CASE COMMENT

Hollis v. *Dow Corning* and *Buchan* v. *Ortho Pharmaceuticals*

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I. INTRODUCTION

HOLLIS v. *DOW CORNING CORP. and Birch*,[1] a recent decision of the British Columbia Court of Appeal, involves a woman in whose chest a breast implant ruptured. *Buchan* v. *Ortho Pharmaceuticals (Can.) Ltd.*,[2] a 1986 decision of the Ontario Court of Appeal, involved a woman who suffered a stroke after taking Ortho-Novum birth control pills. The two cases raised similar issues and in both, the plaintiff succeeded. In *Hollis*, this was because of a generous finding of fact; in *Buchan* it was because of certain conclusions about the law and the facts.

In this comment, I will compare *Hollis* and *Buchan*, but before I do, I wish to note two points about these cases that would ordinarily pass without comment. The first is that the injured plaintiffs in both cases were women and the products involved in both cases are the sort of products that would only be used by women. The same thing is true of another case that was recently decided by the British Columbia Court of Appeal: *ter Neutzen* v. *Korn*.[3] *ter Neutzen* involves a woman who contracted AIDS from semen with which she was artificially inseminated. It is hard to know exactly what one could or should say about the fact that women seem to be especially concerned in medical

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[1] (1993), 103 D.L.R.(4th) 520, [1993] 6 W.W.R. 609, 29 B.C.A.C. 108, 81 B.C.L.R.(2d) 1, 16 C.C.L.T.(2d) 140, B.C.J. 1363 [hereinafter *Hollis* cited to D.L.R.]. Leave to appeal granted March 10, 1994; 109 D.L.R.(4th) vii, [1994] 3 W.W.R. lxvi, 87 B.C.L.R.(2d) xxxii (S.C.C.).

[2] (1986), 54 O.R.(2d) 92, 12 O.A.C. 361, 25 D.L.R.(4th) 658, 32 B.L.R. 285, 35 C.C.L.T. 1 [hereinafter *Buchan* cited to O.R.].

[3] (1993), 103 D.L.R.(4th) 473, [1993] 6 W.W.R. 647, 29 B.C.A.C. 1, 81 B.C.L.R.(2d) 39, 16 C.C.L.T.(2d) 65, [1993] B.C.J. 1362 [hereinafter *ter Neutzen* cited to D.L.R.]. Leave to appeal granted February 10, 1994; 108 D.L.R.(4th) vii, [1994] 2 W.W.R. lxv, 87 B.C.L.R. (2d) xxxiii (S.C.C.).

products liability cases, but it does seem to me that it would be wrong simply to ignore the fact.

The second obvious point to notice is how long the litigation process takes. Ms. Buchan took the birth control pills in 1971. She had her stroke six weeks later and sued in 1974. It took 12 years for *Buchan* to be finally decided and the decision came 15 years after the injury. Ms. Hollis received her breast implants in 1983 and the ruptured one was removed in 1985. Ms. ter Neutzen was artificially inseminated in 1985 and she found out that same year that she had been infected with AIDS. Eight years later, the Court of Appeal has decided both cases, but *ter Neutzen* was sent back for a retrial and before the retrial, there is to be an appeal to the Supreme Court of Canada. *Hollis* too, is set to go further on appeal. Again, one is hard pressed to know what one could or should say about this, except that the length of time it takes for a case to go through the courts is one major weakness of litigation as a technique of either consumer protection or anything else.

II. BACKGROUND

IN *HOLLIS*, THERE WERE two main defendants: Dow Corning, the manufacturer of the breast implants and Dr. Birch, the doctor who implanted them in Ms. Hollis.[4] The trial judge held that Dr. Birch was not liable for Ms. Hollis' injuries, but that Dow was. The basis of Dow's liability was the judge's decision that the implant which ruptured inside Ms. Hollis was defective. The judge came to the conclusion that the implant was defective by eliminating the other possible ways in which the implant could have ruptured. He found that neither the doctor who put the implants in, nor the doctor who took the implants out, had done anything to rupture the implant, that the plaintiff had done nothing to herself to rupture the implant, and that nothing had happened to the plaintiff which might have caused the implant to rupture. The judge said the only other possible cause of the rupture was that the implant which ruptured was defective and, on this basis, he found Dow liable.

