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Waiver of tort: a disturbing development in Canadian product liability law

Mary Jane Stitt

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Canadian courts are expanding the potential exposures for defendants in product liability actions by refusing to strike out pleadings in putative class actions claiming disgorgement of profits under a controversial extension of the doctrine of 'waiver of tort'. Plaintiffs are increasingly relying on waiver of tort, as an alternative to pleading negligence and negligent misrepresentation, in order to circumvent the traditional tort law requirement that a plaintiff must be able to show loss or damage in order to sustain a claim in tort.

Waiver of tort is by no means a new concept; however, its application in Canada is unprecedented. By being able

The ease with which certain Ontario courts have applied the doctrine in certification motions is also extremely problematic. In certain cases, courts are assuming causation of class-wide loss rather than critically examining whether the plaintiff has provided some evidence that there is a way to prove such loss³ and whether the amount of enrichment is truly a common issue rendering a class action the preferable procedure for resolution of the dispute.

For international observers of Canadian legal developments, the embrace of the alternative waiver of tort theory is extraordinary, as historically

The novel application of waiver of tort represents a remarkable policy shift in Canadian law, displacing the primary compensatory function of tort law in favour of corrective justice ...

to pursue a product liability action which focuses on the defendant's gain rather than the loss allegedly sustained by class members, plaintiffs can eliminate a potentially significant individual issue that previously was a bar to certification. The novel application of waiver of tort represents a remarkable policy shift in Canadian law, displacing the primary compensatory function of tort law¹ in favour of corrective justice and extending recovery beyond the well-established Canadian tort law boundaries governing recovery of pure economic loss.²

Canadian courts have been conservative, intent on avoiding the excesses which characterise the US tort law system. For example, punitive damages are the exception, not the rule, in Canada and are relatively modest in relation to what is routinely awarded in the US, with awards seldom exceeding C\$1 million. Similarly, the Supreme Court of Canada made the policy decision in 1978 to cap general (that is, non-pecuniary) damage awards for bodily injury in tort actions at C\$100,000 for the most catastrophic injuries, subject to annual indexation of that amount from the 1978 upper limit,

after being influenced by the astronomical sums awarded in US medical malpractice actions and the impact of such awards on the availability of affordable professional liability insurance.

The waiver of tort development that we are currently witnessing in Canada therefore represents a marked departure from Canadian judicial conservatism and the prior careful delineation of the function and scope of tort, contract and unjust enrichment. The proliferation of a freestanding cause of action based on waiver of tort, if unabated, will create a highly unpredictable product liability environment in Canada and cause a significant misalignment of Canadian tort law with other common law jurisdictions.

Waiver of tort: a tort remedy or an independent cause of action?

The doctrine of waiver of tort finds its origins in the expression 'waiver of tort and suit in *assumpsit*', the latter being the historical antecedent of modern 'quasi-contract' claims for restitution. A plaintiff upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is said to 'waive the tort', in the sense that he or she elects to sue in restitution to recover the defendant's unjust benefit rather than to sue in tort to recover damages. Under the traditional view of waiver of tort, the plaintiff in certain circumstances has alternative remedies; however, the tort itself is not extinguished. A long line of English cases has established that it is a *sine qua non* of both remedies (damages or disgorgement) that the plaintiff establish that the tort has been committed.⁴ Waiver of tort was traditionally regarded as parasitic of the underlying tort claim and involved an election for a more lucrative remedy made *after* the plaintiff had established the requisite elements of the tort, including loss.⁵ The types of torts which could be waived historically were conversion, trespass to land or goods, deceit and extortion. In the US, the doctrine has been extended to permit disgorgement for intentional interference with contractual relations and other intentional torts. In England,

the House of Lords in an exceptional case has accepted that disgorgement is available to the victim of a breach of contract where the plaintiff has a legitimate interest in preventing the defendant's profit-making activity and in depriving him of his profit.⁶

The obvious benefit of pleading waiver of tort is that in certain circumstances, where a wrong has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment from the defendant rather than tort damages. But can the doctrine be invoked where the plaintiff has sustained no loss at all? This issue has been the subject of considerable academic debate.

