See paras. 161-162

Indexed as:

Robb v. St. Joseph's Health Centre; Rintoul v. St. Joseph's Health Centre; Farrow v. Canadian Red Cross Society

Between

Alma Robb as Executrix of the Estate of L. Wayne Robb, deceased, Alma Robb, Douglas Robb, Heather Robb, Edna Robb and George Robb; Judith Lynne Rintoul as Executrix of the Estate of C. Gray Rintoul, deceased, Tracey Rintoul, Trevor Rintoul, Lynne Ferreira and Lisa Edgington; Christopher Farrow, also known as Christopher Le Blanc, Stephanie Beaulieu and Steven Farrow, by their Litigation guardian, Joanne Farrow, and Joanne Farrow, plaintiffs (respondents to CRCS; and cross-appellants against CRCS, Ontario and Bayer), and The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario, Bayer Corp. and Bayer Inc., defendants (CRCS: appellant against plaintiffs; respondent to cross-appeal by plaintiffs; respondent to third-party appeal by Canada; Bayer and Ontario: respondents to cross-appeal by plaintiffs), and The Attorney General of Canada, third party (third-party appellant against CRCS)

[2001] O.J. No. 4605

152 O.A.C. 60

9 C.C.L.T. (3d) 131

109 A.C.W.S. (3d) 1002

2001 CarswellOnt 4159

Docket Nos. C34707, C34708, C34709, C34738, C34739 and C34740

Ontario Court of Appeal
Toronto, Ontario

Osborne A.C.J.O., Catzman and Charron JJ.A.

Heard: June 5-7, 2001.
Judgment: November 29, 2001.

(213 paras.)

Torts -- Negligence -- Duty of care -- Duty to warn -- Whether defendant took reasonable care -- Relationship required to raise duty of care -- Food and drug control -- Drugs -- New drugs.

Appeal by the plaintiffs and cross-appeal by the defendants in a negligence action. The plaintiffs, Robb, Rintoul and Farrow, who were hemophiliacs, each received a manufactured blood factor concentrate called F-IX. Each of them became infected with HIV, and Robb and Rintoul subsequently died of AIDS. The federal government regulated F-IX through the Bureau of Biologics. F-IX was manufactured by Bayer. The plaintiffs commenced a negligence action for damages against the Red Cross, the Province of Ontario and Bayer. The Red Cross and Ontario brought third party claims against Canada. The plaintiffs claimed that they contracted HIV because the F-IX was contaminated, and argued that the defendants breached their duty of care to the plaintiffs by delaying the introduction of heat-treated F-IX into Canada and by failing to warn users of the risks associated with using unheated F-IX. The trial judge held that the Red Cross was negligent for failing to do everything possible to facilitate to facilitate the transition to heat-treated F-IX and for delaying its introduction into Canada. The Red Cross was ordered to pay each plaintiff hundreds of thousands of dollars in damages. Canada was ordered to indemnify the Red Cross to the extent of 25 per cent. The plaintiff's claims against Ontario and Bayer were dismissed.

HELD: Appeals allowed, cross-appeals dismissed. There was a sufficient relationship of proximity between the parties for there to exist of duty of care. For the Red Cross to discharge its duty of care, it was not required to take positive steps to accelerate the regulatory process. It was under a duty not to impede the regulatory process, but there was no evidence that it did so. The trial judge placed the standard of care at too high a level. The evidence established that the main reason why heat-treated F-IX was not introduced at an earlier date was because of regulatory requirements. The evidence did not support the inference that the Red Cross delayed the transition to heat-treated F- IX. The trial judge's conclusions regarding the dates of infection were not reasonably supported by the evidence. Without evidence to establish the dates of infection, the plaintiffs failed to establish that the negligence of the Red Cross caused them to contract HIV.

Statutes, Regulations and Rules Cited:

Evidence Act, R.S.O. 1990, c. E.23, s. 35, 52.

Family Law Act, R.S.O. 1990, c. F.3.

Food and Drugs Act, R.S.C. 1985, c. F-27.

Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7(1).

Appeal from:

On appeal from the judgment of Justice Ellen M. Macdonald dated March 8, 2001.

Counsel:

Peter K. Boeckle, Chris Morrison and Allyson Webster, for the Canadian Red Cross Society (CRCS).
Ian R. Dick and Farhana Parsons, for the Attorney General of Canada (Canada).
Kenneth Arenson, for the Estate of L. Wayne Robb, deceased, Alma Robb, Douglas Robb, Heather Robb, Edna Robb, George Robb, the Estate of C. Gray Rintoul, deceased, Tracey Rintoul, Trevor Rintoul, Lynne Ferreira, Lisa Edgington, Christopher Farrow, Stephanie Beaulieu, Steven Farrow and Joanne Farrow (plaintiffs).
Mario Pietrangeli, James V. Maloney and Victor J. Paolone, for Her Majesty the Queen in Right of Ontario (Ontario).
Allyn Abbott, for Bayer Corp. and Bayer Inc. (Bayer).

[Quicklaw note: A corrigendum was released by the Court December 13, 2001. The correction has been made to the text and is appended to this document.]

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The following judgment was delivered by

THE COURT:--

1. INTRODUCTION

1 In 1985, the plaintiffs, Wayne Robb, Gray Rintoul and Christopher Farrow, received a manufactured blood factor concentrate known as Factor IX (F-IX) to treat a blood disorder known as Hemophilia B. F-IX was allegedly contaminated with the human immunodeficiency virus (HIV) with the result that each of the plaintiffs became infected with HIV. Later, Mr. Robb and Mr. Rintoul contracted acquired immunodeficiency syndrome (AIDS). Mr. Robb died on November 3, 1993 and Mr. Rintoul died on August 18, 1995 - both due to AIDS related complications. At the time of trial, Mr. Farrow was 18 years old and was HIV positive. He had not then contracted full-blown AIDS.

2 At the relevant times, the Canadian Red Cross Society (CRCS) was the licensed distributor of factor concentrates in Canada, including F-IX. The CRCS also identified blood donors, collected blood, did primary processing of blood, contracted with private sector manufacturers of factor concentrates such as F-IX, and distributed blood and blood products to hospitals and clinics.

3 The federal government (Canada) regulated all pharmaceutical products, including F-IX, through the Bureau of Biologics (BoB). The BoB is part of the Drugs Directorate of the Health Protection Branch of the Department of National Health and Welfare. It is responsible for approving new drugs in Canada. The Food and Drugs Act, R.S.C. 1985, c. F-27 sets out what is required for new drug approval in Canada.

4 F-IX was manufactured in the United States by Cutter Biological (Cutter) (now Bayer Corp. and Bayer Inc., collectively, Bayer) and in Canada by Connaught Laboratories Limited (Connaught). These companies manufactured F-IX for the CRCS using blood collected by the CRCS in Canada. Although Bayer is the defendant in these proceedings, Cutter was the entity directly involved with the issues raised by these appeals. Accordingly, we will refer to these entities

interchangeably as either Bayer or Cutter.

5 In 1992, Mr. Robb and Mr. Rintoul commenced actions against the CRCS, Her Majesty the Queen in Right of Ontario (Ontario) and Bayer.[1] In 1996, Mr. Farrow, by his litigation guardian, commenced his action against the same defendants. In November 1998, the three actions were ordered to be tried together. The CRCS and Ontario brought third-party actions against Canada. The CRCS added Connaught as a third party; however, Connaught was released from the litigation at an early stage.

6 In their actions, the plaintiffs claimed that they contracted HIV from taking unheated F-IX. They contended that by 1984 at the latest, it was well known in the medical and blood communities that factor concentrates such as F-IX could contain HIV, and that hemophiliacs taking unheated F-IX could become infected with HIV. The parties accepted, and the trial judge found, that heat-treating F-IX killed viral agents, including HIV. The plaintiffs submitted that the CRCS, Bayer and Ontario breached the duty of care each owed to them by delaying the introduction of heat-treated F-IX into Canada and by failing to warn users of the risks associated with the use of unheated F-IX. The plaintiffs further claimed that Ontario and the CRCS stood in the relationship of principal and agent and that Ontario was therefore responsible for the CRCS's negligence.

7 The plaintiffs also alleged that Ontario (and others) ordered the Secretariat of the Canadian Blood Committee (CBC) to destroy transcripts and audiotapes of meetings of the CBC between 1982 and 1989. They contended that these materials were destroyed in an attempt to cover up wrong-doing by government officials regarding Canada's blood program. Thus, the plaintiffs sought damages from Ontario on the basis that Ontario committed the tort of spoliation.

8 In their third-party claims against Canada, the CRCS and Ontario contended that any delay in the introduction of heat-treated F-IX into Canada was Canada's responsibility. In particular, the CRCS contended that the BoB unreasonably delayed the issuance of the statutorily required Notice of Compliance (NoC) for heat-treated F-IX. Canada responded that the application for the NoC for heat-treated F-IX was processed with reasonable dispatch and, in any case, more quickly than was normal for a new drug product.

9 Before the trial began, each of the plaintiffs received $120,000 ($30,000 a year for four years) from Canada under a federal no-fault payment plan known as the Extraordinary Assistance Plan (EAP). In consideration for the EAP payments, the plaintiffs executed full and final releases relieving Canada of any liability to the plaintiffs. This explains why the plaintiffs made no claim against Canada.

10 The plaintiffs' consolidated actions, various cross-claims that need not be detailed here, and the third-party claims against Canada were tried together before Madam Justice E.M. Macdonald from November 1998 to August 1999.

11 In her reasons for judgment released on June 29, 2000, the trial judge gave judgment for the

plaintiffs against the CRCS, which she found to be 100% negligent for failing to do "everything possible to facilitate" the transition to heat-treated F-IX and for delaying the introduction of heat-treated F-IX into Canada.[2] The trial judge ordered the CRCS to pay the Robb family $599,358.36, the Rintoul family $362,650, and the Farrow family $542,450, exclusive of prejudgment interest.

12 In dealing with the CRCS's third-party claim against Canada, the trial judge found that Canada should indemnify the CRCS to the extent of 25%. She provided no explanation for the 75%-25% apportionment of liability as between the CRCS and Canada. Canada's liability as a third party was based on the trial judge's finding that the BoB did not process the heat-treated F-IX application expeditiously in the prevailing circumstances. As a result of the manner in which the trial judge credited the EAP payments, the CRCS had to pay 100% of the plaintiffs' assessed damages but Canada's obligation to indemnify the CRCS to the extent of 25% was reduced by the total EAP payments made to each of the plaintiffs.

13 The trial judge dismissed the plaintiffs' claims in negligence against Ontario. She found that the CRCS was not Ontario's agent or under the control of Ontario and that Ontario did not provide blood services or purchase them from the CRCS. She dismissed the plaintiffs' spoliation claim on the basis that there was no evidence to support it.

14 The trial judge also dismissed the plaintiffs' claims in negligence against Bayer, concluding that Bayer did not owe a duty to warn the plaintiffs nor to ensure the timely delivery of heat-treated F-IX to those who required this product. The trial judge also observed that there was no evidence that the plaintiffs were infected by a Bayer product.

15 The CRCS and Canada appeal from the trial judge's findings of negligence in the main action and in the third-party proceedings. They also appeal from some of the trial judge's damage assessments. The plaintiffs cross-appeal from: (i) some of the trial judge's damage assessments; (ii) the trial judge's dismissal of their claim against Bayer; and (iii) the trial judge's conclusion that Ontario did not commit the tort of spoliation.

II. FACTUAL BACKGROUND

16 To better understand the issues in this appeal, we think it would be helpful to provide a brief description of the blood program that was in place in Canada at the relevant times and to identify the various entities that were involved with the collection, manufacture and distribution of regulated blood products, particularly F-IX, which the plaintiffs required to treat their hemophilia. As already mentioned, the plaintiffs suffered from Hemophilia B. Hemophilia B patients lack the normal quantities of F-IX that enhances the clotting capacity of their blood. (Hemophilia A patients lack the factor concentrate referred to as F-VIII.)

17 Manufactured factor concentrates were first provided to hemophiliacs in about 1970. This represented a major medical advance for those suffering from hemophilia. Manufactured factor

concentrates enable hemophiliacs to lead more normal lives. The manufacturing of factor concentrates involves the extraction of small amounts of F-VIII (for those suffering from Hemophilia A) or F-IX (for those suffering from Hemophilia B) and other blood molecules, from whole blood. There are minute amounts of these factor concentrates in each unit of blood. Thus, many units of blood are needed to manufacture a single dose of F-VIII or F-IX. Because of the number of donors required to manufacture useable F-VIII or F-IX, the risk of infection is substantially greater than is the case where blood is provided by a single donor.

18 In 1981, the CBC was formed to oversee Canada's blood program. The CBC acted in an advisory capacity to the various Ministers of Health on issues relevant to the blood program in Canada. The CBC's members were senior provincial, federal and territorial officials. Its mandate included making recommendations regarding funding and budgets for the CRCS's blood-donor and transfusion services. The CBC established an advisory sub-committee composed of doctors and other knowledgeable experts in the blood industry. The advisory sub-committee was the forum through which the CBC first dealt with the issue of heat-treating factor concentrates to make them safer for hemophiliacs.

19 The CRCS was funded by the federal and provincial governments. It was responsible for the distribution of factor concentrates manufactured by private sector companies from whole blood that the CRCS collected in Canada from volunteer donors. The CRCS distributed F-IX, and other blood products required by hemophiliacs, to Canadian hospitals and clinics which in turn made them available to hemophiliacs by prescription.

20 In Canada, as we have said, the BoB was responsible for the approval of new drugs. Under the applicable legislation a drug manufacturer may not sell or distribute a new drug product until the BoB has issued a NoC for the new drug. The NoC is separate from licences issued to pharmaceutical companies, which are renewable annually - so long as the manufacturer's premises and conditions of manufacture meet Canada's safety standards.

21 A NoC was required before the CRCS could distribute heat-treated F-IX because, under the applicable regulations, heat-treated F-IX constituted a new drug. The BoB had to be satisfied that heat-treated F-IX was safe and effective before it would issue a NoC to permit its distribution and use. In layman's terms, the BoB had to be satisfied in the public interest that heat-treated F-IX would not harm hemophiliacs and that the heating process specified in the NoC submission did indeed eliminate viral agents.

22 We should note here that at relevant times there was a federal program called the Emergency Drug Release Program (EDRP), now called the Special Access Program, that permitted access to unapproved drugs - that is, drugs for which no NoC had been issued. Access to the EDRP was through a treating medical practitioner. No medical practitioner treating the plaintiffs sought access to the EDRP. However, the plaintiffs argued that the EDRP is relevant because its existence establishes that the BoB could exercise flexibility regarding NoC requirements. We will refer to this

argument further when we address Canada's appeal.

23 By 1982, there was some evidence in Canada and the United States of hemophiliacs who presented with HIV symptoms. Dr. Mozen, the director of research at Cutter from 1970 to 1992, testified that by March 1983 he knew that there was a connection between the use of factor concentrates and the transmission of HIV to hemophiliacs. He also testified about developments that eventually led to heat-treating F-VIII at 68 degrees centigrade for 72 hours. It was determined that this heat-treating would deactivate viral agents such as HIV. Although much of Dr. Mozen's research focused on the preparation of heat-treated F-VIII, it was also relevant to F-IX.

24 In July 1984, Cutter made a new drug submission to the BoB to permit it to add heat-treatment to the processing of F-VIII and F-IX. The BoB issued a NoC for heat-treated F-VIII in December 1984, and on April 10, 1985, it issued a NoC for heat-treated F-IX. The time that it took the BoB to issue the NoC for heat-treated F-IX is a critical issue in respect of the plaintiffs' claims in negligence against the CRCS and the CRCS's third-party claim against Canada.

25 The trial judge concluded that the risk of HIV infection through blood products was well known by "the informed medical community" by October or November 1984. The informed medical community included the CBC, the CRCS, the BoB and the companies that manufactured factor concentrates. The trial judge also concluded that by this time it was also known that heat-treating factor concentrates inactivated HIV. However, hemophiliacs had, as the trial judge put it, "no feasible alternatives" to treat their condition. This explains why hemophiliacs continued to take unheated F-VIII and F-IX even after they and their treating physicians knew that such products could contain viral agents.

