Lost Cause in the Ontario Court of Appeal A Comment on Walker Estate v. York Finch General Hospital

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In the 1990s the Supreme Court of Canada entertained four appeals relating to causation in tort arising in the health care field: *Snell* v. *Farrell*,[1] *Laferrière* v. *Lawson*,[2] *Hollis* v. *Dow Corning Corp*.,[3] and *Arndt* v. *Smith*.[4] Recently it allowed leave in another, the decision of the Ontario Court of Appeal in *Walker Estate* v. *York Finch General Hospital*.[5] *Walker* involves an unusual treatment of causation by the appeal court, one which, if upheld by the Supreme Court of Canada, might have a significant impact on the law of tort. This note will describe the *Walker* case and the issues at stake in the appeal.

The estate of Alma Walker brought a negligence action against the York Finch General Hospital and the Canadian Red Cross Society (CRCS) in respect of her death which had allegedly been caused by a transfusion of HIV infected blood following a caesarean section in October 1983. The suit was tried with two others, and in lengthy reasons following a hundred days of hearings Borins J. dismissed the estate's action against all defendants.[6]

Much of the evidence and of the trial judge's lengthy and detailed reasons dealt with the duty of care owed by the CRCS to prospective recipients of blood products. The CRCS did not dispute that it owed a legal duty to such persons. Since at the time of the donation in question no procedure was available for testing the products themselves for HIV contamination, the question of what the duty of care required focussed on determining the appropriate techniques and procedures for screening prospective donors so as to dissuade certain high risk persons—in particular sexually active gay men—from giving blood. In one of the companion cases tried with *Walker*, Borins J. accepted the plaintiff's argument that, at the time of collecting the blood in question in that action, the CRCS's donor screening techniques were inadequate and constituted a breach of its duty of care.[7] However the blood in question in *Walker* had been donated fifteen months earlier when less was known about HIV transmission, and Borins J. did not make a finding on whether the CRCS was in breach of its duty at that earlier time.

Although the resolution of that question might appear key to *Walker*, Borins J. held that he did not have to address it because in any event the claim would have failed on another ground, *viz*. the plaintiff's failure to prove causation. Based on evidence from the man who had donated the blood which had eventually been transfused into Ms. Walker, Borins J. concluded that, even if the CRCS had implemented donor screening techniques which lived up to its duty of care, the donor in question would not have been dissuaded and would in any event have donated the blood which was later transfused into Ms. Walker.[8] Consequently the plaintiff estate had failed to prove causation; in fact the defendant the CRCS had, on the balance of probabilities, *disproved* causation.

The plaintiff appealed. The Ontario Court of Appeal framed the principal issue before it as

> whether the trial judge was correct in holding that in order to establish causation, the Walkers bore the additional onus of showing that had proper screening measures been in place, they would have deterred [the donor] from giving blood.[9]

The Court unanimously answered this in the negative. It concluded that

> [a]part from evidence of "extraneous conduct" on [the donor's] part that would have made the CRCS's failure to adequately screen high risk donors irrelevant it was not open to the CRCS to dislodge the presumptive causal link by showing that the proper screening measures would have proved ineffective in deterring [the donor].[10]

The appeal court held that once it was demonstrated that the defendant breached its duty of care and that an injury occurred that was of a type which fell within the scope of the risk against the chance of whose materialization the duty was imposed in the first place, the trial judge's finding that the but-for test of causal sufficiency was not satisfied should not preclude a finding of liability. This was said to follow from the decision of the Supreme Court of Canada four years earlier in *Hollis v. Dow Corning Corp*.[11] There the Supreme Court had held that a manufacturer of breast implants which had failed to warn either the patient or her doctor about risks of implant rupture could not avoid

liability by demonstrating that, even if it had warned the doctor, that doctor would not have passed this information on to the plaintiff/recipient. The Ontario Court of Appeal held that *Hollis* applied to the situation in *Walker*. It further reasoned that

> as a matter of policy, it would be unjust to allow the CRCS to escape liability by placing what, in some cases, could amount to an impossible burden on an innocent plaintiff.[12]

The upshot of that holding was that the appeal court had to confront the fact that Borins J. had made no finding on the duty of care issue. Rather than send the matter back for a new hearing on that point, it concluded that based on the finding that such a breach had occurred in the companion case to *Walker*, the CRCS had been in breach of its duty even at the earlier time of the donation in *Walker*.[13] In addition it held that the CRCS's status as a non-profit organization could not excuse its failure to take the required steps to put in place an adequate donor screening program. Accordingly the Court of Appeal allowed the Walker appeal and granted judgment against the CRSC.