The alternative view of waiver of tort that has been advanced by many academics is that it is not necessary to establish all of the constituent elements of a tort, including loss or damage, in order to invoke the doctrine. Influential Canadian legal academics such as P D Maddaugh and J D McCamus argue that waiver of tort is an independent cause of action and that it is difficult to justify denying relief simply because the wrong involves tortious conduct that has caused no pecuniary damage to the plaintiff. Maddaugh and McCamus have opined that, given the Supreme Court of Canada's acceptance of the tripartite principle of unjust enrichment espoused in *Pettkus v Becker*,⁷ 'there appears to be no reason why this approach ought not to be employed to recognise waiver of tort as an independent restitutionary remedy'.⁸ Leading English authorities on the law of restitution also agree that waiver of tort is an example of the general principle that an action in restitution lies to compel the defendant to disgorge an unjust enrichment gained through any type of wrongdoing and that it is not a remedy that is parasitic and dependent on the actual commission of an underlying tort.⁹

What was once an academic discussion is now a fierce judicial debate in Canada, where judges are deeply divided over the proper function of waiver of tort and the stage of the proceeding at which the significant policy issues associated with the doctrine should be determined. In the 2006 decision *Serhan Estate v Johnson*

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Johnson,¹⁰ the Ontario Divisional Court upheld a certification decision based on an independent action for waiver of tort in the absence of any pecuniary loss or bodily injury being sustained by the plaintiff class. The majority of the Divisional Court concluded that while of questionable merit, the modern ambit of waiver of tort should be defined with the benefit of a full trial record and not at the pleadings stage. Previously, Ontario, Saskatchewan and British Columbia courts refused to recognise waiver of tort as a freestanding cause of action.¹¹ In June 2007, an Ontario Superior

2000, in which they admitted that at the time they started distributing the product, they knew of its defects, they failed to remedy the defects when they received complaints and they submitted false reports to the Food and Drug Administration. The defendants ultimately paid a US\$29 million fine in the US and also settled claims initiated by whistleblower employees in their Canadian division.

The plaintiffs pleaded that the meters and the strips inserted into them were dangerously defective in that, in some cases, they would fail to show the existence of high blood glucose levels.

Previously, Ontario, Saskatchewan and British Columbia courts refused to recognise waiver of tort as a freestanding cause of action.

Court judge granted leave to appeal a certification decision based on waiver of tort, concluding that since the amount of the 'wrongful gain' subject to an accounting and disgorgement or a constructive trust may not be a common issue, it is open to serious debate whether a class action is the preferable procedure for a waiver of tort claim based on a negligent failure to warn the putative class.¹²

Serhan Estate v Johnson & Johnson

In *Serhan*, the plaintiffs in a proposed class action claimed damages for negligence, negligent and fraudulent misrepresentation, breach of the Canadian *Competition Act* and conspiracy relating to the defendant's manufacturing, selling and distributing in the 1990s defective meters to be used by diabetics to monitor their blood glucose levels. In 1998, as a result of user complaints, various US federal agencies began an investigation into the meters and the defendants entered into a settlement agreement in December

The plaintiffs alleged that the defendants were negligent in selling the devices when they knew of the defects. The plaintiffs claimed that the defendants held all revenues generated from the sale of the products in a constructive trust for the benefit of the plaintiff class and also sought a personal remedy in the form of an accounting and disgorgement of those revenues, alleging that but for the misrepresentation and conspiracy, the defendants would not have received the revenues.

Cullity J, who heard the original certification motion, refused to certify the class action based on any of the pleaded torts because no findings of liability were possible without individual trials.¹³ Other than an expert's affidavit opining on the potential health consequences for a user with an undetected high blood glucose level, Cullity J found that there was virtually no evidence that either of the representative plaintiffs or any other members of the putative class suffered any injurious effects to their

health by using the meter or the strips, other than the pain involved in obtaining additional blood samples, and no diabetic shock or loss of income. There was no evidence that any member of the putative class actually paid for the meters or the strips, as they were paid for by the applicable provincial drug benefit program. Based on the binding Court of Appeal decision in *Chadha v Bayer*,¹⁴ if no loss or damage could be established on a class-wide basis that ought to have been the end of the inquiry.

However, the plaintiffs had pleaded constructive trust as if it were a separate cause of action rather than a remedy, on the basis that the defendants had acquired property by a wrongful act as contemplated in a Supreme Court of Canada decision that potentially expanded the grounds for finding a constructive trust, *Soulos v Korkontzila*.¹⁵ In *Soulos*, the Supreme Court of Canada identified four conditions which generally should be satisfied as a prerequisite for a constructive trust based on wrongful conduct:

- the defendant must have been under an equitable obligation — that is, an obligation of the type that courts of equity have enforced — in relation to the activities giving rise to the assets in his or her hands;
- the assets in the hands of the defendants must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiffs;
- the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- there must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case, such as the interests of intervening creditors must be protected.