26 On October 30, 1984, the advisory sub-committee of the CBC met to discuss changing from unheated to heated factor concentrates. The minutes of this meeting record a motion that there be a Consensus Conference to deal with heat-treating factor concentrates.

27 On November 16, 1984, because of the recognized risk that unheated factor concentrates contained viral agents such as HIV, the BoB issued a directive to the CRCS recommending that the CRCS move to heat-treated factor concentrates "as soon as possible", on the ground that further reliance on unheated products "cannot be justified". The BoB issued a second directive, also on November 16, 1984, to licensed manufacturers of factor concentrates (including Cutter) advising them to move to heat-treated factor concentrates "as soon as feasible". Both BoB directives (BoB Directives) refer to "AHF", which is the generic term for F-VIII. The trial judge found, and the parties did not dispute, that it was understood at the time that the BoB Directives related to F-IX as well as F-VIII.

28 Within about three weeks after the issuance of the BoB Directives, that is, by early December 1984, Cutter had in fact heat-treated 10,000 vials (a five-month supply) of F-IX for the CRCS. This supply of heat-treated F-IX remained at the Cutter plant in North Carolina pending completion of the regulatory steps required to permit shipment to Canada. In addition to Canadian regulatory

requirements, Cutter could not export blood products, including heat-treated F-VIII and F-IX, without the regulatory approval of the Office of Biologics, the American equivalent of the BoB.

29 Key players in the Canadian blood industry met on December 10, 1984 at what was called the Consensus Conference. There was some conflict at trial about the evidence concerning what was and was not discussed at the Consensus Conference and more will be said about this evidence later in these reasons. What is clear is that, as a result of the BoB Directives, the discussion at the Consensus Conference focused not on the efficacy of heat-treating, but rather on how heat-treating should be implemented. The trial judge viewed this shift in emphasis to be important.

30 We do not propose to review the eleven recommendations made at the Consensus Conference in any detail. It is sufficient to say that the Consensus Conference endorsed, and asked the BoB to expedite, the introduction of heat-treated F-VIII in Canada as soon as feasible before May 1985, with a transition period of between six to eight weeks, during which time both heat-treated and non-heat-treated F-VIII would be given to those suffering from Hemophilia A. Again, there is no issue that any discussion at the Consensus Conference about F-VIII was also relevant to F-IX.

31 As events unfolded, the BoB did not issue the required NoC for heat-treated F-IX until April 10, 1985. The trial judge found that the BoB would not, and we would add could not, issue a NoC for heat-treated F-IX unless it received viral deactivation data establishing, among other things, that heat-treatment in fact eliminated HIV and would not harm hemophiliacs. The trial judge recognized that although Cutter filed its new drug submission for heat-treated F-IX in July 1984, the BoB did not receive the required viral deactivation data from Cutter until March 1985.

32 When the BoB issued its NoC for heat-treated F-IX on April 10, 1985, Cutter began selling this product to the CRCS. Heat-treated F-IX manufactured in the United States by Cutter first arrived in Canada at the end of May 1985. The CRCS began distribution of heat-treated F-IX in July 1985. Messrs. Robb, Rintoul and Farrow did not receive heat-treated F-IX until July 1985. In the meantime, they continued to be treated with unheated F-IX.

33 To summarize, the evidence is clear that by December 1984, the major participants in the Canadian and American blood communities knew that factor concentrates, if not heated to certain specifications, could contain viral agents such as HIV. It was accepted that heat-treating eliminated viral agents and that the blood community should move to heat-treated F-VIII and F-IX as soon as was possible or feasible. It was also accepted that the transition to heat-treated F-VIII and F-IX could not be made until the regulatory authorities in Canada (the BoB) and the United States (the Office of Biologics) were satisfied that heat-treated F-VIII and F-IX were safe and effective. Finally, it appears to have been accepted that there would be a transition period of between six to eight weeks following the issuance of the required NoC, during which time both heated and unheated F-VIII and F-IX would be given to hemophiliacs.

34 The parties do not take issue with the requirement that there be a NoC for heat-treated F-IX before the CRCS could distribute this product to hemophiliacs. The critical factual issues in this

case as related to the plaintiffs' claims in negligence against the CRCS and the CRCS's third-party claim against Canada centre on the time it took the BoB to issue the NoC for heat-treated F-IX and what control the CRCS could, should, and did exercise over the NoC process.

III. REASONS OF THE TRIAL JUDGE

35 The trial judge made numerous findings of fact and drew a number of inferences against the CRCS and Canada for their failure to call certain witnesses. These inferences were not, as frequently occurs, insignificant. They were material to the trial judge's conclusions and the appropriateness of them will be discussed later in these reasons. At this point we will review some of the trial judge's principal findings in a summary way.

CRCS

36 The trial judge concluded that the CRCS owed a duty of care to the plaintiffs. She found that the standard by which the reasonableness of the CRCS's conduct should be measured was "exacting and high". In reaching this conclusion, she relied on evidence that the CRCS was a specialized body with specialized knowledge and that by the fall of 1984 it was common knowledge in the medical community that HIV could be transmitted through blood products. The trial judge framed the standard of care relevant to the CRCS as follows (at para. 75):

> ... the CRCS had a duty to take immediate action to manage the crisis by <u>doing everything possible to facilitate the transition from non-heated to heat-treated products</u>. [Emphasis added.]

37 The trial judge concluded, in the face of disputed evidence, that plaintiffs were infected with HIV through the use of unheated F-IX in April and May 1985. She found that Mr. Rintoul was infected on April 7, 1985; Mr. Robb was infected on April 21, 1985; and Mr. Farrow was infected between April 26 and May 14, 1985. The trial judge's findings regarding the dates of infection form the basis of one of the grounds of appeal by the CRCS and Canada that is reviewed later in these reasons.

38 The trial judge found that the CRCS did not facilitate the transition to heat-treated F-IX. In her view (at para. 76), "rather than taking steps to make the transition to heat-treated products as quickly as possible, the evidence suggests that the CRCS embarked on a course of action which delayed the transition." By that, the trial judge meant that certain actions of the CRCS worked to delay the issuance of the NoC for heat-treated F-IX. The trial judge concluded that but for the negligence of the CRCS, heat-treated F-IX could have been distributed in Canada by March 1985, that is, before the dates that she found the plaintiffs were infected. She rejected the CRCS's submission that even if the CRCS had performed its duty as defined by her, the required NoC would not have been issued any sooner than it was and, therefore, that the plaintiffs would have been infected in any event.

39 In dealing with causation, the trial judge relied on the decision of this court in Walker Estate v. York Finch General Hospital (1999), 43 O.R. (3d) 461, aff'd (2001), 198 D.L.R. (4th) 193 (S.C.C.), to conclude that the necessary causal link between the plaintiffs' HIV infections and the negligence of the CRCS and Canada was presumptively established. More particularly, she concluded (at para. 115) that "it does not fall to the plaintiffs to prove that, had the CRCS lived up to its duty, the BoB would have issued the NoC on an earlier date."

40 The trial judge rejected the plaintiffs' claims relating to the CRCS's duty to warn and to strict liability in tort; neither of those matters are issues on the appeal.

Canada

41 The trial judge found that Canada also faced "a high standard of care" that required it to expedite the issuance of the NoC for heat-treated F-IX. She held (at para. 140) that Canada breached this duty by "the delay caused by the BoB's bureaucratic lethargy in failing to respond to the crisis in a manner which was commensurate with the magnitude of that crisis".

42 The trial judge based her critical conclusions regarding Canada's liability on the evidence that the BoB received the new drug approval application for heat-treated F-IX in July 1984, but did not issue the NoC for heat-treated F-IX until April 10, 1985. She concluded that the BoB had the capacity to respond to urgent circumstances by being flexible with respect to regulatory requirements, but the approval of the application was treated "in the normal course" by the BoB. As was the case with the CRCS, on the issue of causation in relation to the CRCS's claim-over against Canada, the trial judge, relying on this court's judgment in Walker, concluded that causation could be presumed.

Bayer

43 The trial judge dismissed the plaintiffs' actions against Bayer for two reasons. First, she found that Bayer did not owe a duty of care to the plaintiffs to warn them about the risks associated with using unheated F-IX. She noted that Cutter manufactured F-IX pursuant to an agreement under which the CRCS retained ownership over the factor concentrates used to produce F-IX. Thus, she found that it was up to the CRCS to decide whether to include an AIDS warning on their product.

44 Second, the trial judge rejected the plaintiffs' delay submissions as related to Bayer. She found that Bayer was not required to apply for a NoC at any particular time or to pressure the BoB (or the American Office of Biologics) to provide new drug approval. The trial judge's finding that Bayer was not required to facilitate the application for approval of heat-treated F-IX stands in obvious contrast to her finding that the CRCS was obligated to facilitate the application for the NoC for heat-treated F-IX.

Ontario

45 The trial judge rejected the plaintiffs' claim against Ontario. She disagreed with the plaintiffs' submission that Ontario exercised control over the CRCS and that the CRCS was an agent of Ontario for the delivery of blood products to hemophiliacs. She concluded that since the CRCS was not Ontario's agent, or acting for a public purpose, the CRCS could not rely on the limitation period found in s. 7(1) of the Public Authorities Protection Act, R.S.O. 1990, c. P.38. The trial judge rejected the plaintiffs' spoliation claim against Ontario. She found that there was no admissible evidence that Ontario destroyed documentary evidence.

IV. STANDARD OF APPELLATE REVIEW

46 Since the assessment of the evidence is for the trial judge, an appellate court will not reassess the evidence in the absence of palpable and overriding error. Thus, in the absence of palpable and overriding error, an appellate court will not intervene even where it takes a view of the evidence different from that of the trial judge.

47 Where it is alleged, as in this case, that the trial judge disregarded, misapprehended or failed to appreciate relevant evidence, an appellate court will and indeed must, review the trial record to determine if the trial judge has failed to appreciate or consider relevant evidence bearing upon issues of significance to the trial result. See R. v. Harper, [1982] 1 S.C.R. 2; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.); Equity Waste Management of Canada v. The Halton Hills (Town) (1997), 35 O.R. (3d) 321 (C.A.).

48 Where damages are in issue on appeal, an appellate court will recognize that there is a wide discretion to be exercised by the trial judge, or jury, in assessing damages. The standard is reasonableness and it is accepted that reasonable minds may differ. See Woelk v. Halvorson, [1980] 2 S.C.R. 430; Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); Robert McAlpine Ltd. v. Byrne Glass Enterprises Ltd. (2001), 141 O.A.C. 167 (C.A.). However, in this case, there is an issue about one of the trial judge's assessments of non-pecuniary general damages that exceeded the limit ($265,000 at the time of trial) set out by the Supreme Court of Canada in the trilogy of Andrews v. Grand and Toy Alberta Ltd., [1978] 2 S.C.R. 229, Arnold v. Teno, [1978] 2 S.C.R. 287, and Thornton (Next Friend of) v. Prince George School District No. 57, [1978] 2 S.C.R. 267. Whether such an award can be sustained is an issue of law and, therefore, the standard of review is correctness.

V. OVERVIEW OF THE NEGLIGENCE ISSUES AGAINST THE CRCS AND CANADA

49 Apart from the spoliation claims against Ontario, the plaintiffs' claims against all the defendants and the third-party claims against Canada were based in negligence. Negligence is frequently defined as acts or omissions exposing others to an unreasonable risk of harm.[3] Below we address in a somewhat general way the three core negligence issues (duty of care, standard of care, and causation), with particular reference to the CRCS and Canada. Later in these reasons we address the specific submissions made by the CRCS and Canada in relation to the trial judge's

findings of negligence. We also address later in these reasons the standard of care owed by Bayer in the context of the plaintiffs' cross-appeal from the dismissal of their action against Bayer.

50 It was acknowledged on appeal that the plaintiffs were warned of the risks of taking unheated F-IX and the plaintiffs did not pursue the duty to warn, other than in relation to Bayer. Thus, we do not discuss the duty to warn further other than later in the context of the plaintiffs' cross-appeal against Bayer.

A. Duty of Care

51 The existence of a duty of care is an essential element of the tort of negligence. The duty of care arises out of a particular relationship (sometimes referred to in the context of the neighbour principle or proximity) between the plaintiff and the defendant. It implicates foreseeability and raises the question: is the plaintiff within the ambit of the risk created by the relationship between the plaintiff and defendant? See Donoghue v. Stevenson, [1932] A.C. 562 (H.L.). The existence of a duty of care in respect of a particular plaintiff requires the defendant to take reasonable precautions, that is, to measure up to an objectively determined standard of care.

52 In assessing whether a duty of care exists, the Supreme Court of Canada has endorsed the two questions set out in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.). See Kamloops (City) v. Neilsen, [1984] 2 S.C.R. 2. The two questions are: (i) is there a relationship of proximity based on foreseeability objectively assessed; and, if there is, (ii) is there nonetheless a policy basis to limit or negate the prima facie duty of care.

53 There is a sufficient relationship of proximity between the plaintiffs and the defendants. There is no policy basis that would limit or negate the duty of care each of the defendants owed to the plaintiffs. Indeed, none of the defendants submitted that they did not owe a duty of care. Thus, the existence of a duty of care is not an issue in this case. That cannot be said of the standard of care and causation issues.

B. Standard of Care

54 What a defendant must do to discharge the duty of care owed to a plaintiff is determined by the conduct expected of the law's invention, the reasonable person, as adjusted to the circumstances of each case. Since, as we have observed, negligence involves exposing another to an unreasonable risk of harm, the risk to which a defendant is expected to respond must be real and consideration must be given to what a defendant should do, or not do, to guard against the objectively determined risk. The precautions that must be taken to guard against a particular risk will vary directly with the magnitude of the risk. We would add that the trier of fact should not assess a defendant's conduct with the benefit of hindsight. See Lapointe v. Hôpital Le Gardeur, [1992] 1 S.C.R. 351.

55 The standard-of-care question then, in relation to the plaintiffs' negligence claims against the CRCS and the CRCS's third-party action against Canada, is what did the CRCS and Canada have to

do (or not do) to discharge the duty of care imposed upon them as a matter of law. While there may well be expert evidence in particular cases directed towards the applicable standard of care, we do not think that expert evidence on the standard-of-care issue was required in this case and agree with the trial judge's conclusion in this regard.

1. CRCS

56 The CRCS conceded that it owed a duty of care to the plaintiffs as recipients of F-IX that the CRCS distributed to Canadian hospitals. It accepted that it was required to distribute safe F-IX or to warn recipients of the risks of which it knew or ought to have known. It denied that it had any obligation to provide any particular blood product at any particular time. The CRCS took the position that it was not required to interfere with the BoB's consideration of the application for a NoC for heat-treated F-IX and that it did nothing to delay the processing of the NoC for heat-treated F-IX.

57 We agree that the CRCS was required to distribute safe F-IX or to warn recipients of risks of which it knew or ought to have known. In our view, to discharge the duty of care imposed by law, the CRCS could not in a direct or indirect way impede the lawful transition from unheated to heat-treated F-IX. That is to say, the CRCS could not interfere with, and thus retard, the regulatory process leading to the issuance of the required NoC for heat-treated F-IX. We do not think that, to discharge the duty of care it faced, the CRCS was required to take positive steps to accelerate the NoC process.

58 Since the trial judge premised some of her negligence findings on the capacity of the CRCS to accelerate the regulatory process, we will consider later the evidence on which the trial judge relied in concluding that the CRCS could and should have accelerated the BoB's regulatory process. At this point we will review the trial judge's conclusion regarding the scope of the CRCS's standard of care.

59 The trial judge framed the standard of care applicable to the CRCS in this way (at paras. 72-74):

> The CRCS faces, in the context of the analysis, an exacting and high standard. The first factor which puts the standard at a high level is the nature of the relationship between the CRCS and Canadian hemophiliacs, who comprise a sick and vulnerable population. ...
>
> The second factor that causes me to find that the standard of care is a high one stems from the position of the CRCS as a specialized body with specialized knowledge. ...