Notice that this way of treating the case virtually imposes strict liability. The implant ruptured; no external cause can be found for the

[4] The doctor who removed the implants was also sued, as were the hospitals in which both operations occurred. Dow Corning, Canada, Inc. was also sued but none of these parties turned out to be very important because the actions against these parties were dismissed at trial and no appeal was taken from that part of the decision.

rupture; so the implant must have been defective. This assumes that a properly made implant does not rupture and this assumption is essentially *res ipsa loquitur*, which the trial judge cited. In the Court of Appeal, however, Prowse J.A. held that the trial judge was in error for using *res ipsa loquitur*.[5] She did not say that *res ipsa loquitur* could never apply in a case like this, but that the doctrine did not apply in this case, because there was *no* evidence from which it could be concluded that the plaintiff did nothing to herself to rupture the implant and *no* evidence from which it could be concluded that nothing had happened to the plaintiff which might have ruptured the implant. The plaintiff had never testified about either of these matters.[6]

But then, having found that the implant had not been proven to be defective, Prowse J.A., with McEachern C.J.B.C. concurring, held that Dow was liable anyway, on the grounds that it had negligently failed to adequately warn Ms. Hollis and Dr. Birch of the danger of a rupture.[7] As to the liability of the doctor, whom the trial judge had found not liable, Prowse J.A. would have reversed. She said that even without Dow's warning, Dr. Birch should have known enough to warn Ms. Hollis of the danger of a rupture, and he did not warn her. But Prowse J.A. did not speak for the Court on this point. McEachern C.J.B.C. concurred with Prowse J.A. in holding that Dow was liable, but he concurred with Southin J.A. in sending the case between Hollis and the doctor back for a new trial on the negligence of the doctor.

One final point to mention in *Hollis* before I compare it with *Buchan* is the claim against Dr. Birch on the basis of the implied warranty of fitness in the *Sale of Goods Act*.[8] Though the trial judge found that the implant was defective, he held on a variety of grounds that the doctor had not breached any warranty of fitness. Because the

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[5] *Supra* note 1 at 537.

[6] The failure to introduce even a little evidence on this point seems either to have been oversight on the part of plaintiff's counsel or some indication that something did happen to the plaintiff which might have ruptured the implant. The defendants never asked the plaintiff anything about this either on trial or in discovery. I assume this was a matter of trial tactics.

[7] In *Hollis*, Dow raised what is called the "learned intermediary" defense, which will be discussed below, in connection with *Buchan*.

[8] R.S.B.C. 1979, c. 370.

Court of Appeal found that the implant was not defective, it also found that there was no breach of warranty by the doctor.[9]

I have analyzed both the trial and appellate decisions in *Hollis* because they are so different and because to understand the appellate decision, it is necessary to understand the trial decision. This is not true with *Buchan*. In *Buchan*, the trial judge found the defendant liable for a negligent failure to warn and the Court of Appeal affirmed this decision. There is some difference in the reasoning of the trial and appellate courts in *Buchan*, but the appellate decision in *Buchan* can be understood on its own. Essentially, *Buchan* said Ortho was liable to Ms. Buchan because it had negligently failed to warn her about the risk of a stroke from using Ortho-Novum birth control pills. This is similar to the appellate decision in *Hollis* which held that Dow was liable for negligently failing to warn Ms. Hollis that her breast implant might rupture. The interesting thing about these cases, however, is that they come to a similar result in very different ways. I will compare the treatment in *Hollis* and *Buchan* of three issues: whether the product complained of was defective; whether there was a failure to warn; and whether the failure to warn caused the injury.