On 14 October 1999 the Supreme Court of Canada allowed the CRCS's application for leave to appeal on both the issue of causation and the finding on the duty of care. This note will confine itself to the causation issue, though on the question of the duty of care it seems unlikely that the Supreme Court would disagree with the appeal court's decision that CRCS's status as non-profit organization did not operate to lower the standard of care to which it was subject. In the context of vicarious liability for sexual battery the Supreme Court has recently held that non-profit organizations are subject to the same liability tests as commercial ones.[14] If non-profit status does not operate to benefit defendants in the realm of strict liability, *a fortiori* it will not operate in the tort of negligence.

A number of observations may be made about the decision of the Ontario Court of Appeal on the causation issue, and thus on the matter which the Supreme Court will have to decide. As a preliminary observation it should be noted that many passages of the appellate judgment seem to strain to paint the trial judge's approach to causation as unusual and its own rejection of that approach as a return to a more traditional rule. For example, the appeal court wrote at numerous points about the trial judge's decision to place an "additional burden" or "additional onus" on the plaintiff estate. It went on to write:

> In our view, generally accepted notions of fault underlying tort liability contemplate liability where the exact harm envisioned by a breach of duty of care occurs after a breach of that duty. Fault, as understood in tort law, does not require that the Walkers overcome the additional burden of proving what some other person would have done had the CRCS acted in accordance with its duty to Mrs. Walker.[15]

It should be observed that the so-called additional burden that Borins J. had placed on the plaintiff was no more than the requirement to prove, on the balance of probabilities and on the but-for standard, that the defendant's breach caused the plaintiff's harm. That requirement is a necessary part of the orthodox formulation of the cause of action in negligence. For the Court of Appeal to suggest, as it appears to do in the foregoing quotation, that liability in negligence may be established when a certain harm occurs *after*, but not necessarily because of, a breach amounts to an abandonment of the but-for test for cause in fact. Certainly there are classes of cases where courts have decided, in light of special circumstances, the but-for test need not be satisfied (about which more below). However, to suggest as the Court of Appeal does that the general rule of liability in negligence does not employ the but-for test is an unusual statement of the law. Perhaps by writing that the general law of tort "contemplates" (rather than "requires") liability when harm within the risk occurs after (but not necessarily because of) breach the appeal court was seeking to acknowledge that sometimes failure to satisfy the but-for test will result in a finding of no liability, but that is far from clear. If in deciding this appeal the Supreme Court of Canada should conclude that, as a general principle of negligence, fault follows from the mere occurrence of a harm within the scope of the duty breached, that would be a significant change in tort law.

In connection with the previous point, the appeal court wrote about a "presumptive causal link"[16] and went on to justify its decision in light of the fact that

> requiring the plaintiff to prove a hypothetical situation [*i.e.*, what would the donor have done had proper screening measures been in place] relating to the conduct of the infectious donor could, in some instances, make it virtually impossible for the plaintiff to prove causation.[17]

It must be noted, however, that what the Court of Appeal did was not simply to put the burden of disproving causation on the defendant CRCS. Such a move which might perhaps have been justified in light of the CRCS's superior access to the evidence on that issue (though of course whether that would have been justified once CRCS disclosed to the plaintiff estate information about the donor who gave the blood in question is a debatable point).[18] Rather it held that causation on this issue was conclusively established on proof of injury within the scope of the duty breached. In light of that finding, the appeal court's arguments about the unfairness of requiring persons in the plaintiff's position to prove hypothetical situations seem entirely beside the point. One can agree with the appeal court that it may be unfair in this case to require plaintiffs to carry the burden of proof on this part of the causation issue, but it is difficult to see why that supports a holding that the defendant should not be permitted to disprove causation, as the trial judge found that it had.