> The third factor impacting on the standard of care comes from my factual finding concerning the state of medical knowledge in the fall of 1984 and earlier. By the time the BoB directive was issued on November 16, 1984, the CRCS was facing a clearly identified crisis. ... Since an emergency was identified, and a course of action was mandated by an authoritative regulatory body, the CRCS must be held to a high standard of care when its responses to the BoB directive are assessed. [Emphasis added.]

60 In light of the trial judge's findings and conclusions on the standard-of-care issue, the role of the CRCS in relation to the BoB must be examined, particularly since there is no real conflict in the evidence about the areas of responsibility relevant to the application for, and issuance of, the required NoC for heat-treated F-IX.

61 Three aspects of the regulatory process require brief comment. First, the BoB, as Canada's statutory regulator, was solely responsible for the NoC process. The CRCS was a distributor of factor concentrates and could act only when it was lawful to distribute a particular new drug such as heat-treated F-IX. The CRCS was not an arm of government, federal or provincial. The CRCS was not involved in the regulatory process that had to be completed before anyone could lawfully distribute heat-treated F-IX. Second, the CRCS had nothing to do with the data (mainly viral inactivation data) that had to be supplied to the BoB by NoC applicants such as Cutter as part of the new-drug-approval process. Third, the CRCS was not a part of the EDRP through which drugs not approved in Canada could be made available to a physician applicant for use by the physician's patient.

62 By way of summary on the standard-of-care issue as it relates to the CRCS, there is no doubt that in November 1984 the BoB recommended that unheated factor concentrates be replaced with heat-treated factor concentrates "as soon as feasible" and "as soon as possible". However, as we have said, it was the BoB, not the CRCS, that was responsible for and controlled the regulatory process to approve heat-treated factor concentrates in Canada. The BoB required data to establish that heat-treated F-IX would deactivate viral agents such as HIV. That data had to be supplied by the manufacturer of factor concentrates, not the CRCS. As we have stated, the CRCS was under a duty not to impede the regulatory process; however, for reasons on which we will expand shortly, there is no evidence that the CRCS did anything that delayed the issuance of the required NoC for heat-treated F-IX.

63 Finally, in our view, the trial judge (in stating that the CRCS had a duty to do "everything possible" to introduce heat-treated F-IX) placed the standard of care at too high a level, a level that ignores regulatory reality. The CRCS was under no obligation at any time to provide any particular product to consumers. It did, of course, have a duty to warn consumers of dangers of which it knew or ought to have known. Moreover, there was no substitute for F-IX for persons, like the plaintiffs, suffering from Hemophilia B. Thus, withdrawal of unheated F-IX pending the issuance of a NoC for heat-treated F-IX was not a viable option.

2. Canada

64 The trial judge stated as follows (at paras. 139-140) regarding the standard of care against which to measure whether Canada had discharged its duty to the plaintiffs:

> Canada, as regulator of the blood industry, owed a duty of care to the plaintiffs. The BoB was dealing with hemophiliacs, a sick and vulnerable population in the midst of the AIDS epidemic. The hemophiliac population was totally dependant on the BoB for regulatory approval of the heat-treated blood products. Thus, the BoB, like the CRCS, must be held to a high standard of care. Given that the language of the second recommendation of the Consensus Conference contemplated that the BoB would expedite licensing, the content of the BoB's duty of care was exactly this, to expedite the licensing.
>
> The breach of this duty of care was the delay caused by the BoB's bureaucratic lethargy in failing to respond to the crisis in a manner that was commensurate with the magnitude of that crisis. ...

65 Canada takes issue with the trial judge's findings of negligence against it. First, Canada argues that there was no evidence to support the plaintiffs' contention that it unreasonably delayed the regulatory process leading to the approval of heat-treated F-IX. Second, Canada argues that the plaintiffs were really advancing an unpleaded, new case against it; that is, that Canada should have taken a different, more flexible approach to the approval of heat-treated F-IX. With respect to this second matter, Canada denies that it had the option of dispensing with the statutory requirement for a NoC before heat-treated F-IX, or any other new drug, could be distributed to the public.

66 We will consider later in these reasons the evidence that the trial judge relied on to conclude that Canada unreasonably delayed the issuance of the NoC for heat-treated F-IX. For now, we observe that there is no evidence that the regulatory process for the approval of new drugs in Canada and the issuance of an NoC (in particular, the requirement for the submission of viral inactivation data) fell below any common-law standard. In our view, in order to discharge its duty of care, Canada was required to take reasonable steps to abide by its own regulatory processes. It had no obligation to, nor in our view could it, dispense with the regulatory requirements for the approval of heat-treated F-IX.

C. Causation

67 To succeed against the CRCS, the plaintiffs had to establish, on a reasonable balance of probability, that their injuries (contracting HIV) were caused by the negligence of the CRCS. They established that taking unheated F-IX caused these injuries. As the principal finding of negligence against the CRCS consisted of the CRCS's failure to do "everything possible" to expedite the introduction of heat-treated F-IX, the plaintiffs had to establish that the CRCS's failure to do

"everything possible" (assuming that this is a valid finding of negligence) was the probable cause of their injuries.

68 To prove causation, the plaintiffs had to establish, to a probability standard, that they were infected at a time when heat-treated F-IX would have been available to them but for the CRCS's negligence. Thus, the dates upon which the plaintiffs were infected were of paramount importance. Indeed, counsel at trial and the trial judge all recognized the significance of the dates of infection to the causation issue. We agree with the trial judge that expert evidence was required to establish the dates of infection. The interpretation of the serology test results as well as the significance of these results are things that are foreign to the skill and knowledge of lay persons. More will be said later in these reasons about the evidence that the trial judge relied on determine the dates of infection.

69 Furthermore, in light of the Supreme Court of Canada's judgment in Walker, above, (released after the trial judge released her reasons for judgment) we are of the view that causation cannot be presumed in this case. It must, at the very least, be established to a standard of probability that the negligence of the CRCS materially contributed to the plaintiffs being infected with HIV.

70 In Walker, the deceased contracted HIV (and later developed AIDS) from transfused blood collected and distributed by the CRCS. The trial judge concluded that even if the CRCS had met the requisite standard of care and screened blood donors, the infected donor would likely still have given blood. Accordingly, he dismissed Mrs. Walker's claim on the basis that she had failed to establish a causal link between her loss and the CRCS's breach of duty. On the CRCS's appeal, this court (Morden A.C.J.O., Doherty and Moldaver JJ.A.) disagreed with the trial judge's finding on the causation issue. Relying on Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634, this court concluded that causation was presumptively established. On the CRCS's appeal to the Supreme Court of Canada, Major J. rejected a presumption of causation in cases where there is no learned intermediary through which a defendant would be expected to discharge its duty to warn. In doing so, he limited the application of Hollis v. Dow Corning to cases in which there was a learned intermediary.

71 The case before us is not a case where the defendants alone possessed evidence as to the dates of infection. Quite the contrary, although difficult to assemble, that evidence was generally under the control of the plaintiffs. We do not think it is correct to presume, or assume, as the trial judge did, that the plaintiffs were infected at a time when the CRCS, acting reasonably, could have made heat-treated F-IX available to the plaintiffs and other hemophiliacs. Accordingly, although Sopinka J. advocated a pragmatic and robust approach to causation in Snell v. Farrell, [1990] 2 S.C.R. 311, we see no reason to modify the burden of proof on the causation issue in this case.

72 Last, this was not a case of multiple causes or a case where there were learned intermediary issues (except in respect of the duty to warn). Nor was it a case where the plaintiffs were asked to prove the hypothetical (for example whether, if warned, the plaintiffs' treating physicians would have in fact conveyed the warning to the plaintiffs: see Hollis v. Dow Corning, above.) Here, as we

have said, the causation question based on the standard of care imposed by the trial judge was whether the plaintiffs became infected with HIV because the CRCS did not take steps to accelerate, or because the CRCS delayed, the lawful introduction of heat-treated F-IX.

VI. APPEAL BY THE CRCS

A. Trial Judge's Finding of Negligence Against the CRCS

73 As previously stated, we disagree with the standard of care that the trial judge concluded applied to the CRCS. In this section we consider the trial judge's findings of fact that led her to conclude that the CRCS breached its duty of care and the evidence that she relied on.

74 The trial judge's conclusion that the CRCS was negligent because it had embarked on a course of action that delayed the transition to heat-treated F-IX was based on the following findings of fact:

> The CRCS failed to look at the feasibility of purchasing American-sourced commercial F-IX.
>
> The CRCS failed to disclose at the Consensus Conference on December 10, 1984 the fact that Cutter had 10,000 vials of heat-treated F-IX in its inventory in North Carolina.
>
> The CRCS planned to time the shipment of heat-treated F-IX to coincide with the availability of F-VIII (expected for the end of April 1985) rather than as soon as possible.
>
> Although the CRCS anticipated that the NoC for heat-treated F-IX would be issued by January 1985, there was no evidence that it contacted the BoB or took steps to influence the timing of the NoC.
>
> The CRCS planned on depleting the existing inventory of unheated factor concentrate before distributing the heat-treated product because:
>
> > it wrongly assumed that all hemophiliacs who had received unheated products were already infected with HIV; and
> >
> > it was concerned about the financial implications of writing off old

inventory.

> Although the NoC for heat-treated F-IX was issued on April 10, 1985, the CRCS did not begin to distribute it until July 1985.

75 The trial judge rejected the CRCS's contention that the availability of heat-treated F-IX was dependent upon the Canadian and American regulatory processes which were beyond the CRCS's control. She held that the fact that the heat-treated F-IX was not available to be distributed in Canada until May 30, 1985 did not relieve the CRCS of liability because:

> the assumption that the CRCS could not have had an impact on the timing of the government processes was erroneous;
>
> there was no evidence that April 10, 1985 was the earliest possible date for the issuance of the required NoC by the BoB; and
>
> the BoB did not expedite the process because the CRCS maintained from the beginning that it would not be ready to distribute the product until May 1, 1985 at the earliest.

76 Even assuming that the CRCS had a duty to facilitate the introduction of heat-treated F-IX as soon as possible, the CRCS submits that the finding of negligence against it was not supported by the evidence. In particular, the CRCS takes the position that the trial judge's findings on the dates of infection are not supported by any admissible evidence and that, consequently, the plaintiffs' failure to establish when they were infected, in and of itself, is fatal to their claim. The CRCS further submits that the trial judge: (i) paid little or no heed to her own evidentiary rulings; (ii) limited the purpose for which certain evidence was admitted and then relied upon that evidence for other purposes; (iii) inferred facts without a rational basis in the evidence to do so; (iv) drew impermissible adverse inferences; and (v) ignored evidence exculpating the CRCS.

77 The plaintiffs take the position that the trial judge's findings are supported by the evidence and that her decision is entitled to deference in this court.

78 In our view, the trial judge's finding of negligence against the CRCS cannot be supported on the evidence. We agree with the submission of the CRCS that the finding of negligence is based on a number of findings of fact that have little, and in some significant instances, no support in the evidence, and that often run contrary to evidentiary rulings made at trial.

79 Perhaps more importantly, it is our view that the finding of negligence is largely informed by a failure to appreciate that the availability of heat-treated F-IX was essentially dependant on

circumstances that were beyond the CRCS's control. The evidence leaves little doubt that the main reason why heat-treated F-IX was not introduced in Canada before May 30, 1985 was because of the regulatory requirements of the relevant government agencies in both Canada and the United States. The trial judge never identified, and the evidence does not establish, what steps could have been taken by the CRCS to effectively hasten the regulatory process. Indeed, the evidence does not even suggest that the process could have safely been hastened. Nor does the evidence support the trial judge's conclusion that the CRCS embarked upon a course of action that delayed the transition to heat-treated F-IX.

80 Further, even if the CRCS breached a duty of care it owed to the plaintiffs, there is no evidence that such breach caused their injuries. It is our view that the plaintiffs failed to prove the facts underlying the expert testimony about their dates of infection. Accordingly, the trial judge erred in relying on this expert testimony to conclude that the plaintiffs became infected in April and May 1985. In any event, even if the plaintiffs became infected in April and May 1985 as found by the trial judge, the CRCS's conduct would not have had any impact on this unfortunate result since, through no fault of its own, heat-treated F-IX was not available for distribution in Canada until May 30, 1985.

81 Finally, it is our view that the trial judge's findings were based, in large part, on adverse inferences drawn against the CRCS for the failure to call witnesses in circumstances where no such inferences were warranted. On that ground alone, even if the trial judge's reasons could otherwise be supported by the evidence, the trial judgment could not stand.

82 We will review the evidence in relation to the following critical findings made by the trial judge: first, that the CRCS embarked on a course of action to delay the transition to heat-treated F-IX; second, that the CRCS could have had heat-treated F-IX available for distribution in Canada by March 10, 1985 rather than May 30, 1985; and third, that the plaintiffs became infected in April and May, 1985. Finally, we will review the extent to which unwarranted adverse inferences played a role in the trial judge's findings of negligence against the CRCS.

1. Did the CRCS delay the regulatory process?

83 As noted earlier, the trial judge's conclusion that the CRCS embarked on a course of action that delayed the transition to heat-treated F-IX was based on a number of findings of fact. In our view, none of these findings, whether they are considered individually or cumulatively, can reasonably support the inference that the CRCS delayed the transition to heat-treated F-IX. We will deal with each in turn.

(a) Failure to look at the feasibility of purchasing commercial heat-treated F-IX

84 The CRCS had always purchased custom F-IX that was manufactured from blood collected by the CRCS. The trial judge held that the CRCS had an obligation to consider the feasibility of

purchasing commercially manufactured heat-treated F-IX and that it failed to do so. The trial judge stated as follows [at para. 78]:

> Although the CRCS had purchased commercial F-VIII from Cutter in the past when there were plasma shortages in Canada, the CRCS had never purchased commercial F-IX from Cutter. ... The plaintiffs suggested that as part of the discharge of its duty to them, the CRCS should have explored this option in the late fall of 1984. The reality is that there is no evidence either way that suggests that it would have been feasible for the CRCS to respond to the BoB Directive by purchasing American-sourced commercial F-IX. But this does not end the matter. While the plaintiffs called no evidence that commercially-sourced F-IX could have been imported from the U.S. any quicker than custom-fractionated product, they did prove that the importation of commercial product had precedent in emergency circumstances. The option of buying commercial product was explored at the Consensus Conference. Contrary to the submissions of the CRCS, its duty of care, as defined in these reasons, obligated it to look at the feasibility of this option instead of baldly saying that there was no way of knowing that commercial product could have been labelled and licensed any quicker than custom manufactured product. Similarly, it is no answer for it to say, without leading evidence on the point, that ordering commercial product would have been a waste of money and effort.

85 In our view, the trial judge effectively reversed the burden of proof in faulting the CRCS for any failure to consider purchasing commercial heat-treated F-IX. The CRCS was entitled to rely on the fact that the plaintiffs adduced no evidence to suggest that commercial heat-treated F-IX could have been brought into Canada from the United States faster than custom heat-treated F-IX.

86 In any event, the suggestion that there may have been a benefit to purchasing commercial product ran counter to the evidence that was called. Since commercial heat-treated F-IX had never been distributed in Canada before, there was no NoC or approved labelling for this product. Accordingly, commercial heat-treated F-IX could not have been distributed until these requirements were met. As the principal obstacle to getting heat-treated F-IX into Canada was regulatory, the evidence gives no reason to believe that heat-treated F-IX would have been available in Canada earlier had the CRCS sought to bring in commercial heat-treated F-IX instead of custom heat-treated F-IX.