III. DEFECT

IN *HOLLIS*, THE COURT decided that the breast implant had not been *shown* to be defective, whereas in *Buchan*, the Court said:

> There is no question of any defect or impropriety in the manufacture of the oral contraceptive ....[10]

This statement seems odd in light of the Court's decision that the birth control pill had caused Ms. Buchan's stroke. Does there not have to be a defect in the manufacture of a product that causes people to have strokes?

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[9] *Supra* note 1 at 555–6. Warranties on medical products under the *Sale of Goods Act* and at common law are dealt with in my recent comment on *ter Neutzen* v. *Korn* (1994), 17 C.C.L.T.(2d) 152. The *Sale of Goods Act* warranties were raised in *Buchan*, against Shoppers Drug Mart, where Ms. Buchan bought the birth control pills. The action against Shoppers was dismissed by consent when Ortho agreed that it would accept any liability imposed on the retailer. Then, at trial, the judge found there was no breach of the warranties and this issue was not raised on appeal. The trial decision is reported at (1984), 46 O.R.(2d) 113, 8 D.L.R.(4th) 373, 28 C.C.L.T. 233, 25 B.L.R. 225 (H.C.).

[10] *Supra* note 1 at 99.

To understand why the answer to this question is "no," it is necessary to see that there are two ways for a product to be defective. One is for the product not to conform to the manufacturer's own specifications. The breast implant in *Hollis* could have been defective in this way; the implant which ruptured could have been weaker than the implant which did not rupture. A birth control pill could be defective in this same way if, for instance, it contained something it was not supposed to contain, something other, supposedly identical, birth control pills do not contain. No allegation of this sort was made in *Buchan*.

A second way in which a product can be defective is if it conforms to the manufacturer's specifications, but those specifications are themselves defective. A classic example of a product which was defective in this way is the Ford Pinto. The problem with the Pinto was not limited to one or even some Pintos; the same problem existed in all Pintos. Because of where the gas tank was located, every Pinto, when hit from behind, was likely to burst into flames. This is called a design defect and it is possible that the breast implant in *Hollis* had such a defect. While only one of the implants Ms. Hollis was given actually ruptured, it is possible that both of them were too weak. There was some indication of this in the evidence because Dow no longer makes the type of implant that was given to Ms. Hollis. Dow now makes a stronger implant. The trial judge considered this fact in finding that the implant which ruptured was defective, but Prowse J.A. held that this was an error.

> [T]he learned trial judge relied on his conclusion that Silastic II replaced Silastic I as one piece of evidence upon which he could, and did, rely in drawing an inference of negligence against Dow. Since the "fact" is not supported by the evidence, it cannot support an inference of negligence against Dow.[11]

The reason Prowse J.A. said the "fact" is not supported by the evidence is that she does not think the stronger implants can properly be said to have "replaced" the weaker ones.

> I am satisfied that the learned trial judge did err in finding that Silastic II replaced Silastic I. The evidence establishes that Silastic I was on the market from 1975 to later 1987 or early 1988. Silastic II came on the Canadian market in mid-March, 1983 and was on the market as of the trial in late 1989 and early 1990. In other words, both Silastic I and Silastic II were on the market at the time the plaintiff received her

[11] *Supra* note 1 at 533.

original implants. These two products continued to share the market from mid-1983 until late 1987. It cannot be said that Silastic II "replaced" Silastic I.[12]

With respect, I cannot understand what error Prowse J.A saw here. Even on her own description, it sounds to me as if the stronger implants did replace the weaker implants, and if the stronger implants did not replace the weaker implants, that is an independent basis for holding Dow liable. If Dow was able to make implants that were stronger but continued to make and sell the weaker ones, that, in and of itself, would be negligence.

We can, however, put aside the factual question of whether the stronger implants replaced the weaker ones, because even the stronger implants sometimes rupture. Does this not mean that breast implants are defectively designed in just the way that Pintos were defectively designed? All Ford Pintos carried the danger that they might burst into flames if hit from behind; all Dow breast implants carry the danger that they might rupture. The same thing, of course, is true for all Ortho's birth control pills. They all carry the danger that they might cause a stroke. But if that is true, why then is it said in *Buchan* that "there is no question of any defect or impropriety in the manufacture of the oral contraceptive?"