With respect to the first condition, Cullity J noted that fraud had been pleaded, which was one of the traditional heads of equity jurisdiction.

He did not see any difficulty in holding that a party who has obtained property of another by fraudulent misrepresentations has breached an obligation of the type courts of equity have enforced. He also noted that in cases where the 'doctrine' of waiver of tort applied, the equitable remedy of an accounting of profits will often be appropriate and has often been granted.

Notwithstanding that the plaintiffs had not pleaded waiver of tort and had 'probably inadequate' references to 'good conscience' in the statement of claim, Cullity J nevertheless believed that material facts had been alleged which, if proven, could entitle the plaintiffs to a remedy on the basis of waiver of tort, noting that claims based on waiver of tort seek restitution of benefits received by the defendants, as a consequence of their tortious conduct, rather than damages to compensate the plaintiffs for a loss. He pointed to an American decision,¹⁶ quoted by Maddaugh and McCamus, as encapsulating the basis of the doctrine:

The point is not whether a definite something was taken away from the plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.

He then referred to the view expressed by Lord Denning in *Strand Electric & Engineering Co Ltd v Brisford Entertainment Co*,¹⁷ that benefits are recoverable even though the plaintiff suffers no loss and noted that another Ontario Superior Court justice has accepted Lord Denning's view in *Transit Trailer Leasing Ltd v Robinson*.¹⁸ Observing that a motions judge should be slow to strike novel causes of action or those in an area of the law that is unsettled or undergoing significant change or development, Cullity J found that the law relating to waiver of tort falls within each of these categories.

Cullity J then conceded that the application of the second condition in

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Soulos to the facts of the case 'raises a question of some difficulty', as no agency relationship existed and he did not see any ground on which one could be deemed to exist. However, he mused that it was possible that the references to 'agency activities' in *Soulos* were not intended to limit the availability of the constructive trust remedy to cases of fraud, or other wrongful conduct, by agents, but only reflected the facts of that particular case. He concluded that the second condition in *Soulos* could be satisfied as:

Equity is evidently concerned with an event rather than a relationship. The offence is the conduct which brought about the acquisition; the courts are not primarily concerned with the relationship that was thereby abused.¹⁹

With respect to the third and fourth condition in *Soulos*, Justice Cullity concluded that they would not be appropriately dealt with on the basis of the pleadings alone, as the third may be affected by a decision with respect to other remedies available at trial and the fourth is one on which evidence may be required. While it was not alleged that each class member had any pre-existing legal or equitable interest in the property that would be the subject matter of the trust and its existence was not premised on any payments made by class members to acquire the impugned products, he did not think these objections would necessarily be fatal to the waiver of tort claim. He did not, however, refer to or distinguish the clear direction from the Court of Appeal in *Chadha v Bayer* that there be some evidence for the certification judge to conclude that the loss or gain could demonstrably be linked to the defendant's wrongful conduct.

In concluding that the material facts alleged in the statement of claim disclosed a potential cause of action for waiver of tort, in the absence of loss or damage sustained by the plaintiff class, Cullity J acknowledged (at [46]) the radical shift that the imposition of such liability in the product liability context would represent:

While I recognize that the introduction of waiver of tort principles – for which proprietary, as well as personal, remedies may be available — into cases of

products liability may have serious, and possibly, far-reaching implications, I do not believe that the law is at present sufficiently clear to permit me to strike the claim for a constructive trust solely on the basis of the pleadings, or to find that it does not satisfy the requirement in s. 5(1)(a). If, at trial, it is found that waiver of tort principles are applicable, but that a proprietary remedy is not appropriate, this would not exclude the possibility of the personal restitutionary remedy for an accounting and disgorgement that the plaintiffs have claimed in the alternative.

In November 2004, Ground J granted leave to appeal the certification decision to the Divisional Court on the basis that Cullity J's decision was in conflict with the judicial consideration of waiver of tort in other decisions where it had been regarded as a choice of remedies after an actionable wrong had been established.²⁰

The Divisional Court split 2–1 on whether a claim based on waiver of tort in the absence of loss or damage was certain to fail. The majority concluded that, while they had serious reservations about the ultimate viability of the cause of action, the plaintiffs should nevertheless be permitted to proceed with their action. In doing so, they had to distinguish a well-crafted decision by a British Columbia Supreme Court Judge discussed below.