(b) Failure to disclose Cutter's existing heat-treated F-IX inventory at the Consensus Conference

87 The evidence showed that Cutter had some heat-treated F-IX in its inventory in North Carolina as early as December 1984. The trial judge found that the CRCS did not disclose this fact at the Consensus Conference on December 10, 1984. She regarded this as a "serious omission" that

would have had some impact on the assessment of the transition period to move to heat-treated F-IX made by the Consensus Conference participants. The relevant parts of her reasons for judgment on this point are as follows (at paras. 79, 82-84):

> After the BoB Directive was issued, the CRCS instructed Cutter to heat-treat approximately 10,000 vials (a five month supply for Canada) of F-IX from the CRCS plasma. As early as December of 1984, this heat-treated F-IX was sitting in inventory at Cutter's plant in Clayton, North Carolina. It was available for shipment to Canada, pending the completion of the necessary regulatory steps. The existence of this inventory was disclosed to senior members of the CRCS at a meeting held with Cutter representatives on December 4, 1984.
>
> ...
>
> Six days after the December 4, 1984 meeting at Clayton, the Consensus Conference took place in Ottawa. Although the Conference was focused on how to respond to the BoB Directive and make the transition to heat-treated products as quickly as possible, the CRCS representatives did not disclose to the meeting the existence of the 10,000 heat-treated product vials in inventory. Dr. Martin Davey, the Assistant National Director of Canadian Blood Transfusion Services of the CRCS at the relevant times, when asked about this at discovery, stated that it did not occur to him to disclose the existence of this heat-treated supply.
>
> Given the agenda of the Consensus Conference, I regard this as a serious omission. To my mind, it would have been imperative to give the experts assembled at the Conference as much information as possible concerning the ability of the CRCS to make a speedy transition. I note that the timeline for making the transition to heat-treated product was a central topic at the Conference, which seems to make the existence of heat-treated inventory all the more relevant. I find that reasonable persons, charged with the responsibility for the safety of the Canadian blood supply, would have assessed the transition period differently if they had known of the existence of this heated supply.
>
> Dr. Furesz, the Director of the BoB, attended the Consensus Conference. He made a projection that the transition to heat-treated product could be made in two to three months. Since he was not aware of the 10,000 vials of heat-treated product in inventory, this projection must have included time to heat-treat the factor product. The failure of the CRCS to disclose the existence of the inventory

> at the Conference constitutes additional circumstantial evidence that the CRCS unjustifiably delayed implementation of the Directive.

88 The trial judge appears to have placed considerable weight on the CRCS's failure to disclose the existence of the heat-treated inventory in support of her conclusion that the CRCS "unjustifiably delayed" the implementation of the BoB Directives. In our view, however, it is not at all clear on the evidence that the existence of the heat-treated inventory was not disclosed at the Consensus Conference. Indeed the evidence, which we will review in a moment, appears to suggest otherwise. More importantly, even if the CRCS did not mention the heat-treated inventory at the Consensus Conference, there is no rational basis to infer from this evidence any intent by the CRCS to delay the transition to heat-treated F-IX. There is also no rational basis to infer from this evidence that the CRCS's failure to mention the heat-treated inventory in any way delayed the regulatory process in either Canada or the United States or could have had any impact on these processes. The inference drawn by the trial judge ignores the fact that the very existence of heat-treated inventory at this early stage was the result of the CRCS having taken immediate action to send all of its factor concentrates for heat-treatment upon the issuance of the BoB Directives.

89 We will now review the evidence of what occurred at the Consensus Conference as it relates to this issue. The evidence consisted of: various documents admitted for a limited purpose; the testimony of Dr. Langley; and read-ins from the discovery of Dr. Davey. The evidence can be briefly summarized as follows.

90 The documentary evidence was silent on the issue of the heat-treated inventory. Undoubtedly, this formed the basis of the trial judge's conclusion that the existence of the inventory had not been disclosed at the Consensus Conference. The main document was a "Summary Report" (Walcroft Summary Report) prepared by one of the attendees, Dr. Walcroft, who died before the commencement of the trial. His assistant gave evidence on Dr. Walcroft's note-taking habits and the trial judge admitted the Walcroft Summary Report as a business record. It was understood, however, that the Walcroft Summary Report did not constitute minutes of the Consensus Conference but rather, Dr. Walcroft's personal recollections of what took place at the Consensus Conference. Other documents consisted of copies of some of the speeches made by various participants at the Consensus Conference. Although the absence of any notation in these documents about the heat-treated inventory is consistent with the trial judge's finding that the existence of heat-treated F-IX inventory was not discussed, the other evidence on this point must also be considered.

91 The only person in attendance at the Consensus Conference who testified at trial was Dr. Langley. It was Dr. Langley's recollection that the CRCS representatives who attended the Consensus Conference did advise the participants that the CRCS channelled all of its factor concentrates to Cutter to be heat-treated immediately after the BoB Directives were issued. He also recalled that the CRCS representatives advised the participants that the heat-treating process took about a month. Dr. Davey (whose examination for discovery was read in as part of the plaintiffs'

case) agreed that no reference was made to the existence of the heat-treated inventory in the formal presentations at the Consensus Conference as evidenced by the copies of the speeches but stated that the issue may have come up during the course of the informal discussions.

92 It is our view that it cannot be said that the existence of Cutter's heat-treated inventory was not disclosed if the CRCS in fact informed the participants at the Consensus Conference that it had sent factor concentrates for heat-treatment about a month earlier (as Dr. Langley recalled). The participants who attended the Consensus Conference would have been aware, at the very least, that some heat-treated product was already in Cutter's inventory in North Carolina, or would be shortly.

93 In any event, the CRCS correctly pointed out that the plaintiffs did not show what difference the disclosure of the inventory could have made. At that time, the heat-treated inventory had not gone through quality control at Cutter, the BoB had not received the viral inactivation data from Cutter, the heat-treated inventory had not gone through the various testing protocols required at the American Office of Biologics, the labelling had not been submitted to either Canadian or American regulatory agencies, and the vials for the heat-treated inventory were unlabelled. In these circumstances, it is doubtful that the existence of the heat-treated inventory could have played any role in the Consensus Conference's assessment of the transition period or in the timing of the availability of heat-treated F-IX in Ontario.

(c) Plan to tie the introduction of heat-treated F-IX with the availability of heat-treated F-VIII; and

(d) Failure to follow up with the BoB to influence the timing of the NoC

94 The trial judge made two significant findings on the issue of delay based on a memorandum to file prepared by Dr. Naylor (of the CRCS) recording the events of a meeting between senior members of the CRCS and Cutter representatives on December 4, 1984 (Naylor Memorandum). The trial judge described the Naylor Memorandum as follows [at para. 80]:

> The CRCS representatives present at that meeting included Dr. Naylor, Dr. Tom Walker and Mr. Anhorn. The BoB Directive had been received two weeks prior to this meeting, and was discussed. Dr. Naylor's memo to file recording the events of this meeting confirms that 10,000 vials of F-IX concentrate (lots C9N005A and C9N006A) were heat treated from earlier plasma shipments. The memo records that the shipment of these products back to Canada would coincide with the first deliveries of F-VIII concentrate. It is on this basis that the plaintiffs allege that the CRCS decided to time the delivery of heated F-IX to coincide with the delivery of F-VIII. The memo also mentions that "licence approval" for F-IX was anticipated in January, 1985, and that Mr. Phil LeBlanc (Cutter's representative in Canada) suggested that it might be beneficial for him and a CRCS representative to visit the BoB in January to discuss the progress of

> the license application. There is no evidence that such a visit took place. I took the reference to "licence approval" to refer to the NoC, as there was a frequent tendency to use the term "licence" when what was actually meant was the NoC.

95 The relevant paragraphs of the Naylor Memorandum referred to by the trial judge read as follows:

> TIMING OF PRODUCTION OF HEAT-TREATED COAGULATION FACTOR PRODUCTS FROM CRC PLASMA
>
> 5. The CRC shipment of plasma, which arrived at Cutter Clayton on November 20th will be the first plasma to be processed (glycine precipitation) to enable the production of heat-treated Factor VIII concentrates. Scheduled return of this product is anticipated to be at the end of April, 1985. All subsequent plasma shipments will be handled in the same manner.
>
> 6. Factor IX complex concentrates, totaling 10,000 vials (lots C9N005A, C9N006A), produced from earlier plasma shipments, have been subjected to heat-inactivation in vial and <u>these product lots will be returned at a time coinciding with first deliveries of treated Factor VIII concentrates</u>. [Emphasis added.]
>
> CANADIAN LICENSING OF HEAT-TREATED COAGULATION FACTOR PRODUCTS
>
> 7. Canadian licensing of heat-treated Cutter Factor VIII concentrate has been obtained.
>
> 8. Submission for licensing in Canada for Cutter heat-treated Factor IX complex has been made. <u>License approval is anticipated during January, 1985. Mr. LeBlanc suggested that it might be beneficial for him and a CRCBTS representative to visit the BoB in January to discuss the progress of this license application</u>. [Emphasis added.]

96 The trial judge drew the following inferences from the Naylor Memorandum (at para. 81):

> Two elements of this memo are circumstantial evidence that the CRCS's

> course of action subordinated safety of the Canadian hemophiliac population to other concerns. First, the CRCS seemed to be planning to time the shipment of the heat treated F-IX back to Canada so that it would coincide with the F-VIII shipments, rather than planning to ship the F-IX as soon as it was available. Second, the CRCS was anticipating that a NoC would be issued by January, 1985, but did not follow through on the suggestion that a CRCS representative should visit the BoB. There is no evidence that the CRCS made efforts to influence the timing of the NoC or to discuss the progress that was being made by the BoB in obtaining the NoC.

97 We agree with the CRCS's submission that the trial judge erred in considering the Naylor Memorandum in isolation, without regard for the purpose for which it was introduced, and without considering the other evidence on this point. In our view, the Naylor Memorandum, when properly considered in context, cannot provide support for the trial judge's inference that the CRCS subordinated the safety of the Canadian hemophiliac population to other concerns.

98 With respect to the allegation that the CRCS intended to tie in the introduction of heat-treated F-IX with heat-treated F-VIII, we make the following observations. The purpose for which the Naylor Memorandum was introduced must be considered in assessing its weight. The Naylor Memorandum was introduced in the context of the plaintiffs' read-ins from Dr. Davey's examination for discovery on matters related to the December 4, 1984 meeting but unrelated to the question of timing for the introduction of heat-treated F-IX. In fact, the CRCS submits, and the plaintiffs do not argue to the contrary, that the record reveals that the questions and answers on the discovery that do relate to the portion of the Naylor Memorandum in issue were intentionally not read in by counsel for the plaintiffs at trial. In these circumstances, it is clear that only those parts of the Naylor Memorandum that were referred to as part of the read-ins were properly introduced in evidence.

99 Even if the entire Naylor Memorandum had been introduced for the truth of its contents, the reference to the timing of the delivery of heat-treated F-IX is, at best, equivocal. The Naylor Memorandum does not identify if a CRCS representative or someone from Cutter made the statements about delivery. And it is not at all clear whether such a statement was referring to an intention with respect to the delivery of heat-treated F-IX, or was simply an estimation that the delivery of heat-treated F-IX was expected to be made coincidentally with the delivery of heat-treated F-VIII. The other evidence on this point supports an interpretation that the CRCS did not plan the delivery of heat-treated F-IX to a time when F-VIII was also available. Dr. Mozen, who was present at the meeting in question, testified that he had no recollection of the CRCS tying the delivery of heat-treated F-VIII to heat-treated F-IX. Further, in the Walcroft Summary Report, which was heavily relied upon by the trial judge on other issues, Dr. Davey was reported to have expressed his belief that the use of heat-treated F-IX could be implemented sooner than heat-treated F-VIII.

100 In any case, regardless of the CRCS's intention in December 1984 on the timing of the

delivery, the evidence demonstrated that in fact the heat-treated F-VIII and heat-treated F-IX were not delivered at the same time. The trial judge made no reference to this evidence.

101 With respect to the second inference drawn by the trial judge relating to the CRCS's alleged failure to follow up with the BoB in January 1985, we see little evidentiary value in the CRCS's belief on December 4, 1984 that the NoC would be issued in January 1985, as recorded in the Naylor Memorandum. It is clear on the evidence that everyone was advised differently a few days later on December 10, 1984 at the Consensus Conference and that no one at that time expected the NoC for heat-treated F-IX to be issued in January 1985.

102 Finally, we see no basis for the trial judge's final observation in reference to the Naylor Memorandum that there was a lack of evidence that the CRCS made efforts to influence the timing of the NoC or to discuss the progress of Cutter's submission. More germane to the issues at hand was the lack of evidence that the CRCS could have influenced the timing of the NoC. It was incumbent upon the plaintiffs to show what steps the CRCS could have taken to hasten the regulatory process, if indeed the process could have been safely hastened. No such evidence was adduced. Thus, the inferences that the trial judge drew from the Naylor Memorandum are unreasonable in that they are not supported by the evidence.

(e) Plan to deplete the existing inventory of unheated F-IX before distributing heat-treated F-IX

103 The trial judge found (at para. 87) that "the CRCS chose to exhaust existing inventory of product, which was likely contaminated, before distributing the heated product." She held further that the choice to exhaust existing inventory was likely motivated by the CRCS's belief that all hemophiliacs who had received an unheated blood product were already infected and by the CRCS's "unfounded concern" over the financial implications of writing off existing inventory.

104 In reaching her conclusion that the CRCS chose to exhaust existing inventory, the trial judge relied heavily upon her interpretation of statements made at the Consensus Conference as reported in the Walcroft Summary Report. She sets out the relevant parts of the Walcroft Summary Report as follows (at paras. 85-86):

> Persuasive evidence of unjustifiable delay is found in the remaining records from the Consensus Conference. At the Conference, Dr. Naylor, on behalf of the CRCS, made a presentation in which he addressed concerns about the existing inventory of non-heated factor product. The Walcroft Summary records the following from Dr. Naylor's presentation:
>
> > [Dr. Naylor] Discussed the current inventory of AHF ... Existing inventory of non-heated AHF is estimated to last approximately 22.3 weeks. On this basis the objective is to introduce heat treated AHF by May

> 1, 1985 by which time inventories of non-heat treated product would be depleted.
>
> This statement generated wide ranging discussion on the ethical and legal implications arising if heat treated product became available prior to May 1, 1985: should introduction of heat treatment be delayed until all non-heat treated inventories are depleted or should the CRC be prepared to discard non-heat treated inventories. This question was unresolved. [Emphasis added.]

The Walcroft Summary also records the comments of Dr. Rivard, expressed as follows:

> Spent considerable time discussing the moral and legal aspects of using non heat treated AHF even though heated AHF is available.

105 The trial judge then concludes as follows (at para. 87):

> I take from this evidence, when combined with the testimony of Dr. Langley, that the plaintiffs are correct that the CRCS chose to exhaust existing inventory of product, which was likely contaminated, before distributing the heated product. [Emphasis added.]

106 The trial judge correctly noted that a number of statements from the Walcroft Summary Report were incompatible with the suggestion that the CRCS intended to exhaust existing unheated inventory but she found that it was incumbent upon the CRCS to call a witness to explain these apparent inconsistencies. She therefore drew an adverse inference and concluded that the CRCS indeed intended to exhaust unheated inventory before distributing heat-treated F-IX.

107 In our view, there is no evidence to support this conclusion. It is based solely on the trial judge's interpretation of one ambiguous statement in the Walcroft Summary Report. However, this interpretation is incompatible with a number of other statements in the same document, as the trial judge noted. As well, contrary to what the trial judge said, Dr. Langley's testimony was inconsistent with her interpretation of the Walcroft Summary Report. Dr. Langley testified that the date when the CRCS expected to receive the heat-treated F-IX coincided with the date the unheated F-IX would be depleted. Dr. Langley was asked if anyone at the Consensus Conference advocated a position that unheated product should be depleted even if heat-treated F-IX was available. Dr. Langley answered, no. He further recalled that the gist of the CRCS's presentation was that it had to get the heat-treated product out "as fast as we can".