The answer to this question is that while both breast implants and birth control pills are defective, in the sense that both of them have dangers associated with them, neither is defective in the sense that the manufacturers are liable in negligence if the dangers materialize. Given the current state of human knowledge, the dangers involved in using breast implants and birth control pills are not avoidable without eliminating the products altogether, and tort law says that when a product is unavoidably unsafe, the only duty the manufacturer of that product has is to warn consumers of the danger. This is true even in the United States, where most jurisdictions treat products liability in terms of strict liability, rather than negligence. Comment k to section 402A of the *Second Restatement of Torts* speaks of "unavoidably unsafe products" and says:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use.... Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective....

[12] *Ibid* at 532.

Having said this, however, it is worth noting that the fact that a product cannot be made safe is sometimes the basis for saying that the product may not be sold at all. Honda, for instance, used to produce and sell a three wheel vehicle which had a tendency to turn over. Honda could not correct this problem and was forced, by the American and Canadian governments, to stop selling these three wheel vehicles in North America.[13]

Whether an unsafe product cannot be sold at all or can be sold, but only with a warning, is usually a matter for the government, rather than the courts. The decision depends on the seriousness of the dangers the product carries, the frequency with which they occur and the value we associate with the product. A decision like this has to made about every medical product because the sale of medical products is strictly regulated in Canada. One point to notice about both *Hollis* and *Buchan*, therefore, is that the food and drug authorities had decided that birth control pills and breast implants could be sold in Canada, even though they were both known to pose serious risk of injury.

I will return to this point below in my discussion of the failure to warn that was found in both *Buchan* and *Hollis*, but before I turn to that issue, I would like to point out that a large number of women have breast implants and a very large number of women use birth control pills. Given that some of these women are going to suffer injuries from using these products, would it not make more sense to treat the economic side of these injuries in terms of insurance, rather than a failure to warn? This point was made by the trial judge in *Buchan*, who said:

> It may be that a Legislature may consider that when certain drugs, such as oral contraceptives, are sold which carry with them a risk of serious consequences but are generally beneficial to society as a whole, the manufacturer should bear the risk of such rare and serious complications. This could be accomplished by the establishment of a fund, or through insurance, paid for by a small increase in the price of the drug.[14]

I am not suggesting a no-fault scheme, which always entails lower damages. I am suggesting that we should make the manufacturers of products, which contain well-known but unavoidable dangers, liable for any injuries that occur from the use of their products, *whether or*

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[13] See *Honda* v. *Stiles*, B.C.S.C., January 4, 1993, Vancouver Reg. #C893010 at 16–17; [1993] B.C.W.L.D. 342 (*sub nom. Stiles* v. *Beckett*).

[14] *Buchan* v. *Ortho Pharmeceuticals (Can.) Ltd.* (1984), 28 C.C.L.T. 233, 46 O.R.(2d) 113, 8 D.L.R.(4th) 373, 25 B.L.R. 225 (Ont. H.C.) [cited to C.C.L.T. at 248].

not there was an adequate warning. This would force the manufacturers to insure themselves against this liability, and since they, in turn, would undoubtedly put up the price of their products, the economic cost of the injuries which are an unavoidable side effect of using certain products would be spread among all the users of those products. To me, this makes a great deal more sense then treating the problem in terms of a failure to warn, but a failure to warn is the basis on which both *Hollis* and *Buchan* proceed, and I turn now to that issue.