The orthodox view of waiver of tort: *Reid v Ford Motor Co*

The Divisional Court in *Serhan* was referred to the British decision of Gerow J in *Reid v Ford Motor Co*, which apparently had not been cited to Cullity J. *Reid* was a class action in which the representative plaintiff claimed damages in negligence for repairing an allegedly defective ignition switch. Following the issuance of the *Serhan* decision, the plaintiff in *Reid* decided to up the ante and moved to amend the statement of claim and certification order to include a claim for waiver of tort. The plaintiff sought an order adding a claim for a restitutionary award of the benefits that accrued to Ford as a result of its negligence or failure to warn (that is, an order for

disgorgement of revenue from the sales of replacement modules). Gerow J dismissed the motion, noting (at [17] and [18]):

In order to be successful in a claim of negligence against a defendant, the plaintiff must prove on the balance of probabilities that the defendant owed a duty of care to the plaintiff, the defendant breached its duty to the plaintiff and the plaintiff suffered loss or damage as a result of the breach. By pleading waiver of tort Ms. Reid is attempting to avoid the necessity of proving that the Class Members suffered any loss as a result of Ford's negligence or failure to warn.

This is made apparent in the pleadings by the fact that the statement of claim now pleads that in the alternative the class members have a claim for out-of-pocket expenses they have incurred as a result of their attempts to identify and repair the TFI defect. The effect of the pleading is that waiver of tort stands on its own, and that proof of causative loss as a constituent element of negligence or failure to warn is not required. In effect the proposed plead of waiver of tort introduces strict liability for an allegedly defective product.

Gerow J also noted as grounds for refusing to permit the claim for the restitutionary award the policy reasons that motivated the Supreme Court of Canada in *Winnipeg Condominium Corporation No 36 v Bird Construction Co*,²¹ where the Supreme Court of Canada created an exception to the historic prohibition against recovering pure economic loss in negligence for products with defects that posed a 'substantial danger'. The policy reason for imposing liability in such circumstances was to encourage people to act quickly and responsibly to fix a defect before it causes injury to person or damage to property. Gerow J correctly noted that the Supreme Court addressed the traditional concern of liability in an indeterminate amount by limiting the liability to the reasonable cost of repairing the dangerous defect and restoring the product to a non-dangerous state.

Gerow J observed that the amount of damages the plaintiff would be entitled

to in the dangerous defect exception to the prohibition against claiming for pure economic loss was confined to the reasonable cost of repairing the defect and mitigating the danger, but did not extend to pursuing the revenues earned on the sale of the replacement modules. Gerow J stated (at [23]) that:

... as the amount the Class Members would recover would bear no relationship to any losses or damages they incurred, the proposed amendment would raise the risk of indeterminacy of damages the Supreme Court avoided by limiting the amount of liability to the reasonable cost of repair.

Turning to the law of unjust enrichment, Gerow J referred to the decision of the British Columbia Supreme Court in *Networth Industries Ltd v Cape Flattery*,²² where Lowry J observed (at [29]) that there has never been a case of unjust enrichment grounded in negligence:

The torts supporting a claim for unjust enrichment have been for the most part proprietary torts such as conversion or trespass to land and goods which have been described as 'anti-enrichment wrongs'. Restitutionary claims are not made in negligence and nuisance because they are in the main 'anti-harm wrongs' in relation to which it is impossible, even if they lead to an enrichment of the wrongdoer, to elevate the prevention of enrichment to the level of a primary purpose.

Gerow J also referred to the decision of the British Columbia Court of Appeal in *Capilano Fishing Ltd v Qualicum Producer*,²³ where the appellate court rejected a claim for unjust enrichment in the context of a claim for damages on the basis that actions for negligence in the operation of vessels are actions for compensation for losses caused — there was no need to complicate such actions with notions of unjust enrichment. Gerow J also observed that she was aware of no authority in which unjust enrichment had been grounded in failure to warn.

Finally, in rejecting the proposed amendment, Gerow J pointed out that the proposed pleading did not alleged any corresponding deprivation (the plaintiff was arguing that the class members would not have to show they

suffered any deprivation in order for Ford to be forced to disgorge the benefits that had accrued to it by its negligence and failure to warn). Gerow J disposed of this argument by noting that any benefit to Ford from the sale of the replacement modules was indirect and only incidentally conferred on Ford. Unjust enrichment does not extend to permit such a recovery, as cases where unjust enrichment has been made out generally deal with benefits conferred directly and specifically on the defendant, such as goods or services purchased directly from the defendant or money paid to the defendant.²⁴

Serhan Divisional Court majority distinguishes Reid

The majority of the Divisional Court in *Serhan* distinguished the *Reid* decision on the basis that it concerned a claim which was framed in negligence, unlike the case in *Serhan*, where fraud and conspiracy formed the foundation of the claim. They observed that Gerow J had specifically recognised fraud as one of the intentional torts where the doctrine of waiver of tort had been utilised.