108 Another witness called by the plaintiffs also rejected any notion that the CRCS intended to deplete the existing inventory. Ms. Good, a former CRCS board member, was briefed on the CRCS's implementation plan shortly after the Consensus Conference. In her testimony in chief she stated that there was "no idea of any delay" and in fact a great deal of "urgency" within the CRCS. According to Ms. Good:

> ... the [unheated] stocks would be used only until heated stocks were available ... that it would not be later than May or, at the latest, early June, but we were all optimistic that it would be earlier. ...
>
> Q. Was there any opposition to the idea that it should occur as quickly as possible?
>
> A. None. No. Of course not.
> Q. Of course not?
>
> A. No. These are people with - whose lives are devoted to this ... There was no - no idea of any delay.
>
> I would have remembered that.

109 Finally, and perhaps more importantly, regardless of any statement of intention that may have been made in December 1984 with respect to depleting the existing unheated inventory, in actual fact the CRCS did not choose this course of action when heat-treated F-IX finally became available.

110 We turn to the trial judge's finding that the CRCS intended to deplete its unheated inventory because it mistakenly assumed that "all but virgin hemophiliacs" were already infected. This finding is based entirely on a brief excerpt from a memorandum from Drs. Naylor and Derrick (of the CRCS) to Dr. Perrault (National Director of the Blood Transfusion Service for the CRCS) dated October 29, 1984 dealing with the anticipated introduction of heat-treated factor concentrates. In the memorandum, a statement is made to the effect that it will take years to determine whether the use of heat-treated F-VIII will lower the incidence of AIDS in hemophilia patients "since all but virgin hemophiliacs' have almost certainly been exposed to the putative AIDS agent". When read in the context of the entire memorandum and the other evidence at trial, it is, in our view, unreasonable to infer from this brief excerpt that the CRCS intended to deplete its existing inventory because it erroneously assumed that all hemophiliacs were already infected. In fact, the memorandum itself concludes with the recommendation that a Consensus Conference be held "at the earliest opportunity" to deal with the issue of heat-treating factor concentrates. Further, as noted by the

CRCS in its factum, read-ins from Dr. Davey's examination for discovery reveal that the CRCS had no such belief in respect of persons suffering from Hemophilia B at the time that the BoB Directives were issued in November 1984 (which followed the memorandum of Drs. Naylor and Derrick by two weeks).

111 Finally, there is no evidence that the CRCS had "unfounded concerns" about the financial implications of writing off the old unheated inventory. In fact, the evidence was to the contrary. The only witness who was asked about the financial implications of the transition to heat-treated factor concentrates was the Ontario representative on the CBC, Stephen Dreezer. Mr. Dreezer testified that there was no financial impact on the CRCS in respect of this transition. His evidence was not contradicted or challenged. The suggestion that the CRCS might have been concerned about financial implications did not come from evidence but rather, from an unproven assertion made by counsel for the plaintiffs during the course of Mr. Dreezer's cross-examination.

2. Can the CRCS rely on the fact that heat-treated F-IX was not available for distribution in Canada until May 30, 1985 for reasons beyond its control?

112 It is undisputed that heat-treated F-IX first became available for distribution in Canada on May 30, 1985 after all necessary Canadian and American regulatory approvals had been obtained. The trial judge, however, held that the CRCS was not exculpated by that fact and that it could have had heat-treated F-IX available by March 10, 1985. As noted earlier, she based this conclusion on a number of findings.

113 First, the trial judge found the CRCS could not rely on the fact that heat-treated F-IX was not available before May 30, 1985 because, in her view, this wrongly assumed that the CRCS could not have had an impact on the timing of the regulatory process. Yet the trial judge does not set out in her reasons why this assumption is erroneous and the plaintiffs have not identified any evidence that showed that the CRCS could have accelerated the Canadian and American regulatory processes.

114 Second, the trial judge held that there was no evidence that April 10, 1985 was the earliest possible date for the issuance of the NoC by the BoB. In our view, it was wrong to say that there was no evidence to explain why the BoB did not issue the NoC until April 10, 1985. It is uncontradicted that the BoB, amongst other matters, required viral inactivation data from Cutter before it would give its approval. This data was not received by the BoB until March 5, 1985. The BoB's review was on March 22, 1985 and the BoB issued the NoC on April 10, 1985. No evidence was called to show that this process could have been completed before April 10, 1985. In fact, the only evidence is from a representative of the BoB who stated that the regulatory approval time for the heat-treated F-IX had been "average or shorter."

115 Third, the trial judge held that the BoB did not expedite the NoC process because the CRCS maintained from the beginning that it would not be ready to distribute heat-treated F-IX until May 1, 1985 at the earliest. This finding is without support in the evidence and, indeed, as noted by the CRCS in its factum, is inconsistent with the evidence on this point that showed that the CRCS

merely anticipated that heat-treated F-IX might not be available until May 1, 1985 but that it was ready to distribute heat-treated F-IX when the BoB issued the required NoC and when heat-treated F-IX was available.

116 Accordingly, we see no basis in the reasons identified by the trial judge why the CRCS was not entitled to rely on the fact that, regardless of its own conduct, heat-treated F-IX was not available in time to prevent the plaintiffs from becoming infected.

117 Further, it is our view that the trial judge's finding that the product could have been available on March 10, 1985 cannot reasonably be supported on the evidence. This finding appears to be entirely based on the contents of Dr. Furesz's presentation at the Consensus Conference on December 10, 1984. The trial judge noted in her reasons that Dr. Furesz, the Director of the BoB, estimated that heat-treated products would be available for distribution in Canada "within two to three months". On the basis of this evidence the trial judge concluded as follows (at para. 109):

> I take from this evidence that, but for the breach by the CRCS in its failure to conduct the transition as soon as possible, heat-treated product could have been in Canada, at the latest, three months after the Consensus Conference, on March 10, 1985, or one month before the first plaintiff was infected.

118 The CRCS correctly notes that the trial judge's reliance on the written copy of Dr. Furesz's presentation ignores the purpose for which the trial judge permitted it to be introduced. In answer to the defendants' objection to the admission of this document at trial, counsel for the plaintiffs stated at trial that it was introduced solely to prove that Dr. Furesz made these statements and not for the truth of its contents. Indeed, counsel for the plaintiffs stated that the document "could have been a pack of lies". Hence, this document cannot constitute proof that the BoB in fact estimated that the delay would be two or three months. In any case, the trial judge's conclusion ignores the fact that Dr. Furesz's estimate was expressly stated to be contingent upon the manufacturers' compliance with the regulatory requirements. The relevant excerpt from this presentation reads as follows:

> While it is difficult to predict how quickly the companies will comply with the requirements, it is anticipated that lots could be available for release onto the Canadian market within two or three months.

119 As events unfolded, the regulatory requirements were not complied with within the estimated two- or three-month time frame. Thus, we fail to see how an estimate of time, made contingent upon Cutter's compliance with regulatory requirements, provides any evidence to support the conclusion that the CRCS could have distributed heat-treated F-IX within the estimated time frame. In addition, there was general agreement at the Consensus Conference that a six- to eight-week implementation period would be required after heat-treated factor concentrates became available in Canada before such products would reach all consumers. The trial judge's finding that the plaintiffs would not have been infected if heat-treated F-IX had been available for distribution on March 10, 1985 appears to ignore this additional implementation period. We note further that the trial judge

appears to have ignored this implementation period as an explanation for the delay from May 30, 1985, when heat-treated F-IX became available, to its distribution on July 1, 1985.

3. When did the plaintiffs become infected?

120 It was, of course, crucial to the plaintiffs' case that they establish when they became infected with HIV. It was incumbent upon the plaintiffs to prove that they became infected at a time when their infections could have been prevented if the CRCS had acted differently. In the absence of such evidence, there could be no finding that the CRCS's alleged breach of duty caused their injuries. The trial judge made the following findings with respect to the dates of infection of each plaintiff (at paras. 100-103):

> The plaintiffs did tender evidence which established the dates and existence of test results for Mr. Farrow, and the dates on which samples were taken from Mr. Robb and Mr. Rintoul. It is at this point that expert evidence becomes necessary.
>
> Dr. Remis reviewed complete medical records of each of the plaintiffs, including medical notes from clinic visits and hospitalizations, F-IX administrations, laboratory reports and demographic and clinical background information. He also had access to serologic tests results. He determined the exposure period, which took into account the "window period" of roughly two to three months <u>before the last seronegative test result and two weeks before the seropositive test results</u>. Dr. Remis then estimated when each patient experienced acute retroviral syndrome, which occurs, in most patients, two to six weeks after infection. [Emphasis added.]
>
> Dr. Remis concluded that all three patients were likely infected by the same lot of F-IX, lot 3321-1, manufactured by Connaught Laboratories. Mr. Rintoul received F-IX from this lot on April 7 and April 25, 1985, Mr. Robb received it on April 21, 1985 and Mr. Farrow received it four times between April 26 and May 14, 1985. Dr. Remis opined that a patient receiving contaminated F-IX would likely be infected on the first infusion.
>
> Based on Dr. Remis' evidence, I conclude that Mr. Rintoul was infected on April 7, 1985, Mr. Robb was infected on April 21, 1985, and Mr. Farrow was infected between April 26 and May 14, 1985.

121 As can be seen from this extract from the trial judge's reasons for judgment, Dr. Remis based his opinion about the plaintiffs' infection dates, in part, on the dates when the plaintiffs' blood last

tested negative. Although the trial judge concluded that the plaintiffs tendered evidence that established the dates and existence of blood tests for Mr. Farrow, and the dates on which the blood samples that tested negative were taken from Mr. Robb and Mr. Rintoul, she did not set out the evidence upon which she relied to reach these conclusions. This absence of reasons is unfortunate because the admissibility and weight of the evidence relating to these issues were highly contested at trial and formed the subject-matter of a number of evidentiary rulings.

122 The importance of the dates and existence of blood tests for Mr. Farrow and the dates on which blood samples were taken from Mr. Robb and Mr. Rintoul lies in the fact that these matters formed an integral part of the foundation for Dr. Remis's opinion. The CRCS argues that there was no admissible evidence to establish these matters and that, consequently, Dr. Remis's opinion on the dates of infection cannot be given any weight. In the absence of reasons from the trial judge on this point, it is incumbent upon this court to conduct its own review and assessment of the relevant evidence.

(a) Evidence of the last HIV-negative blood tests for Wayne Robb and Gray Rintoul

123 The evidence of the last HIV-negative blood tests for Mr. Robb and Mr. Rintoul consisted of reports of "non-reactive" HIV serology tests (Serology Reports) conducted in September 1992 on blood samples allegedly taken from Mr. Robb and Mr. Rintoul in 1985, some seven years earlier. The dates on which the blood samples were collected for testing, as noted on the Serology Reports, were not entirely clear. On the Robb report, it was noted as "1985 May" and on the Rintoul report as "1985". Counsel for the plaintiffs explained that the blood samples were allegedly frozen and stored by Dr. Inwood, the treating physician for both these plaintiffs, from 1985 to 1992 when Dr. Inwood sent them in for testing. Dr. Inwood became unavailable to testify, for reasons we do not need to get into, and hence did not provide evidence with respect to the taking of the samples. However, in an attempt to further particularize the "1985" notation on the Rintoul report, counsel for the plaintiffs sought to introduce at trial a letter he received from Dr. Inwood dated November 17, 1992 (the "Explanatory Letter"), in which Dr. Inwood stated that "[t]he date for the 1985 sample is most likely May 9, 1985".

124 The admissibility of the Serology Reports and the Explanatory Letter as proof of the dates on which the blood samples were taken from Mr. Robb and Mr. Rintoul became highly contentious given the unavailability of Dr. Inwood to testify. In the result, after a number of exchanges between counsel and the trial judge, the Serology Reports were admitted as business records under s. 35 of the Evidence Act, R.S.O. 1990, c. E.23. The trial judge ruled that the Explanatory Letter did not satisfy the requirements of s. 35 but that it could be admitted for "limited purposes" only. The limited purposes for which the Explanatory Letter was admitted were not specified but the trial judge made it clear in her ruling (which concerned other documents as well) that "where the letters offer opinions on matters which may be germane to issues in this litigation, there is a requirement for further proof of the truth of their contents."

125 For sake of completeness, we note the other items of evidence relied upon by the plaintiffs to substantiate the dates noted on the Serology Reports relating to the collection of blood samples from Mr. Robb and Mr. Rintoul. With respect to Mr. Robb, there is a record from St. Joseph's Hospital entitled "Patient's Clinic Log" with an entry stating "8 May 85 - Dr. Inwood - Hemophilia [Clinic] - Assess." With respect to Mr. Rintoul, there is a record from St. Joseph's Hospital entitled "Patient's Progress Notes", which stated "May 9, 1985 - Gray is in good spirits. Annual assessment. Dr. Inwood discussed concerns regarding transmission of HTLVIII virus with Gray", and a corresponding record of "peripheral blood tests" being performed during the assessment. We will comment further on this evidence later in these reasons.

(b) Evidence concerning the existence and

dates of blood tests for Christopher Farrow

126 In order to establish the dates of HIV testing for Mr. Farrow, counsel for the plaintiffs sought to introduce two letters written by Dr. Blanchette, Mr. Farrow's treating hematologist (the Blanchette Letters). The Blanchette Letters made the following references to records of HIV testing for Mr. Farrow. In the first letter, addressed to another physician and dated October 13, 1987, Dr. Blanchette stated as follows:

> I interviewed with Christopher's parents on October 6, 1987 in regard to his HIV-I antibody positive status. Our records indicate that he was negative by Western blot testing in May 1985 and again in September 1985. In March 1986 he was positive by the screening assay (Elisa) and I'm awaiting Western blot confirmation of this sample. His June 1987 sample was positive by Western blot testing.

127 In the second letter, a transfer letter' addressed to Dr. Joan Dahmer and dated June 10, 1991, Dr. Blanchette listed Mr. Farrow's "major clinical problems" as follows:

> Christopher was HIV-1 antibody negative by Western blot assay in May 1985. By March, 1986 the Western blot assay was positive.

128 The Blanchette Letters were written during the course of Mr. Farrow's treatment, and not for the purposes of trial. Apart from the Blanchette Letters, there were no other records of HIV testing for Mr. Farrow.

129 Counsel for the plaintiffs sought unsuccessfully to admit the Blanchette Letters as business records. After much debate on their admissibility, counsel for the CRCS consented to the admission of the Blanchette Letters as medical reports under s. 52 of the Evidence Act subject to Dr. Blanchette's being available for cross-examination. The trial judge ruled accordingly. In the course of her ruling, she explained the basis upon which the documents were admitted in these words:

> In this situation, getting at the truth is directed towards getting evidence before the Court as to the date of infection of Christopher Farrow. I do not agree with Mr. Arenson that the matters opined on by Dr. Blanchette in his letter of October 13th, 1987, addressed to Dr. Schacter, and the letter dated June 10th, 1991, addressed to Dr. Joan Dahmer, are factual matters. I regard them as opinions that may be related to or influence the Court's ultimate determination of when Christopher Mr. Farrow was infected.
>
> ...
>
> The October 13, 1987 letter and the 10th of June, 1991 will be treated by the Court as reports under section 52 of the Ontario Evidence Act. [Emphasis added.]

130 In cross-examination, Dr. Blanchette testified that the HIV tests were not conducted by him but rather were part of a confidential research study conducted by one Dr. Read. The actual test results could not be located. Dr. Blanchette believed that he obtained the results either by written notification or orally from Dr. Read. Although Dr. Blanchette could not remember precisely how he obtained the results, he testified that he would not have written the dates without honestly believing them to be accurate. Dr. Read did not testify at trial.

(c) Expert opinion evidence

131 As the trial judge noted in her reasons, expert opinion evidence was necessary to determine the dates of infection for the three plaintiffs. The plaintiffs called Dr. Mazzulli with respect to Mr. Robb and Mr. Rintoul but did not call any expert evidence with respect to Mr. Farrow's date of infection. The CRCS called Dr. Remis with respect to the infection dates of the three plaintiffs.

132 The trial judge preferred the evidence of Dr. Remis. She found that the plaintiffs' expert had not been provided with sufficient information upon which to base his conclusions and hence rejected his testimony. Since no appeal is taken from this finding, we will only consider the evidence of Dr. Remis.