IV. FAILURE TO WARN

THE STRIKING THING ABOUT *Hollis* and *Buchan* is how differently the two cases treat the failure to warn. One difference is in their treatment of the learned intermediary defence. Ordinarily, the manufacturer of a product has a duty to warn the consumer of the product of any dangers associated with the use or misuse of the product. But where the warning would be technical and the product is only acquired through a learned intermediary, like a doctor, the manufacturer only has a duty to warn the intermediary. In *Buchan*, the Court came very close to rejecting the learned intermediary defence. The Court did not have to go quite this far, however, because it held that the doctor had not been adequately warned. But *Buchan* suggests that even if her doctor had been adequately warned, Ortho would still have been liable to Ms. Buchan, because it had a duty to warn her directly.[15]

This decision was based on the nature of birth control pills. The Court quoted an American decision, also involving Ortho:

> The oral contraceptive thus stands apart from other prescription drugs in light of the heightened participation of patients in decisions relating to use of "the pill;" the substantial risks affiliated with the product's use; the feasibility of direct warnings by the manufacturer to the user; the limited participation of the physician (annual prescriptions); and the possibility that oral communication between physicians and consumers may be insufficient or too scanty standing alone to fully apprise consumers of the product's dangers at the time the initial selection of a contraceptive method is made as well as at subsequent points when alternative methods may be considered.[16]

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[15] *Supra* note 2 at 102.

[16] *MacDonald* v. *Ortho Pharmaceutical Corp.*, 475 N.E.2d. 65 at 70, *per* Abrams J., (Mass. S.C.).

There are some ways in which the decision to have breast implants is like the decision to take birth control pills. Breast implants are not usually required to treat a disease and therefore, the decision about whether to have breast implants is one which a woman normally makes on her own, rather than in accordance with her doctor's advice. Despite this, the Court in *Hollis* accepted that the learned intermediary defense applied to breast implants, but then it held, just as it was held in *Buchan*, that the doctor had not been adequately warned. In *Hollis*, the inadequacy of the warning to the doctor was established in an interesting way.

> The warning set forth in the insert accompanying the implants received by the plaintiff in late 1983 was the same warning that was contained in the implant insert in 1979. It is clear from the rupture reports received by Dow that there had been developments in the state of knowledge of Dow during that period relating to the incidence of rupture. The fact that Dow issued an extended warning with respect to rupture of gel-filled implants in 1985 is evidence that it recognized the need to provide further information to the medical community of the possibility of rupture.[17]

The trial judge had reasoned the same way when he concluded that the replacement of the weaker implants by stronger ones was evidence that the weaker ones were defective and he noted that:

> [e]vidence of conduct following allegations of a negligent act was excluded at one time on grounds of policy. It was thought better to encourage a tortfeasor to correct a deficiency than for an injured plaintiff to use that correction as a method of proving the original negligence.[18]

But the trial judge pointed out that this practice had been reversed in British Columbia in 1979, and if there was any doubt about this, *Hollis* is clearly authority for the proposition that conduct subsequent to the alleged tort can be used as evidence of negligence.

In *Buchan*, the inadequacy of the warning that was given both to Ms. Buchan and her doctor was established, not by comparing the warnings they received with warnings that were given subsequently, but by comparing the warnings that were given in Canada with the warnings that were given in the United States. The warnings given in Canada, both to women and doctors, were much less candid about the risk of a stroke than the warnings given in the U.S. at exactly the same time and in a way, this made *Buchan* a very easy case because

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[17] *Supra* note 1 at 543–544.

[18] Quoted in the Court of Appeal judgment at 532.

it made Ortho look so bad. By giving less candid warnings in Canada, Ortho looked as if it had been treating Canadian women very shabbily.

Needless to say, Ortho did not admit that it was treating Canadian women shabbily and Ortho's arguments on this point were very interesting. As regards the warning given to Canadian doctors, Ortho argued that the Canadian food and drug authorities had issued a very strong warning to doctors about the danger of stroke from birth control pills. Since the standard law on warnings is that a party has no duty to warn someone of a danger they know or ought to know about, Ortho argued that whether or not its warnings to doctors were adequate was irrelevant because Canadian doctors should have been well aware that birth control pills posed a danger of causing strokes.