Putting aside questions of whether the appeal court was accurate in characterizing its decision as an invocation of a general rule, it did justify its decision as following from a decision of the Supreme Court of Canada in *Hollis*.[19] It is on the link between *Hollis* and *Walker* that most of the rest of this comment will focus. By way of initial observation, it is by no means uncontentious that *Hollis* governs the situation in *Walker*. For one thing, *Hollis*, unlike *Walker*, was an action for failure to warn. Its holding on the causation issue was made in the context of the question of what the plaintiff would have done had she been given adequate information about the health care product she was considering using, and the Supreme Court has held in *Reibl* v. *Hughes*[20] and *Arndt* v. *Smith*[21] that the failure to warn cases require a special approach to the causal question. By way of contrast, the issue in *Walker* was simply whether the defendant was negligent in supplying HIV-tainted blood. Whether that should make any difference in light of the fact that another feature of the causal issue was common to *Walker* and *Hollis*—*viz*. what would some third party have done had the defendant not failed to supply that third party with certain information—is an interesting question. But the Ontario Court of Appeal did not advert to it.

More importantly, in *Hollis* the Supreme Court was at pains to emphasize the special features of the case which supposedly justified the highly unusual step of holding a key element in the causal chain to be irrefutably established, namely the operation of the learned intermediary rule. In his reasons for the Supreme Court La Forest wrote:

> The ultimate duty of the [defendant] manufacturer is to warn the plaintiff adequately. For practical reasons the law permits it to acquit itself of that duty by warning an informed intermediary. Having failed to warn the intermediary, the manufacturer has failed in its duty to warn the plaintiff who ultimately suffered injury by using the product.... The learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary, but if it fails to do so it cannot raise as a defence that the intermediary could have ignored this information.[22]

This special circumstance—the learned intermediary rule—did not obtain in *Walker*. Obviously there are respects in which *Walker* is akin to *Hollis*. A few words thus need to be said about the court's reliance on *Hollis*. There are, indeed, important parallels between the two cases, but the matter is rather more complex than the reasons in *Walker* reflect.

The kinship with *Hollis* consists in the fact that in both cases proof of causation is, we might say, frustrated by the fact that it would require proof of a "hypothetical decision." Perhaps a better way to make the point is to say that in both cases proof of causation is complicated by the fact that the plaintiff's injury and the omission in which the defendant's breach of duty consisted are linked by a third party's decision to do or forbear from doing something. At times, both *Walker* and *Hollis* seem to suggest that the unfairness of putting on the plaintiff the burden of demonstrating something as elusive of proof as what a third party would have done had he had information he did not have, in itself warrants the adoption of some plaintiff-favouring flexibility in the rules of causation. This argument is not without merit, but there is a deeper point here.

Let's start with *Hollis*. At issue in that case, in part, was the implication for the causal question (who has to prove what?) of the defendant's reliance on the learned intermediary rule. The learned intermediary rule permits manufacturers to discharge their duty to warn consumers of the risks inherent in the use of their products by warning a learned intermediary (*e.g.*, a doctor), supposing certain conditions are met (e.g., that the product will be used typically only on the recommendation of such a third party). In *Hollis*, the defendant manufacturer argued that while it breached its duty to warn, that breach did not cause the plaintiff's injury, because the doctor would not have passed the warning on in any case. But such an argument runs afoul of considerations of equity. The manufacturer could claim that it could have discharged its duty to Hollis by warning her doctor (rather than her) only on the assumption that the doctor would have passed on the warning. The defendant manufacturer, we might say, was thus effectively estopped from at once relying on and retracting that assumption.

While they do not involve a learned intermediary, the facts in *Walker* display the same basic structure. In both cases, the defendants undertook to discharge their duty to the plaintiff

by doing something in the hopes of affecting the behaviour of a third party. By parity of reasoning, then, the CRCS cannot argue that had it done as it should have to dissuade the donor from giving blood, its efforts would have been ineffective, because the claim that they *could* have discharged their duty to the plaintiff in this way depends on the assumption that the screening process at issue was effective.