133 The significance of the dates on which the samples of blood were drawn for HIV testing is readily apparent upon review of the testimony of Dr. Remis. Dr. Remis was called as an expert in epidemiology, and in particular, the surveillance of HIV and AIDS and the transmission of HIV through blood products. In his examination-in-chief, Dr. Remis offered his opinion on the dates and sources of the HIV infections of the plaintiffs.

134 With respect to Mr. Robb and Mr. Rintoul, Dr. Remis arrived at his opinion after reviewing their medical records that included information on the administrations of various products, visits to

clinics and hospitals, and most importantly, their test results for HIV. The first step in Dr. Remis's analysis was to define the "exposure period" for each plaintiff - the period during which Mr. Robb and Mr. Rintoul would have been infected with the HIV virus. He testified that this period was typically two to three months before the last negative test and up to two weeks before the first positive test. Dr. Remis defined the beginning of the exposure period based on May 8, 1985 and May 9, 1985 being the last times that HIV-negative blood samples were drawn from Mr. Robb and Mr. Rintoul. Dr. Remis assumed these dates, presumably, from the Serology Reports and the Explanatory Letter.

135 After defining these exposure periods, Dr. Remis looked at the factor concentrate products that were received during each exposure period, as well as other possible sources of HIV infection to determine what was the likely source of each plaintiff's infection. Then, after identifying a single lot' of factor concentrate as the most likely source of all three plaintiffs' infections, Dr. Remis pinpointed the dates on which the plaintiffs were infected. He concluded that Mr. Robb was infected on April 21, 1985, and Mr. Rintoul on either April 7, 1985 or April 25, 1985.

136 During his examination-in-chief, Dr. Remis was asked if he relied on anything else to determine the likely source and dates of infection. Dr. Remis replied that he also considered evidence of symptoms consistent with HIV. According to the medical records, Mr. Robb had experienced "protracted fever, sweats and chills" in the first two weeks of June 1985, and had a lab test at the time that showed "a low lymphocyte count". According to Dr. Remis, these were indicators of an acute primary retroviral syndrome, signifying a possible infection with HIV anywhere from two to six weeks earlier. As for Mr. Rintoul, Dr. Remis noted that the records showed a pancytopenia (or "a lack of cells across the board") on May 9. This, too, was described by Dr. Remis as being consistent with a recent HIV infection.

137 Finally, in determining the probable source of infection, Dr. Remis testified that he also considered distribution patterns of blood products in Canada and the link to HIV infection.

138 In the end, Dr. Remis concluded that all of the factors combined assisted him in reaching his opinion. He stated that "everything in [the] case added up, one thing after the other".

139 With respect to Mr. Farrow, based on the same methodology that was used for Mr. Robb and Mr. Rintoul Dr. Remis opined that Mr. Farrow was infected any time between April 26, 1985 and May 14, 1985. This methodology included a preliminary consideration of the "exposure period" for Mr. Farrow, which was determined from the dates of HIV testing noted in the Blanchette Letters. However, Dr. Remis had greater difficulties in arriving at an opinion for Mr. Farrow than he did for Mr. Robb and Mr. Rintoul. He recognized the ambiguity in the dates in the Blanchette Letters that made it uncertain whether the last negative test was obtained in May 1985 or September 1985. He noted that his conclusions with respect to Mr. Farrow were tempered by this uncertainty and that, for the purpose of his opinion, he assumed that there was no negative result for Mr. Farrow in September 1985. Had it been proven that there was in fact a negative result in September 1985, Dr.

Remis stated that his opinion would have to be reconsidered. Dr. Remis also noted that Mr. Farrow, unlike Mr. Robb and Mr. Rintoul, did not have an acute retroviral syndrome that was clinically evident.

140 In determining the source of Mr. Farrow's infection, Dr. Remis relied on the conclusion that he had reached in respect of Mr. Robb and Mr. Rintoul because he was of the opinion that all three plaintiffs were probably infected from a single source. Dr. Remis stated:

> So all we could say, Mr. Farrow does not really help us a lot except it was likely one of these five lot numbers, but aside from other considerations, doesn't help us to distinguish between which one it was.

(d) Position of the parties at trial

141 The sufficiency of the evidence with respect to the dates of infection was clearly raised at trial. With respect to Mr. Rintoul and Mr. Robb, counsel for the CRCS took the following position in his written submissions concerning the dates when Mr. Robb and Mr. Rintoul were last HIV-negative and the dates when their blood samples were taken:

> ... the plaintiffs rely upon test results from 1992 to indicate that these plaintiffs were HIV negative in May, 1985. These test results, in turn were interpreted by [the expert] who based his conclusions upon them.
>
> The CRCS takes no issue with the accuracy of the test results as being admissible under the Evidence Act as business records, so long as they are entered as evidence of a contemporaneous transaction. That is, these records demonstrate that the samples tested by the provincial testing laboratory were negative for HIV when the tests were done for HIV. <u>The question that they do not answer is when the samples themselves were taken. As noted previously unless there is some evidence that blood was drawn and stored from these patients on the dates advanced by the plaintiffs and it was this blood that was sent to the provincial testing laboratory in 1992, it is not permissible to draw the conclusion that these patients had not developed detectable antibodies in early May, 1985</u>. [Emphasis added.]

142 With respect to Mr. Farrow, counsel for the CRCS argued that the "opinion evidence" of Dr. Blanchette about the blood test results and the date of such tests, as contained in the Blanchette Letters, should be given no weight. Counsel noted that Dr. Blanchette's opinion was based entirely on unproven hearsay evidence: there was nothing in the way of contemporaneous documentation to ground the dates reported, nor was there evidence to establish that the tests were ever conducted. Hence the CRCS took the position that the Blanchette Letters could not be relied on to establish the

infection date for Mr. Farrow.

143 Counsel for the plaintiffs did not really address these issues in his written submissions. Rather, his submissions were based on the assumption that the dates in the Serology Reports, the Blanchette Letters and other records established as a fact the dates upon which blood samples were drawn from Mr. Robb and Mr. Rintoul and the date and existence of Mr. Farrow's blood tests. It appears from the trial judge's reasons that she accepted the plaintiffs' position without further analysis.

(e) Conclusion

144 For the reasons that follow, it is our view that the position adopted by the CRCS in its submissions at trial and on this appeal is correct. There was no admissible evidence as to the date and existence of blood tests for Mr. Farrow. There was also no admissible evidence as to the dates the negative blood samples were collected from Mr. Rintoul and Mr. Robb or that such samples came from Mr. Robb or Mr. Rintoul. Consequently, the trial judge erred in finding that the plaintiffs had established these matters. We are also of the view that these factual issues were crucial to Dr. Remis's opinion with respect to the dates of infection. It follows that, without proof of these important facts that provide the foundation for his expert opinion evidence, Dr. Remis's opinion could not be given much weight, if any. Consequently, the trial judge's conclusion with respect to the dates of infection, which was based solely on Dr. Remis's testimony, is not reasonably supported by the evidence.

145 As noted earlier, with respect to Mr. Robb, the only evidence in the record as to the date on which the crucial blood sample may have been taken is as follows: (a) a notation contained in the 1992 Serology Report in the box entitled "Date Specimen Collected" that stated "1985 May"; and (b) a record from St. Joseph's Hospital entitled "Patient's Clinic Log" with an entry stating "8 May 85 - Dr. Inwood - Hemophilia [Clinic] - Assess."

146 At best, one could infer from the latter record that Mr. Robb was referred to the hemophilia clinic for assessment on May 8, 1985. However, in and of itself, this record provides no evidence that a blood sample was taken that day and certainly cannot constitute proof that, if a blood sample was taken at the St. Joseph's Hospital on that date, it is the same sample that made its way to the provincial testing laboratory some seven years later.

147 As for the Serology Report, it constituted proof that the sample tested by the provincial testing laboratory was negative for HIV when the test was done in 1992. To that extent, the information contained in the Serology Report fell within the scope of s. 35 of the Evidence Act. It constituted a record made of an act made in the usual and ordinary course of the laboratory's business and it related to a contemporaneous event. Section 35 reads as follows:

35.(1) In this section,

> "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
>
> "record" includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.
>
> (4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.
>
> (5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. [Emphasis added.]

148 While the Serology Report constituted proof of the fact that the test in question was made with respect to a blood sample reportedly taken from Mr. Robb in May 1985, it did not constitute proof that the sample was in fact taken in May 1985 or that the sample was taken from Mr. Robb. Although it was in the ordinary business of the laboratory to receive and record information about the date of the sample collection, the notation does not refer to a contemporaneous event within the meaning of s. 35 and cannot constitute proof of its content. See: Adderly v. Bremner, [1968] 1 O.R. 621 at 623-24 (H.C.J.); Kolesar v. Jeffries (1976), 12 O.R. (2d) 142 at 145 (C.A.), aff'd on other grounds [1978] 1 S.C.R. 491; McGregor v. Crossland, [1994] O.J. No. 310 at para. 3 (C.A.). The Serology Report cannot be used to prove an event taking place seven years before its creation, all the more so where the event in question did not take place as part of the recorder's business.

149 With respect to Mr. Rintoul, the only evidence in the record as to the date on which the

crucial blood sample may have been taken is as follows: (a) a notation contained in the 1992 Serology Report in the box entitled "Date Specimen Collected" that stated "1985"; (b) the Explanatory Letter stating that "the date for the 1985 sample is most likely May 9, 1985"; (c) a record from St. Joseph's Hospital entitled "Patient's Progress Notes", that stated "May 9, 1985 - Gray is in good spirits. Annual assessment. Dr. Inwood discussed concerns regarding transmission of HTLVIII virus with Gray"; and (d) a corresponding record from St. Joseph's Hospital entitled "Assessment Findings and Recommendations" dated 1985 that refers to "peripheral blood tests" being performed.

150 The trial judge correctly ruled that the Explanatory Letter did not meet the requirements of s. 35 of the Evidence Act and could not provide proof of the truth of its contents. Even if the Explanatory Letter is considered with the remaining evidence on this point, the same limitations already noted apply. At best, there was evidence of the existence of HIV testing done in 1992 in respect of a blood specimen that the laboratory was informed was taken from Mr. Rintoul in 1985. However, for the reasons just stated, the Serology Report and the hospital records were not admissible to prove that blood samples that tested negative in 1992 were taken in May 1985 or that such samples were taken from Mr. Rintoul.

151 The evidence concerning Mr. Farrow on this issue consisted solely of the Blanchette Letters. As indicated earlier, the Blanchette Letters, although admittedly not medical reports, were admitted at trial, with the consent of the CRCS, as if they were medical reports under s. 52 of the Evidence Act. Section 52 reads as follows:

> 52(1) In this section,
>
> "practitioner" means,
>
> (a) a member of a College as defined in subsection 1(1) of the Regulated Health Professions Act, 1991,
>
> (b) a drugless practitioner registered under the Drugless Practitioners Act,
>
> (c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b).
>
> (2) A report obtained by or prepared for a party to an action and signed by

> a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action.
>
> (3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action.
>
> (4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2).
>
> (5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate.

152 Section 52 differs from s. 35 in that it permits the admission of opinions and diagnoses contained in medical reports signed and prepared by qualified practitioners: See McGregor v. Crossland, above. Section 52 was designed as an alternative to oral testimony.

153 In the Blanchette Letters, Dr. Blanchette expressed certain opinions with respect to Mr. Farrow's treatment. The Blanchette Letters also referred to the results of Mr. Farrow's HIV testing. As noted earlier, one letter referred to the last negative test as being in May 1985 and the other in September 1985. Dr. Remis's opinion on the date of infection, which was accepted by the trial judge, was based on the May 1985 date.

154 Even disregarding the ambiguity with respect to the date of Mr. Farrow's last negative test, the reference to Mr. Farrow's May 1985 record cannot be accepted for its truth. The admission of Dr. Blanchette's opinion, whether it be under s. 52, or by way of oral testimony, does not establish the facts upon which the opinion is based. The facts reported by Dr. Blanchette with respect to the results of the HIV testing for Mr. Farrow are admissible as having been accepted as true by Dr. Blanchette but they are not admissible for their truth. Put another way, the facts on which Dr. Blanchette's opinion was based must be established: See Reimer v. Thivierge (1999), 46 O.R. (3d) 309 at 314 (C.A.); see also McGregor v. Crossland, above, at para. 6.

155 Even assuming that Dr. Blanchette's reference to the timing of the negative testing could be considered as an opinion rather than a statement of the basis for the opinion, the weight of that opinion would have to be properly assessed. In this case, it becomes apparent, when the Blanchette

Letters are considered as a whole together with Dr. Blanchette's testimony, that very little weight, if any, can be given to Dr. Blanchette's opinion on this issue given the following factors: no supporting documentation was adduced; the date of last negative testing is uncertain in the Blanchette Letters; no record was kept of the HIV testing; Dr. Blanchette did not perform the HIV tests himself, and was not involved in the taking of the blood samples that were tested; Dr. Blanchette could not recall precisely how the results of the tests were communicated to him; and the results were not communicated to Mr. Farrow or his family when the tests were completed. In any event, it is our view that the reference to the HIV testing is not an opinion but a fact upon which the opinion is based, the truth of which was not proven.

156 Hence, it is our view that the plaintiffs, having failed to prove the facts upon which Dr. Remis based his opinion regarding the dates of infection, have failed to prove the dates upon which they were infected. Without evidence to support the trial judge's conclusions on the dates of infection, the plaintiffs have not established that the negligence of the CRCS, as found by the trial judge, caused the plaintiffs to contract HIV.

4. Did the trial judge err in drawing adverse inferences against the CRCS for the failure to call certain witnesses?

157 The CRCS takes the position that the trial judge improperly drew adverse inferences against it for failing to call certain witnesses. It is submitted that these inferences were not permissible at law, and were contrary to the trial judge's own rulings during the course of the trial. The CRCS takes particular issue with the adverse inferences drawn from its failure to call Drs. Davey, Herst, Perrault, Walker and Mr. Anhorn as witnesses.

158 It is clear from the trial judge's reasons that adverse inferences stemming from the failure to call material witnesses played an important role in her analysis of the evidence against both the CRCS and Canada. Before dealing with the evidence against the CRCS, she stated as follows (at paras. 60-62):

> The CRCS and Canada chose not to call material witnesses on issues that were raised by the plaintiffs. Persons with knowledge of events that were the subject matter of testimony and documents tendered by the plaintiffs did not testify. As a result, it is proper for the court to draw an adverse inference against the defendants. I now refer briefly to the law. In Kaytor v. Lion's Driving Range (1962), 40 W.W.R. 173 (B.C.S.C.), this statement of principle appears at p. 176 of the judgment of Aikens J.:
>
> > It is, I think, well established that where a party fails to call a witness, and it is apparent from the evidence in the case that the witness would have been able to give evidence on a material issue, then the court may draw such inferences as the particular circumstances of the case

> warrant against the party failing to call the witness. This would apply, of course, only where the failure to call the witness is not satisfactorily explained.
>
> The CRCS and Canada were particularly possessed of resources which would enable them to lead evidence on important issues raised by the plaintiffs. The fact that these important witnesses were not called cannot fall at the feet of the plaintiffs. To do so would place an impossible burden on them in the circumstances of this case.
>
> At this point, I identify persons who would have been able to give evidence on material issues relating to the delay of the implementation of the BoB directive, and who were not called by the CRCS or Canada. The failure to call these persons was not explained.

159 The trial judge then identified seven potential witnesses, including those mentioned above, and concluded as follows (at para. 70):

> I conclude that, had these persons been called as witnesses, their evidence would not be favourable to the CRCS or Canada. The plaintiffs have tendered sufficient admissible evidence that the delay in the implementation of the Directive was negligent. It is no answer for the CRCS or Canada to say that these persons are no longer employed by them, or that they are unfriendly.