The Divisional Court acknowledged the legitimate concern that Gerow J had expressed about the consequences of allowing, in products liability cases, a cause of action that eliminates the need to prove loss. Writing for the majority of the Divisional Court, Epstein J stated (at [67] and [68]):

I share this concern, but am of the view that it should be considered and resolved on the basis of a full record ... *Reid*, while distinguishable, does, however, contribute to the ongoing debate regarding the legal issues raised in this appeal. The debate taking place among legal writers and arguably in the jurisprudence demonstrates that there is room for difference of opinion as to the precise status of the doctrine and specifically whether it is an independent cause of action ... the law with respect to this issue has not been authoritatively settled. Clearly, it cannot be said that an action based on waiver of tort is sure to fail. Furthermore, the resolution of the questions the defendants raise about the consequences of identifying waiver of tort as an independent cause of action in



circumstances such as exist here, involves matters of policy that should not be determined at the pleadings stage.

The majority of the Divisional Court upheld the certification decision, even though it found that there was considerable merit to the defendants' arguments about the problems the plaintiffs have in meeting the four conditions in *Soulos* for the remedy of a constructive trust based on wrongful conduct. With respect to the personal remedy of an accounting and disgorgement, founded in waiver of tort, Epstein J noted (at [122]):

This examination of disgorgement raises significant policy concerns with respect to the nature and scope of a remedy that possesses no link to a plaintiff's loss ... in the absence of such a loss, society arguably should not incur the cost of shifting a windfall from one party to another without good reasons.

Notwithstanding the conceptual and substantive challenges associated with permitting the class action to proceed on an independent waiver of tort theory, the majority of the Divisional Court ultimately concluded that the policy concerns, including the essential nature of the remedy of disgorgement, require clarification in Canadian jurisprudence and that such questions need to be developed on the basis of a full factual record. While it may be that applying either remedy, a constructive trust or disgorgement, to the type of situation in *Serhan* would take 'corrective justice' too far and at trial the plaintiffs may find themselves without a remedy, the majority of the Divisional Court concluded that it may well be critical that the action be allowed to proceed because (at [156]):

Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

The Serhan dissenting judgment

In a very strong dissent, Chapnik J found that the plaintiffs had failed to plead material facts or adduce evidence to satisfy the tripartite test for unjust enrichment which underlies all

restitutionary claims. The representative plaintiffs had received their equipment essentially for free and therefore suffered no deprivation corresponding to the defendants' alleged enrichment. Further, following *Boulanger v Johnson & Johnson Corp*,²⁵ a binding Ontario Court of Appeal decision, any benefit conferred on the defendants was indirect given the lack of any direct relationship between the parties. Chapnik J noted that 'the complete, undeniable lack of unjust enrichment in this case is a factor that militates against finding entitlement to a restitutionary remedy'.²⁶

Turning to the requirements in *Soulos* for a constructive trust, Chapnik J noted that the defendants in this case did not fall into the category of a person who obtained property of another by fraudulent misrepresentation. As Cullity J had found that the nominate tort of fraudulent misrepresentation was an individual issue, and unsuitable as a cause of action in the circumstances of this class proceeding, it was difficult to see how it might ground a claim in waiver of tort. A review of the case law, including *Soulos*, indicated that the Supreme Court of Canada did not intend for fiduciary concepts to be stretched to such an extent, so as to permit a finding of a 'trust-like' duty on the facts of this case, where there is no direct relationship between the parties akin to an agency relationship.

Finally, examining the disgorgement remedy, Chapnik J noted that it was akin to a punitive damages award which Canadian courts now recognise must be reserved only for exceptional cases. To permit disgorgement of profits would push Canadian tort law beyond the broad post-*Winnipeg Condominium* parameters already established by the Supreme Court of Canada (at [227]–[228]):

The Supreme Court held that compensation ought to be extended to the cost of 'fixing the defect'. In effect the amount of damages a plaintiff is entitled to in the 'dangerous defect' exception to the prohibition against pure economic loss claims is confined to the reasonable cost of repairing the defect and mitigating the danger.