Now, the question in both cases is whether such a finding (which we to some extent have put in the courts' mouths) constitutes an abandonment of or an alteration to cause-in-fact. It approaches the former if we think of disproof of causation as a defence here barred by considerations of equity. Alternatively, we may think of this argument as altering the causal standard, perhaps by replacing the but-for test with the material contribution test approved by the Supreme Court in *Athey* v. *Leonati.*[23] We hasten to note both that no mention was made of this test in either *Hollis* or *Walker*, and that, as we have argued elsewhere,[24] it is by no means clear what the test requires and under what circumstances plaintiffs may elect to rely on it rather than the standard but-for test. But, that having been said, cases like *Hollis* and *Walker* display features that suggest that the appropriate causal question is not whether the defendant's breach of duty was a necessary condition of the plaintiff's injury, but rather whether the former contributed to the latter.

This follows from the fact that part of the causal claim leading to the plaintiff's injury was a third party's decision to do or forbear from doing something. Given the assumptions in both cases that the warning to the third party would have made a difference, we can plainly infer that so too would making an inadequate warning. At the least, it would have (materially) contributed to the third party's decision to do that which turned out to adversely affect the plaintiff. Thus, on this interpretation, the point is not that considerations of equity bar the permissibility of the defendant disproving causation. Rather it is that the structure of the duty in cases like *Hollis* and *Walker* entails that proof of breach of duty is more probative (perhaps conclusive) of proof of cause-in-fact than in typical cases.

The Ontario Court of Appeal in *Walker* said little about what features of *Hollis* made it applicable to *Walker*; it made reference to "cases of this nature"[25] without saying much about what that meant. We have tried to explicate the affinities between *Hollis* and *Walker*, but obviously there are important choices to be made in defining the scope of this departure from the traditional causal standard. Presumably we can conclude that it refers to elements of the causal chain which deal with a hypothetical decision. However that comprises many types of cases, including, for example, a wide range of product liability actions, or suits for financial loss caused by negligent misrepresentation or inducing breach of contract. *Walker* gives little guidance as to the class of cases in which its decision to irrefutably assume a significant link in the causal chain operates. Presumably it includes some class of cases of which both *Hollis* and *Walker* are members, but—to offer a non-exhaustive list of possible descriptions of such a class—that might be (1) all negligence actions where the matters under counterfactual contemplation include someone's decision whether to do something; (2) as in (1), except limited to hypothetical decisions by third parties (*i.e.* persons other than the plaintiff); (3) only negligence actions involving *personal injury* where the causal link involves hypothetical decisions (perhaps by anyone, or perhaps confined to decisions by third parties); or (4) negligence actions *involving defective health care products* (and possibly also health care services) involving hypothetical decisions (perhaps by anyone, or again perhaps just by third parties). In short, given the significance and practical import of its decision, the appeal court failed to provide much guidance as to its scope of operation.

There is another unexplored aspect of both *Hollis* and *Walker*. In *Walker* the Ontario Court of Appeal made passing mention of the fact that the CRCS might avoid liability where there was "evidence of 'extraneous conduct' on [the donor's] part that would have made the CRCS's failure to adequately warn high risk donors irrelevant" .[26] The reference to "extraneous conduct" is derived from the judgment of La Forest J. in *Hollis.*[27] Neither *Hollis* nor *Walker* does anything to elaborate on what this concept might mean. Obviously it does not mean that the donor, had he been properly warned, would not have been dissuaded from giving blood, since that was what the trial judge found and what was held by the appeal court not to be a bar to a finding of liability. The "extraneous conduct" defence is mysterious. Possibly it refers to intentionally conduct on the part of the donor, that is, electing to give blood even though he knew that was imposing a high risk of HIV infection on recipients. Such conduct might be held to operate as a *novus actus* interveniens relieving the CRCS from responsibility for failing to meet its duty of care. But this is speculation on our part. Given its importance, it is to be hoped that the Supreme Court of Canada will take this opportunity to elucidate it.