160 The trial judge then proceeded with her analysis and drew adverse inferences from the CRCS's failure to call certain witnesses with respect to a number of significant issues, including some of the issues reviewed earlier in this judgment. The extent to which adverse inferences played a role in the trial judge's analysis is apparent from her concluding observations on the issue of causation where she refers to a number of those earlier findings (at paras. 123-125):

> The circumstantial evidence tendered by the plaintiffs, taken together with the CRCS's failure to meet the standard of care (which materially increased the risk to the plaintiffs) permits the court to draw an inference of causation, thus placing the last pieces in the puzzle, which leads to a finding of negligence. The inferences of negligence in these actions come from certain documentary and viva voce evidence. Examples are the Walcroft Summary, the notes and memoranda of Dr. Naylor, and the testimony of Ms. Krepps. ...
>
> Once the documents are before the court, the court is required to examine the documents closely to ascertain whether or not they contain sufficient

> circumstantial evidence to permit the court to draw the inferences of negligence. In these cases, the strength of the inferences of negligence is sufficient to compel the CRCS to submit evidence to meet them. The plaintiffs' evidence, including that of the witnesses called, suggests that the CRCS probably subordinated safety concerns to matters such as using up contaminated inventory prior to the distribution of heat-treated inventory.
>
> Another aspect of the analysis under this heading is that the CRCS and others appeared to believe that by December of 1984, all but virgin hemophiliacs were infected in any event. The reality is that there was no statistical basis for this assumption. Furthermore, the evidence is that by December, 1984 and through to March, 1985, Mr. Robb, Mr. Rintoul and Mr. Farrow were not infected. In these circumstances, this assumption is shocking, if not reckless.

161 In the circumstances of this trial, the adverse inferences drawn by the trial judge with respect to the witnesses in question were unwarranted. An inference may be drawn against a party for failure to call a witness who may give material evidence when that party alone could bring the witness before the court: See Lambert v. Quinn (1994), 110 D.L.R. (4th) 284 at 287-88 (Ont. C.A.). This was not the case here.

162 None of the witnesses was, at the time of trial, an employee of the CRCS. There is no reason to believe that they were not equally available to the plaintiffs. Indeed, during the course of the trial, counsel for the plaintiffs expressed an intention to call many of these witnesses. His motion to compel the attendance of Dr. Davey and Mr. Anhorn (amongst others) as adverse witnesses under Rule 53.07 was unsuccessful, the trial judge ruling that neither was an officer, director or employee of the CRCS. Counsel for the plaintiffs even conceded on the record on different occasions during the trial that the CRCS was not in a position to call Dr. Davey or Mr. Anhorn. Further, two of the witnesses, Dr. Herst and Dr. Davey, were examined for discovery by the plaintiffs and extensive parts of their examination were read in as part of the plaintiffs' case. Finally, and perhaps most importantly, the CRCS was entitled to rely on the trial judge's own rulings with respect to the calling of these witnesses. The following exchanges, noted by the CRCS in its factum, are of particular relevance:

> During its case, the CRCS advised that it was calling no evidence on the standard of care. The plaintiffs moved to re-open their case and have the court revoke a number of rulings it had previously made. During the course of the argument, plaintiffs' counsel suggested that one of the reasons for revoking her rulings could be that it was anticipated that certain witnesses would testify, specifically, Dr. Walker, Dr. Perrault and Dr. Davey. The trial judge immediately disabused all present in the court of that suggestion:

> But Mr. Arenson [counsel for the plaintiffs], I never had it in my mind, just so you're very clear, that Mr. Boeckle [counsel for the CRCS] was going to call these people. ... Because I knew that ... [the witnesses they would call] ... would very much be the by-product of what they considered they had to meet in terms of the case that you had proven, or had laid out before the Court. ... and no judge should draw any inference from the fact that names appear on a witness list at some point and then that person doesn't materially turn up at the trial.

Plaintiffs' counsel then complained that he reasonably believed that the CRCS was going to call these witnesses. The trial judge immediately corrected him as follows:

> Court: I thought -- well, let me just say this to you, Mr. Arenson. I thought you would call Mr. Anhorn. ... and you didn't.
>
> Arenson: I didn't. That's right.
>
> Court: I tried to make it easy for you to do so.

The plaintiffs' motion to re-open their case was dismissed. In dismissing the motion, the Court made the following statements:

> In this complex and long case, experienced counsel on all sides have made <u>tactical decisions</u> which reflect the strategies adopted by them to put forward evidence material to their assessments of the issues raised in the pleadings ... Throughout the trial [Mr. Arenson] made tactical decisions as to which witnesses he would or would not call. For example, <u>he decided not to call Dr. Martin Davey, Mr. Craig Anhorn, or Dr. Walker</u> ... [emphasis added]
>
> ... Before the plaintiffs closed [CRCS counsel] prepared a list of all exhibits marked at the trial. The list identified the date on which such exhibit was marked; who was testifying when it was marked and whether or not it was the subject matter of a ruling by the court.

> There would have been enormous work in the preparation of this list. This step was taken so that all parties in the court would have a clear understanding of the status of each exhibit. Mr. Arenson was invited to agree or disagree with the status of this list of exhibits. Mr. Arenson refused to participate in this process and closed his case. I agree that it should have been obvious that the CRCS was attempting, by the use of the list, to determine what evidence was in against the CRCS ...
>
> It is fundamental that the CRCS [or any defendant] is entitled to know the case it has to meet.
>
> There have been rulings on almost a daily basis on the admissibility of evidence. While the majority of these rulings have been oral, there are many which have been in writing, it being my hope that by taking this extra step, I would assist counsel in having a clear understanding of the parameters of such rulings ... <u>It also goes without saying that, based on these rulings, counsel are entitled to make decisions on the identity of witnesses</u>, cross-examination strategies, and what documents should or should not be put to witnesses ... [Emphasis added.]
>
> * * *
>
> ... A trial judge has a duty to make rulings which are, as far as possible, consistent, certain, and fair. These rulings must be based on established principles of the law of evidence; otherwise, the results are not only chaotic they impugn the integrity of the administration of justice.

163 In our view, the trial judge's conclusion in her reasons for judgment (at para. 61) that it "would place an impossible burden" on the plaintiffs to call these witnesses was inconsistent with the view she expressed during the trial and this reversal of position effectively deprived the CRCS (and other parties) of procedural fairness. On that ground alone, her judgment, even if it could otherwise be supported by the evidence, cannot stand given the significance of the adverse inferences drawn by the trial judge.

B. Damages

1. Christopher Farrow: non-pecuniary general damages

164 The CRCS appealed against Mr. Farrow's award of $300,000 for non-pecuniary general damages. In its submission, Mr. Farrow's case did not present "exceptional circumstances" warranting an award for non-pecuniary general damages beyond the upper limit set by the Supreme Court of Canada in the trilogy of Andrews, Arnold and Thornton, above: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 642-643. That upper limit, adjusted for inflation, stood at $265,000 at the time of the trial.

165 In ter Neuzen v. Korn, [1995] 3 S.C.R. 674, a jury awarded $460,000 non-pecuniary general damages to a patient who had become infected with HIV while participating in an artificial insemination program. At the time, the adjusted upper limit stood at approximately $240,000. The British Columbia Court of Appeal ordered a new trial on the issues of liability and damages. The patient's appeal to the Supreme Court of Canada was dismissed. Speaking for the majority of the Court, Sopinka J. said (at p. 724):

> There is no doubt that the appellant has suffered immensely as a result of this tragedy. It is also apparent that AIDS is a dreadful disease which will eventually take the life of the appellant prematurely. However, with respect to non-pecuniary losses, I do not believe that the present case is any different than other tragedies, such as those which befell the plaintiffs in the Andrews trilogy. I agree with the following comments of the Court of Appeal [(1993), 81 B.C.L.R. (2d) 39] (at p. 87):
>
>> While recognizing that the Plaintiff's injuries are markedly different in kind from those under consideration in the trilogy, we cannot conclude that the principle adopted by the Supreme Court of Canada, aimed at controlling the social burden of damages awards, should not be applied in this case. It follows, in our view, that the Plaintiff's non-pecuniary damages cannot exceed the adjusted rough upper limit.

166 In our view, this passage is determinative of the upper limit of non-pecuniary general damages to which Mr. Farrow is entitled. Had we affirmed the trial judge on the question of liability, we would have reduced Mr. Farrow's non-pecuniary general damages award to $265,000.

2. Steven Farrow: Family Law Act claim

167 Christopher Farrow was nine years old when his brother Steven was born, approximately three years after Christopher's HIV diagnosis. The trial judge was of the view that a person could not "marry into" a claim under the Family Law Act, R.S.O. 1990, c. F.3. For example, Judith Rintoul, who married Gray Rintoul after learning of his HIV status, received no award for her Family Law Act claim. However, the trial judge concluded that the policy considerations for excluding "marrying into" claims did not apply where, as in Steven's case, he was born after his brother was infected. The trial judge awarded Steven $15,000 for loss of care, guidance and

companionship under the Family Law Act.

168 We think that the trial judge erred in making this award. The authorities have consistently held that a person can no more be "born into" a Family Law Act claim than he or she can "marry into" a claim: Ficht v. Kitchen (1984), 47 O.R. (2d) 495 at 499 (H.C.J.); MacIsaac v. Smith (1987), 58 O.R. (2d) 289 at 303 (Div. Ct.); Rothwell v. Raes (1988), 66 O.R. (2d) 449 at 513 (H.C.J.), aff'd on other grounds (1990), 2 O.R. (2d) 332 (C.A.), leave to appeal to S.C.C. refused [1991] 1 S.C.R. xiii; Kenyeres (Litigation Guardian of) v. Cullimore, [1992] O.J. No. 540 (Gen. Div.), appeal settled [1994] O.J. No. 3803 (C.A.); Finlayson v. Roberts, [1996] O.J. No. 4050 at para. 12 (Gen. Div.), rev'd on other grounds (2000), 136 O.A.C. 271 (C.A.). We see no different policy considerations applying to the two types of claim. Had we affirmed the trial judge on the question of liability, we would have set aside the award of $15,000 to Steven Farrow under the Family Law Act.

3. Deductibility of EAP payments

169 The plaintiffs each received $120,000 under the EAP and released Canada from all claims relating to their having become infected with HIV. The trial judge's reasons for judgment suggested that these payments were collateral benefits and deductible from the plaintiffs' awards. In her supplementary reasons for judgment, however, she refused to give the CRCS any credit for the EAP payments. She wrote in her supplementary reasons (at paras. 20 and 21):

> In assessing both interest and damages in this case, one important preliminary issue is the effect of the Government of Canada's Extraordinary Assistance Plan (EAP) payments to the plaintiffs. Prior to this action, Canada paid each of the plaintiffs $120,000. In exchange, the plaintiffs released Canada from any liability. Canada became a party to these proceedings following a motion which was heard by Feldman J. (as she then was) in her capacity as Trial Management Judge. In her endorsement, adding Canada as a third party, Feldman J. provided as follows:
>
> > Any costs award shall be subject to the right of the Red Cross to seek reimbursement for some or all of the costs it is required to pay, from the third parties at trial.
> >
> > As requested, the Red Cross shall be precluded from passing over to a plaintiff any set-off allowed to the Government of Canada as a result of the EAP release.
>
> To my mind, this is a complete answer to the CRCS's submission that it should receive credit for the EAP payments.

170 Much of the argument before us on this issue addressed the endorsement of Feldman J. and a similar endorsement of Benotto J., both made in the course of case management of these actions prior to trial. In our view, these endorsements were not intended to determine the issue of whether the EAP payments should or should not be deducted from the amounts of the plaintiffs' damages. That issue remained to be resolved at the trial and the trial judge was not constrained by the case-management endorsements, although her supplementary reasons suggest that she believed she was so constrained.

171 We agree with the trial judge's initial determination that the $120,000 represented a collateral benefit that should have been deducted from each of the plaintiffs' damages. Accordingly, had we affirmed the trial judge on the questions of the liability of the CRCS to the plaintiffs for damages and of Canada to the CRCS for contribution, we would have deducted the $120,000 payment from each plaintiff's damages payable by the CRCS and we also would have deducted that sum from the amount payable by Canada to the CRCS by way of contribution. By way of illustration, if a plaintiff's damages had been $1,000,000, we would have ordered the CRCS to pay to that plaintiff $880,000 (i.e. $1,000,000 less $120,000) and we would have ordered Canada to pay to the CRCS by way of contribution $100,000 (i.e. 25% of $880,000, which is $220,000, less $120,000).

C. Costs as between the CRCS and the Plaintiffs

172 In addition to a number of motion-specific and witness-specific orders, the trial judge ordered that the plaintiffs recover their costs against the CRCS on a party-and-party scale following assessment. In her supplementary reasons for judgment, the trial judge rejected the plaintiffs' request for costs on a solicitor-and-client scale, and also rejected the CRCS's request for a reduction of the plaintiffs' costs by 40% to signal her disapproval of unnecessary delay caused by Mr. Arenson's conduct of the trial. The trial judge gave thorough reasons explaining why she chose not to make these orders. We are not persuaded that her decision regarding costs was clearly wrong or made in the improper exercise of her discretion. Had we affirmed the trial judge on the question of liability, we would not have disturbed her decisions regarding the scale or the quantum of her costs award.

D. Disposition of the Appeal by the CRCS

173 For these reasons, the appeal by the CRCS is allowed, the judgment against it is set aside and the plaintiffs' actions against it are dismissed.

VII. APPEAL BY CANADA

174 In view of our conclusion that the plaintiffs' claims against the CRCS must be dismissed, it follows that the appeal by Canada must also be allowed and the judgment against it set aside. Regardless of the fact that this result is dictated by our findings on the CRCS's appeal, we are also of the view that the finding of negligence against Canada cannot be supported by the evidence.

A. Trial Judge's Finding of Negligence against Canada

175 Even assuming that Canada, as regulator of blood products, had the duty to expedite the regulatory process (as found by the trial judge), we are not satisfied that there was any basis in the evidence to find that Canada breached this duty. The principal cause of the BoB's delay in approving heat-treated F-IX was the time it took to obtain the viral inactivation data from Cutter. We agree with Canada's submission that, in order for the CRCS to prove its case against Canada, the CRCS had to prove that the BoB could have caused Cutter to send this data sooner, or that the BoB could have dispensed with the requirement for such data. No suggestion of that kind was made by anyone at trial.

176 The trial judge's finding of liability against Canada was essentially based on her conclusion that Canada had the capability, within the BoB, to expedite the regulatory process. She cited two examples of regulatory flexibility in support of this conclusion: (i) one instance where she found that the labelling requirements for some heat-treated F-VIII were dispensed with; and (ii) the existence of the EDRP.

177 The first example is mentioned in para. 142 of the trial judge's reasons for judgment. The trial judge referred to a memorandum written by Ms. Krepps from the BoB dated March 25, 1985. The memorandum recorded a conversation between Ms. Krepps and a Cutter employee in which the employee asked permission to send heat-treated F-VIII to the CRCS with American labelling. The American labelling would subsequently be "overstickered" with the Canadian licence number and the drug identification number. Dr. Boucher of the BoB satisfied himself that there was some urgency to the request and gave permission for this procedure. The trial judge concluded that this incident provided evidence that the BoB had the capability, in collaboration with the CRCS, to respond to "urgent circumstances" by dispensing in that case with labelling requirements.

178 We agree with Canada's submission that this example provides no support for the conclusion that the BoB could dispense with any regulatory requirement. Ms. Krepps testified that the difference between the American and Canadian labelling was that in Canada the labels of the drugs had to show the company's Canadian licence number as well as the drug identification number. In the example relied on by the trial judge, the BoB agreed that the vials of F-VIII could be "overstickered" to include this information. Hence the labelling requirements were not dispensed with. Rather, the required information was pasted to the American labels pending the printing of the Canadian labels. Further, Canada points out that, unlike the heat-treated F-IX at issue in this litigation, heat-treated F-VIII was a commercial product manufactured by Cutter with an American label. Cutter would never have printed an American label for the custom manufactured F-IX at issue in this appeal.