The Court in *Buchan* brushed this fact aside. It said:

> The manufacturer's duty to warn continues notwithstanding that the information may be otherwise available.[19]

The Court quoted Linden J. as saying:

> A drug company cannot rely upon the doctors to read all the scientific literature outlining the specific dangers involved in the many drugs they have to administer each day.[20]

With respect, birth control pills must be one of the most common medications doctors prescribe and doctors would not have had to read *all* the scientific literature to find the warning about the danger of stroke. All a doctor would have had to read was the warning issued by the food and drug authorities. It seems to me that it is reasonable to expect doctors to read warnings issued by the food and drug authorities.

As regards the warnings it gave directly to the women who used its birth control pills, Ortho pointed out that those warnings had been written, not by Ortho, but by a panel of doctors appointed by the food and drug authorities. Ortho argued that it had given Canadian women the precise warning the government of Canada had directed it to give them. Of course, meeting government requirements does not necessarily mean one has met the duty of care in tort law. Government

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[19] *Supra* note 2 at 114.

[20] *Ibid.* quoting *Davidson* v. *Connaught Laboratories* (1980), 14 C.C.L.T. 251 at 276 (Ont. H.C.).

requirements are often just a minimum and the reasonable person can often be expected to do more than just the minimum. I happen to agree with the decision in *Buchan* that the warning Ortho gave to Canadian women was not candid enough about the risk of a stroke, but it seems to me that some, if not all, of the fault for this lies with the food and drug authorities, rather than with Ortho. As I pointed out above, the government decides whether a product that is dangerous cannot be sold at all or can be sold with a warning. Since medical products are fully regulated, the regulations in this area should not be regarded as minimums. The food and drug authorities should not be relying on drug manufacturers to do more than they are required to do, and I would guess that the food and drug authorities do not see themselves as doing so. I think the food and drug authorities see themselves as prescribing exactly how drug manufacturers are to act and, since the Canadian food and drug authorities undoubtedly had access to the warnings that were given about birth control pills in the United States, it is not clear why they required a less candid warning. In any case, it does not seem quite fair for a court to decide later that the warning Ortho gave was inadequate.[21]

V. CAUSATION

THE FINAL DIFFERENCES BETWEEN *Hollis* and *Buchan* are on the issue of causation. There were two causation problems in both cases. One was scientific. In *Buchan*, Ortho argued that the birth control pills had not caused Ms. Buchan's stroke and in *Hollis*, Dow argued that the rupture of the implant had not caused Ms. Hollis' injuries. On these scientific questions, both trial courts decided against the defendants and neither finding was seriously at issue on appeal.

The causation issue that was seriously disputed on appeal in both *Hollis* and *Buchan* was not a scientific one. The question was whether the failure to warn had caused the use of the product. Would Ms. Hollis have had the breast implants even if she had been warned about the risk of rupture? Would Ms. Buchan have taken the birth control pills even if she had been warned about the risk of a stroke? If either woman would have used the product even if she had been adequately warned of the danger, then the failure to warn cannot be said to have caused the accident.

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[21] I discuss this apparant unfairness in a comment on *McKay* v. *Bank of Nova Scotia* (1995) C.B.R. [forthcoming].

Hollis and *Buchan* treat this non-scientific question of causation very differently. One reason for this is that *Buchan* was decided when *McGhee* v. *National Coal Board* was still good law.[22] In *McGhee*, Lord Wilberforce held that when there was a breach of duty, scientific causation could under certain circumstances be presumed. *Buchan* applied this presumption to the non-scientific question of causation:

> Once the breach of duty to warn prescribing physicians has been established, I think it is fair and reasonable to *presume* that the inadequacy of the warning was a contributing cause of the ingestion of the drug. [emphasis added][23]

It is not clear why it was necessary to presume the facts in *Buchan*. The inadequacy of the warnings given in Canada was established by comparison with the warnings given in the United States and there should have been plenty of evidence as to whether American doctors, with their better warning, were prescribing differently from Canadian doctors. There also should have been plenty of evidence as to whether American women, with their better warning, were deciding differently from Canadian women about whether to take Ortho-Novum. Indeed, the trial Court in *Buchan* noted:

> the evidence adduced at trial which indicated that per capita consumption of birth control pills in the United States of America fell relative to the rate in Canada following the 1966 insertion in the pill packages of substantial warnings. The percentage of women in child bearing years in Canada who take oral contraceptives is still significantly higher in Canada than in the United States of America.[24]

Two years after *Buchan* was decided, the House of Lords held in *Wilsher* v. *Essex Area Health Authority* that Lord Wilberforce had been wrong in *McGhee*.[25] *Wilsher* says causation may not be presumed, but it allows the courts to make what it calls a "robust" inference of causation.[26] In a sense, this is just what was done in *Hollis*.

Whether or not Ms. Hollis would have had the breast implant if she had been warned about the risk of a rupture can be asked subjectively or objectively. We can ask what Ms. Hollis would have done, or we can

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[22] [1973] 1 W.L.R. 1 (H.L.) [hereinafter *McGhee*].

[23] *Supra* note 2 at 116.

[24] *Supra* note 14 at 275.

[25] [1988] A.C. 1074 [hereinafter *Wilsher*].

[26] *Ibid.* at 1090.

ask what a reasonable woman would have done in her position. Using the subjective approach is likely to result in a finding of liability because Ms. Hollis' testimony that she would not have had the implants had she been adequately warned of the danger of a rupture is very nearly determinative. Using the objective test is likely to result in a finding of no liability, because the fact that many women choose to have breast implants even after they have been warned about the risk of a rupture is, likewise, very nearly determinative. In *Hollis*, the Court of Appeal followed *Reibl* v. *Hughes*,[27] a Supreme Court of Canada decision on medical malpractice, rather than products liability, and held that the objective test must be used. But then, applying the objective test, the Court concluded that a reasonable woman in Ms. Hollis' position would *not* have had the implants if she had been warned about the risk of a rupture. This decision is based on the particular facts of the case.

Evidence was led on behalf of Dr. Birch that most women who have breast implants come to their doctors "pre-sold" on the surgery and that warnings do not deter them. Ms. Hollis did not come to Dr. Birch doctor wanting breast implants. The suggestion about the breast implants came from Dr. Birch, rather than from Ms. Hollis herself. From this fact and the fact that Ms. Hollis did not need the breast implants for an urgent medical reason, Prowse J.A. concluded that a reasonable woman in Ms. Hollis' situation would not have had the breast implants if she had been warned about the risk of rupture. This is a very generous finding of fact; it is what one might well call a "robust" inference of causation.

In *Buchan*, the Court did not have to be so generous on the facts because it said: "the *Reibl* test is inappropriate to products liability cases."[28] *Buchan* applied the subjective test. The trial judge had accepted Ms. Buchan's testimony that she would not have taken Ortho-Novum birth control pills if she had been adequately warned of the risk of stroke and the Court of Appeal sustained this finding.

> Whether a so-called reasonable woman in the plaintiff's position would have done likewise is beside the point.... So long as the court is satisfied that the plaintiff would not have used the drug if properly informed of the risks, this causation issue should be concluded in her favour regardless of what other women might have done.[29]

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[27] [1980] 2 S.C.R. 880, 114 D.L.R.(3d) 1, 14 C.C.L.T. 1, 33 N.R. 36 [hereinafter *Reibl*].

[28] *Supra* note 2 at 119, *per* Robins J.A..

[29] *Ibid.* at 121.

The Court defended this decision in language which I find quite inspiring:

> The suggestion that the determination of this causation issue other than by way of an objective test would place an undue burden on drug manufacturers is answered by noting that drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know. In my opinion it is sound in principle and in policy to adopt an approach which facilitates meaningful consumer choice and promotes market-place honesty by encouraging full disclosure. This is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales.[30]

[30] *Ibid.*