Lastly, nowhere did the Ontario Court of Appeal take up the issue of whether causal conundra of this sort should be dealt with on a loss of chance basis. Such an approach would permit a judge to resolve the causal uncertainty by finding that, even if a properly warned donor would have given blood anyway, there was a chance he would not have, and that the plaintiff should be awarded a percentage of its damages to compensate for the loss of that chance. Stephen Waddams has noted that the Canadian courts have in some cases endorsed a probabilistic approach to causation,[28] and has gone on to argue for an expanded role for such an approach in complex medical care cases.[29] This issue was evidently not raised by the parties in *Walker*. Conceivably the Supreme Court of Canada, which has dealt with this matter previously in an inconclusive fashion,[30] will use this opportunity to explore it further.

The concerns raised so far about the reasoning of the Ontario Court of Appeal do not amount to an argument against the result in the case. When the Supreme Court of Canada decided in *ter Neuzen* v. *Korn*[31] that recipients of HIV-tainted bodily fluids would not normally be able to base compensation claims on strict, contract-like liability against immediate providers, such as doctors or hospitals, it confined such potential plaintiffs to the generally more

difficult route of negligence claims against persons further up the chain of supply. Claims against the original donors of infected blood or semen will not often be fruitful. Even if such persons are (1) still alive, (2) can be identified and located and (3) can be shown to have been negligent in choosing to donate, they are unlikely to be insured for this risk and may well be incapable of personally satisfying a damages claim.

That leaves the difficult route of negligence claims against parties such as the CRCS. Given the difficulties of such claims it is unsurprising that courts might be tempted to temper some of the more difficult burdens of negligence law. On the complex issue of causation such tempering might include one or more of (1) placing the burden of disproving causation on the defendant on the grounds that the relevant information is under its control or was rendered inaccessible by its actions; (2) the causal stance associated with *Snell* v. *Farrell* where the Supreme Court endorsed, for certain types of cases, a "robust and pragmatic approach to the...facts"[32] amounting to a willingness to draw factual inferences in the plaintiff's favour; (3) invocation of the doctrine of loss of chance;[33] or (4) allowing the plaintiff to establish causation by means of the more easily satisfied "material contribution" test associated with *McGhee* v. *National Coal Board*[34] and approved by the Supreme Court of Canada in *Athey* v. *Leonati*.[35]

However, the step taken by the appeal court in *Walker*—finding causation to be established on the mere finding of the occurrence of an injury within the scope of the breached duty—goes beyond any of these (except possibly the last, depending on what the still unelucidated concept of material contribution might turn out to mean). Despite the appeal court's efforts to characterize its decision as relieving a sympathetic plaintiff from some "additional burden" placed on it by the trial judge, the appeal decision results in removing a core element of a negligence action as it is traditionally formulated. Possibly this is justified by analogies between *Walker* and the decision of the Supreme Court of Canada in *Hollis*. However, the Ontario Court of Appeal did relatively little to specify what those were. Given that its decision amounts to holding the CRCS liable for a harm which, according to but-for standard applied by the trial judge, it probably did not cause, some elaboration is needed here. If the Supreme Court of Canada should discover a justification for this result it is to be hoped that it articulates that principle (and the "extraneous conduct" defence) clearly and in such a manner as to state definite boundaries to its operation.

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1.[1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 [hereinafter *Snell*, cited to S.C.R.].
2.[1991] 1 S.C.R. 541, 78 D.L.R. (4th) 609.
3.[1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 [hereinafter *Hollis*, cited to S.C.R.].
4.[1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48.
5.(1999), 43 O.R. (3d) 461, 169 D.L.R. (4th) 689, 118 O.A.C. 217 (C.A.) [hereinafter *Walker*, cited to O.R.], leave to appeal to S.C.C. granted 14 October 1999 (Lamer C.J. and McLachlin and Iacobucci JJ.) *Supreme Court of Canada Bulletin of Proceedings* October 15, 1999 at 1525.
6.*Walker Estate* v. *York Finch General Hospital* (1997), 39 C.C.L.T. (2d) 1 (Ont. Gen. Div.). One of the other actions was successful and was appealed by the defendant CRCS, but that appeal did not raise the issues presented in *Walker* and will not be discussed in this note.
7.*Ibid*. at 77-80.
8.*Ibid*. at 20.
9.*Walker*, *supra* note 5 at 471.
10.*Ibid*. at 473.
11.*Supra* note 3.
12.*Walker*, *supra* note 5 at 474.
13.*Ibid.* at 471.
14.*B. (P.A.)* v. *Curry* (1999), 46 C.C.L.T. (2d) 1 (S.C.C.). We also find it somewhat surprising that the appellate court chose to resolve the duty of care issue itself rather than send the matter back for a new hearing on this point.
15.*Walker*, *supra* note 5 at 474.
16.*Ibid*. at 473.
17.*Ibid*.
18.In *Snell*, *supra* note 1, the Supreme Court discussed the circumstances in which an evidentiary burden might be shifted from the plaintiff to the defendant. Although the Court noted that the ultimate burden in common law actions always rests on the plaintiff, it observed that where the facts lie particularly within the defendant's knowledge "very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary" (at 328-29).
19.*Walker*, *supra* note 5 at 473.
20.[1980] S.C.R. 880, 114 D.L.R. (3d) 1.
21.*Supra* note 4.
22.*Hollis*, *supra* note 3 at 683-84. For further discussion of the nature of the special circumstances which offered justification for the unusual holding on the causation issue in *Hollis* see V. Black & D. Klimchuk, Case Comment (1996) 75 Can. Bar Rev. 355 at 368-75.

