and damages, it is *never* possible to conclude with certainty that the plaintiff would, or would not have, modified his or her conduct but for the defendant's negligence. Although the law of torts does not require such a degree of proof, the absence of a "best case" scenario confirms the fact that decision causation, unlike other elements of liability, is fundamentally a question of speculation. This being the case, actual decisions often turn on policy considerations that are either unarticulated in the judgment or difficult to reconcile with an inquiry into factual causation. Indeed, the reasons given by La Forest J. in *Hollis* are strong evidence that, with respect to decision causation, the line between cause-in-fact and proximate cause is difficult to defend.

Having said this, how should the law respond to this gap? One approach is to simply ignore it, as the Supreme Court did, and treat decision causation as being no more problematic than any other question of fact. The main problem with this approach,

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[216] If the plaintiff did not have actual knowledge, but should have known the risk in view of the circumstances, the question becomes different. Presumed or imputed knowledge may be relevant with respect to comparative negligence, but it should not absolve a manufacturer of liability for negligence under either decision causation or *volenti non fit injuria*.

[217] *Supra* note 7 at 1230.

however, is that it gives manufacturers an avenue for challenging liability in each and every case where an allegation of failure to warn is made. Indeed, it is always possible to argue that the plaintiff would not have read, understood, remembered or heeded the warning, had one been given. In the final analysis policy considerations may prevail to ensure that manufacturers answer for their negligence. However, an alternative that is superior in terms of sincerity, and that is not directly in conflict with the Supreme Court's ruling in *Hollis*, is to modify the starting point of the inquiry. It is both appropriate and just to presume decision causation once the plaintiff establishes a duty to warn, its breach, his or her damages and injury causation. It is easier to defend a presumption on the basis of policy, than it is to implement a subjective approach to decision causation on a similar basis. The dissenting reasons of Sopinka J. in *Hollis* highlight some of the difficulties with the latter approach. More importantly, however, a presumption does not view factual causation in isolation, but as implementing the general assumptions made about consumer behaviour in the context of the duty inquiry. The law should assume that what is material to consumers, would have been material to the plaintiff, as done in insurance law and fiduciary law. Furthermore, this approach ensures that decision causation is litigated in exceptional circumstances, where liability would clearly undermine the risk management function of warnings -- for example, where the plaintiff had actual knowledge of the risk from a source as reliable as the manufacturer's warnings.

To be sure, products liability for failure to warn has come under attack in the last decade. In three recent surveys, the "how-you-pronounce-it"[218] law of warning has been described as an "empty shell",[219] as "a doctrinal body with almost no working parts",[220] and as "cryptic".[221] In essence, the concern expressed by many academics, especially in the United States, is the absence of any certainty in the law.[222] The standards currently used to determine whether or not a manufacturer is liable for failure to warn, it is said, do not send sufficiently clear signals to allow litigants and adjudicators to distinguish frivolous actions, from those deserving litigation and eventual redress. This situation drains judicial resources and encourages manufacturers to provide warnings of an encyclopaedic nature, in an attempt to prevent litigation at the outset -- results that are not necessarily compatible with enhancing personal risk management. The specific targets of such critics include the rule of strict liability, the relevance of the defendant's knowledge and foresight, the concepts of "obvious risk" and "adequacy", and the presumption of decision causation. At the same time, however, it is important for proposals of reform to be addressed to the facets of liability for failure to warn that are susceptible to improving certainty within the common law. In this article, I have argued that decision causation, whether approached subjectively or

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[218] Huber, *supra* note 133 at 54.

[219] Henderson & Twerski, *supra* note 16 at 265.

[220] Jacobs, *supra* note 133 at 199.

[221] Weissman, *supra* note 161 at 682.

[222] Concerns about the depth of failure to warn have also been raised by the judiciary. In the most notable example, the Supreme Court of California recently conceded that strict products liability, a theory that this court was instrumental in fashioning, was never intended to convert manufacturers into insurers for their products: *Anderson* v. *Owens-Corning Fibreglass Corp.*, 810 P.2d 549 at 552 (Cal. 1991). The Court suggested that safeguards against unlimited liability are required in the field of failure to warn, holding that foreseeability is relevant in determining whether or not a manufacturer owes a duty to warn, even though knowability is irrelevant when other categories of defect are alleged.

objectively, does not strike an appropriate balance between certainty and justice. Instead of treating the plaintiff's probable behaviour as a question of fact that must be resolved in every case, the common law should identify the circumstances that either warrant or negate liability for failure to warn. Arguably, actual knowledge of the risk is a consideration that negates liability. A pragmatic approach to factual causation would allow courts to identify, on a case-by-case basis, other specific instances where it is unfair to uphold a presumption of causation.