179 The second example referred to by the trial judge as providing evidence of the BoB's flexibility was the EDRP. The EDRP is expressly provided for under the Food and Drug Regulations and allows a treating physician to request an unapproved drug for his or her patient.

The BoB can authorize the manufacturer to provide the physician with the requested drug. Ms. Krepps, a BoB employee, testified about the release to a physician of an unapproved drug under the EDRP. The trial judge concluded (at para. 144):

> Ms. Krepps' evidence demonstrated that there was a capability in the BoB to be flexible with respect to regulatory requirements in emergency circumstances. [Emphasis added.]

180 We agree with Canada's submission that the existence of the EDRP provides no assistance in determining the issues raised in this case because no request was ever made by any of the plaintiffs' physicians for heat-treated F-IX. Moreover, in our view, the existence of the EDRP does not demonstrate a general regulatory flexibility. Rather, it demonstrates that the regulatory window of flexibility was open only to the limited extent that physicians in prescribed circumstances could gain access to unapproved drugs. We note that in 1998, provision was made to the EDRP for the issuance of a NoC with conditions.

181 Finally, our analysis with respect to adverse inferences on the CRCS appeal applies equally to Canada's appeal.

B. Disposition of the Appeal by Canada

182 For these reasons, the appeal by Canada is allowed, the judgment against it set aside, and CRCS's claim against Canada is dismissed.

VIII. CROSS-APPEALS BY THE PLAINTIFFS AND CROSS-APPEAL BY BAYER ON COSTS ONLY

A. Damages

1. Christopher Farrow: future care

183 The trial judge fixed the value of the claim for future care costs for Mr. Farrow at $85,000, less 20% for contingencies. Mr. Arenson suggested that this was a "slip of the pen" and that the trial judge must have intended to award a higher figure, approximately $180,000, on the basis of expert evidence that he described as uncontradicted. Although a number of damages issues were clarified before the trial judge at a hearing subsequent to the delivery of her original reasons for judgment, Mr. Arenson did not ask in those submissions for clarification of the future care costs award or suggest that she had made an error in the amount of that award.

184 Mr. Arenson's suggestion that the evidence regarding future care costs was uncontradicted is not entirely accurate. Counsel for the CRCS made submissions at trial that certain items of future care and the associated calculation of costs proposed by the experts called by Mr. Arenson should be reduced to reflect other aspects of the evidence given at the trial. The CRCS suggested an

amount for future care costs between $76,745 and $86,143, less contingencies. The trial judge appears to have agreed with that submission and made an award at the high end of the range suggested by the CRCS. The figure she selected is supportable by reference to the evidence and the submissions made to her. Had we affirmed the trial judge on the question of liability, we would not have disturbed her award for Christopher Farrow's future care costs.

2. Christopher Farrow: lost years

185 The trial judge accepted the submissions of the CRCS that the value of the award for Mr. Farrow's future income during the "lost years" (when a claimant is alive at the time of trial but has a shortened life expectancy) was $80,000, less contingencies. Mr. Arenson submitted that this value, inappropriately, represented a reduction of Mr. Farrow's income by over 90%, and argued that we should substitute a figure of approximately $373,000, based on a 50% reduction, the amount of the reduction made by the Supreme Court of Canada in Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114 at 126-128.

186 In subsequent cases, trial judges have deviated from the 50% reduction on the basis of the evidence before them, adopting the view that Toneguzzo-Norvell enunciated the principle but did not dictate the percentage in calculating an award for "lost years". See Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, [1996] O.J. No. 4420 (Gen. Div.), aff'd on other grounds 51 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66, where an 85% deduction was made; and Granger (Litigation guardian of) v. Ottawa General Hospital, [1996] O.J. No. 2129 (Gen. Div.), where a 70% deduction was made.

187 The CRCS led considerable evidence on this issue before the trial judge. Her award is consistent with that evidence and with the submissions that were made before her. Had we affirmed the trial judge on the question of liability, we would not have disturbed her award for Mr. Farrow's lost years.

3. Wayne Robb and Gray Rintoul: non-pecuniary general damages

188 The trial judge awarded non-pecuniary general damages in the amount of $175,000 for each of Mr. Robb and Mr. Rintoul, both of whom had died before the trial. We have already noted that we would have reduced the $300,000 awarded to Mr. Farrow as non-pecuniary general damages to $265,000, the upper trilogy limit, adjusted for inflation at the time of the trial.

189 Mr. Arenson submitted that the awards for Mr. Robb and Mr. Rintoul should be no less than the award for Mr. Farrow. In support of increased awards, he cited the tragic personal circumstances of the lives and eventual deaths of Mr. Robb and Mr. Rintoul. In response, the CRCS directed our attention to a number of cases in which a figure less than the upper trilogy limit had been awarded in similar cases, and noted that no case has been found where a court has awarded the upper limit to the estate of a deceased claimant.

190 The purpose of non-pecuniary general damages is to compensate for pain and suffering and to provide solace while the claimant is alive. The damages for Mr. Robb and Mr. Rintoul were within the range of awards, albeit at the high end, granted for deceased claimants and, had we affirmed the trial judge on the question of liability, we would not have disturbed these damages.

4. Judith Rintoul: estate trust claim

191 Counsel for the CRCS conceded, on the authority of Ficht v. Kitchen, above, that despite the inability to "marry into" a claim, the trial judge ought to have made an award in respect of Judith Rintoul's "in trust" claim for services she provided to her husband. Had we affirmed the trial judge on the question of liability, we would have made an award for Mrs. Rintoul's housekeeping claim in the amount of $7,126.

5. Children of Wayne Robb and Gray Rintoul: Family Law Act claims

192 The trial judge awarded $35,000 to each of Mr. Robb's two children and $35,000 to each of Mr. Rintoul's two children. The children each sought to increase their individual award to $45,000. We see no error in these awards and had we affirmed the trial judge on the question of liability, we would not have interfered with them.

B. Claim against Bayer

1. Liability

193 The trial judge dismissed the action against Bayer with costs. She stated in her supplementary reasons for judgment (at para. 33) that there was "no evidence at any stage of the trial that Mr. Robb, Mr. Rintoul and Mr. Farrow were infected by use of a non-heat-treated product manufactured by Bayer". Although Mr. Arenson sought to reopen this question on the appeal, we are satisfied that the trial judge's finding had a sound foundation, and we would not disturb it.

194 The trial judge rejected the two allegations made by the plaintiffs against Bayer. The first was that Bayer should have warned the plaintiffs against the risks of using unheated factor concentrates and provided them with information about the alternatives to that method of treatment. The second was that Bayer was liable to them because of the length of time it took to get heat-treated F-IX into Canada. On appeal, Mr. Arenson pursued only the first of these two allegations.

195 In holding that Bayer owed no duty to warn the plaintiffs, the trial judge relied on unchallenged evidence that Cutter manufactured F-IX for the CRCS under a plasma-processing agreement under which the CRCS retained ownership of the factor concentrate. She held that in these circumstances the duty to include an AIDS warning on the manufactured product lay with the CRCS; in her view, the highest duty that Cutter (now Bayer) owed was to warn the CRCS about the

risk.

196 In 1983, when Cutter first considered the subject, it advised the CRCS about its plan to add an AIDS warning to its own products and the content of that warning. From October 1984, Cutter's own commercial unheated F-IX products carried such a warning. The CRCS chose not to add a warning at that time to the F-IX products that Cutter manufactured for the CRCS. The trial judge found that, against this background, Bayer had discharged any obligation it had to warn the CRCS.

197 We agree with the trial judge's reasons regarding Bayer's duty and for the further reason that, as she found and as we agree, there was no causal connection between any suggested failure on the part of Bayer to warn the plaintiffs and their infection with HIV, because there was no evidence that the plaintiffs were infected by unheated F-IX manufactured by Bayer.

2. Costs

198 The plaintiffs also appealed the order that they pay Bayer's costs of the action. Instead, the plaintiffs sought an order refusing Bayer its costs, ordering Bayer to pay their costs, or ordering that Bayer's costs be paid by the CRCS pursuant to either a Bullock or a Sanderson order.

199 The trial judge ordered that Bayer receive its costs from the plaintiffs for two reasons: first, because these costs should follow the event; and second, because, as stated in the supplementary reasons for judgment (at para. 39), "the reality [is] that Bayer should have been let out of these actions before the trial started". Having regard to these factors and to our conclusion respecting Bayer's liability, there is no merit in the plaintiffs' submission that we interfere with the trial judge's decision by refusing Bayer its costs or ordering Bayer to pay costs.

200 The third suggestion - that Bayer's costs be paid by the CRCS - was specifically put to the trial judge. She observed that the case against Bayer had focused, unsuccessfully, on the question of whether Bayer had a duty to warn the plaintiffs and that the plaintiffs had advanced, also unsuccessfully, the same claim against the CRCS. The trial judge rejected the plaintiffs' submission that the CRCS pay Bayer's costs on the basis that: (a) it was not reasonable for the plaintiffs to keep Bayer in the action in the absence of evidence that they were infected by the use of a Bayer product; and (b) it would be inequitable to require the CRCS to pay Bayer's costs given that the CRCS and Bayer both successfully defended the same claim relating to the duty to warn. We see no error in the trial judge's refusal to make a Bullock order or a Sanderson order with respect to Bayer's costs.

3. Bayer's cross-appeal against the plaintiffs on costs

201 The trial judge ordered the plaintiffs to pay Bayer's costs from and after June 29, 1998, the date on which Feldman J. added Bayer as a defendant in these actions. Bayer asked leave to appeal that order and sought slightly earlier starting dates in March (in respect of Mr. Farrow) and April (in respect of Mr. Robb and Mr. Rintoul) of the same year. Bayer's position is that it attended examinations for discovery of the plaintiffs in one of the actions and case management meetings

from and after these earlier dates in its capacity as a "potential addition to the action as a defendant".

202 In our view, the decision of the trial judge to award costs to Bayer from the date it became a defendant is more sensible than the suggested award of costs from the date it participated in these actions as a "potential addition as a defendant". We would grant leave to Bayer to appeal costs, but would dismiss its appeal with costs in this court.

C. Claim against Ontario

1. Spoliation

203 The plaintiffs appealed the dismissal of their claim against Ontario for spoliation or destruction of evidence.

204 The claim for spoliation in this case has had a chequered history. Feldman J. granted the plaintiffs leave to amend their statement of claim to plead spoliation in May 1998: 24 C.P.C. (4th) 392 (Ont. Gen. Div.). In her view, spoliation was "a novel cause of action" that should not be struck out at the pleading stage. The Divisional Court reversed Feldman J.'s ruling in October 1998: 42 O.R. (3d) 379. The majority in the Divisional Court held, at p. 384, that "the foreseeable trend is to view spoliation' as an evidentiary rule that raises a presumption and not as a stand-alone, independent tort". No leave to appeal from the Divisional Court to this court was sought, undoubtedly because the trial of these actions began in November 1998. Notwithstanding the state of the pleadings, evidence regarding the spoliation claim was led at the trial and the trial judge requested submissions on the subject, which she heard in February 2000. In her reasons for judgment, the trial judge found against the plaintiffs on the spoliation issue.

205 In this court, the plaintiffs renewed their claim for damages for spoliation in their cross-appeal. Ontario's motion to quash that portion of the cross-appeal was dismissed on the basis that there was a sufficient factual record in the evidence at trial to permit the question to be addressed on appeal: [2001] O.J. No. 606 (C.A.). The spoliation issue was therefore aired before us on the argument of these appeals and cross-appeals.

206 The plaintiffs' claim for spoliation was summarized in their factum in these words:

> In a nutshell: at the direction of Ontario and other member provinces of the Canadian Blood Committee [CBC], verbatim transcripts and audiotapes of key CBC meetings were destroyed. Members of the CBC did this in order to hide evidence of wrongdoing. The CBC was a committee of the provinces and territories through which the Red Cross was paid to operate the blood system in Canada.

207 In dismissing this claim at trial, the trial judge adverted to the allegation that "at a meeting of the CBC in May of 1989, the Secretariat of the CBC was directed to destroy the verbatim transcripts and audio tapes of all meetings of the CBC held between 1982 and 1989". Although she expressed unease about the destruction of this material, she concluded (at para. 178) that she had "no evidence as to who is responsible for the decisions that led to the destruction of the verbatim transcripts and audio tapes" and accepted (at para. 181) Ontario's submission that:

> there is no admissible evidence to support the conclusion that Ontario spoliated or destroyed evidence. The plaintiffs did not prove that the tapes and transcripts prepared by the Secretariat of the CBC were ever in the possession or control of Ontario; the evidence is to the contrary. The Secretariat was comprised of employees of Canada. These employees were not controlled by Ontario.

208 We did not call upon counsel for Ontario to respond to the plaintiffs' submissions regarding spoliation. In our view, assuming for the purposes of disposing of this appeal that there is a separate tort of spoliation, this claim is completely answered by the above-quoted extract, which accurately reflects the evidence adduced at the trial. There is no merit in the claim for spoliation against Ontario.

2. Admissibility of documents

209 The plaintiffs argue that the trial judge erred in refusing to admit certain documents that they allege establish Ontario's role in the destruction of the CBC audio tapes and transcripts. These documents were: the minutes of the May 1989 meeting of the CBC, the report of the Royal Commission of Inquiry into the Blood System (commonly referred to as the Krever Report), and the report of the Information Commissioner of Canada John W. Grace into a complaint against Canada regarding the destruction of audio tapes and transcripts of the CBC.

210 In an unreported oral ruling made on June 30, 1999, the trial judge refused to admit the CBC minutes as a business record under the Ontario Evidence Act without the requisite evidentiary foundation. With respect to the Krever Report and the Grace Report, the trial judge rejected the plaintiffs' submission that these reports could be admitted under the public document exception to the hearsay rule: 31 C.P.C. (4th) 99 (Sup. Ct.). We agree with the trial judge's rulings regarding the admissibility of these documents and would not give effect to this ground of appeal.

D. Disposition of the Cross-appeals by the Plaintiffs and of Bayer's Cross-appeal on Costs

211 For these reasons, we would dismiss the cross-appeals by the plaintiffs. We would also grant leave to Bayer to cross-appeal on costs alone but would dismiss that cross-appeal with costs.

IX. CONCLUSION

212 For the reasons above, we would dispose of these appeals as set out below, set aside the trial judgment and dismiss the plaintiffs' actions and the third-party claims.

The appeal by the CRCS against the plaintiffs is allowed with costs.

The cross-appeals by the plaintiffs against the CRCS, Ontario and Bayer are dismissed with costs.

Leave to cross-appeal costs against the plaintiffs only is granted to Bayer but the cross-appeal is dismissed with costs.

The appeal by Canada against the CRCS is allowed with costs.

213 Counsel made no submissions respecting the costs of the trial in the event that appeals by the CRCS and Canada were allowed. We therefore invite the parties to make written submissions regarding the trial costs. The parties have fifteen days to serve and file their written submissions.

OSBORNE A.C.J.O.
CATZMAN J.A.
CHARRON J.A.

* * * * *

Corrigendum
Released: December 13, 2001

In the style of cause, Ms. Webster's first name should have been spelled "Allyson" rather than "Allison". (This change was made in several copies before they were released. If your copy already has a "y", please ignore this change.)

The second word of the fourth line of the quote in para. 207 should have read "of" rather than "or".

1 Mr. Robb and Mr. Rintoul died before trial. Their actions were continued by their estates.

2 The trial judge's reasons for judgment released on June 29, 2000 are reported at [2000] O.J. No. 2396 (Sup. Ct.). Her supplementary reasons for judgment were released on February 28,

2001 and are reported at [2001] O.J. No. 702 (Sup. Ct.). In our reasons that follow, the paragraph pinpoint references to the trial judge's reasons refer to her reasons for judgment released on June 29, 2000, unless we specifically refer to the supplementary reasons for judgment.

3 Contributory negligence is often part of the negligence calculus. Contributory negligence is not relevant to this case since it is agreed that none of the plaintiffs failed to take reasonable care for his own safety.

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