In addition, it may be observed that in *Hollis*, since there had been no trial findings on what the doctor might have done had he received the requisite warning from the manufacturer, any holding other than an irrebuttable finding of proof of causation would have resulted in sending the plaintiff back for a new trial, one in which she might very well have been able to prevail, but only after years of litigation. In other words, in *Hollis* irrefutable proof of causation was a way for the Supreme Court to resolve an unaddressed factual question in a way which may ultimately have been fairer and cheaper for all parties. That circumstance did not operate in *Walker*, where the trial judge had made factual findings on the causation issue.

23.[1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 [hereinafter *Athey* cited to S.C.R.]. Arguably the Supreme Court did not need to resort to the material contribution test to find causation in *Athey* v. *Leonati:* see D. Klimchuk and V. Black, "A Comment on *Athey* v. *Leonati:* Causation, Damages and Thin Skulls" (1997) 31 U.B.C. L. Rev. 163 at 166-70. However, it did approve that test and it has been applied in subsequent cases at the appellate level. See in

particular, *Green* v. *Surchin* (1997), 44 C.C.L.T. (2d) 68 (Qué. C.A.), leave to appeal to S.C.C. refused, [1997] 3 S.C.R. x; *Webster* v. *Chapman,* [1998] 4 W.W.R. 335, 40 C.C.L.T. (2d) 212 (Man. C.A.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. vii; and *Briglio* v. *Faulkner,* [1999] B.C.J. No. 1293 (B.C.C.A.). For a helpful discussion of material contribution test in light of the last mentioned case see G. Demeyere, "The Material Contribution Test: An Immaterial Contribution to Tort Law – A Comment on *Briglio* v. *Faulkner*" forthcoming U.B.C. L. Rev.

24.V. Black, G. Demeyere & D. Klimchuk, Annotation to *Green* v. *Surchin* (1997) 44 C.C.L.T. (2d) 68.

25.*Ibid*.

26.*Walker, supra* note 5 at 473.

27.*Hollis, supra* note 3 at 684.

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

29.S.M. Waddams, "The Valuation of Chances" (1998) 30 Can. Bus. L.J. 96.

30.In *Laferrière* v. *Lawson*, *supra* note 2, the Supreme Court rejected the loss of chance approach to causation in a different setting. However, they did not say it could never operate and in *Athey* they indicated that the status and scope of the doctrine was an open question: *supra* note 23 at 474.

31.[1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577.

32.*Supra* note 1 at 330, Sopinka, J. The quoted words, complete with ellipsis, are taken from the speech of Lord Bridge in *Wilsher* v. *Essex Area Health Authority*, [1988] 2 W.L.R. 577 (H.L.) at 569.

33.It should by noted that the loss of chance approach to causation does not always function as a plaintiff-favouring one. It has that effect only in cases like *Walker*, where the plaintiff has failed a balance of probabilities failed to meet the but-for test for causation, and thus would be met with the total failure of its claim.

34.[1956] A.C. 613 (H.L.).

35.*Supra* note 23.