In the instant case, we are not dealing with a claim by plaintiffs who incurred expense in mitigating or repairing a dangerous defect. The facts suggest that even the broad post-*Winnipeg* parameters of tort law are being challenged here. In my view, there is no principled basis upon which the remedy of disgorgement might be available to the plaintiffs in their claim based on waiver of tort.

Chapnik J concluded that, from a policy perspective, what certification accomplished in *Serhan* was, in essence, to bring strict liability to Canadian law in the area of products liability which prior courts have rejected. The only goal accomplished would be the punishment of unlawful and inappropriate behaviour by the defendants. While the goal of deterrence might in another case favour a class proceeding, given the recalls and corrective action taken by the defendants, any behavioural modification goal may well be moot. Even in the US, which has witnessed a proliferation of products liability lawsuits, the fundamental precepts of tort law are observed and enforced in US litigation. Chapnik J concluded that is not desirable as a matter of policy to make a choice such as waiver of tort, which represents a significant departure from well-established tort law and unjust enrichment jurisprudence, the norm in products liability litigation in Canada.

Heward v Eli Lilly: critical examination of the certification evidence to restrict the application of Serhan

Because of the refusal of either the Court of Appeal for Ontario or the Supreme Court of Canada to hear an appeal in *Serhan*, there remains considerable uncertainty in Canada at the present time about the scope and function of waiver of tort or whether the alternative view of waiver of tort will ultimately have any traction at trial. The doctrine, when used to circumvent proof of loss on a class-wide basis, provides a unique opportunity for plaintiffs to avoid an individual issue which has historically proven to be a

barrier to certification. This aspect of the *Serhan* decision was recently considered by Lederman J in *Heward v Eli Lilly*,²⁷ whose decision granting leave to appeal creates a glimmer of hope for defendants that certification will be granted only if there is cogent evidence of a direct causal connection between the wrongful conduct and the gains which the plaintiffs seek to disgorge.

The certification decision in *Heward*²⁸ was another instance of Cullity J applying waiver of tort to certify a tenuous tort claim. In the class action, the plaintiffs alleged that the defendants had been negligent in their manufacturing of an anti-psychotic drug called Zyprexa, which gave rise to an increased risk of diabetes. Notwithstanding these alleged concerns, it was uncontroverted that the Health Canada approvals for the drug had not been withdrawn and it was still marketed, distributed and prescribed across Canada and continued to be purchased by certain class members. The plaintiffs sought an order based on unjust enrichment or waiver of tort, seeking disgorgement of revenues from the sale of the drug. Cullity J expressly rejected the analysis in *Reid* to the effect that waiver of tort was not available in negligence as that tort was an ‘anti-harm’ not an ‘anti-enrichment tort’. These labels were meaningless.

Relying on waiver of tort, Cullity J certified the class action and the common issues included Common Issue #9:

Are the defendants liable to account, by waiver of tort, to any of the class members on a restitutionary basis for any part of the proceeds of the sales of Zyprexa? If so, in which amount and for whose benefit is such accounting to be made?

In certifying this common issue, Cullity J said (at [101]):

The finding that a cause of action based on waiver of tort has been disclosed in the pleading is not in itself sufficient to qualify it as a common issue. *In particular, the court must be satisfied that it is possible to determine on a class-wide basis whether a sufficient causal connection existed between the wrongful conduct and the amount for which the*

defendants could be ordered to account. In *Serhan*, the ‘but for’ test of causation would have been satisfied if a finding was made that the products involved were, as pleaded and supported evidentially, dangerously defective to the knowledge of the defendants. Similarly, in this case, a necessary causal link between the wrong and the amount claimed by way of ‘restitution’ or disgorgement would be established if the plaintiffs can prove their claim that the defendants were negligent in placing Zyprexa on the market, or in continuing to market it after November 2001, without a sufficient warning of its side-effects. *In the event of a finding to this effect, the defendants would not have derived any proceeds but for their breach of duty and, in this sense, the proceeds would have resulted from the wrong. In consequence, I believe the question of causation could – as in Serhan – be dealt with in respect of the class as a whole.* [Emphasis added.]

In considering the defendant’s application for leave to appeal from Cullity J’s certification decision, Lederman J observed that he was bound by *Serhan* in so far as it established that it is not plain and obvious that an independent cause of action for waiver of tort would fail in Ontario. However, he questioned whether proof of the amount to be disgorged or held in a constructive trust is a common issue. Lederman J noted that *Serhan* does not change the requirement that there be proof of a ‘wrongful gain’ that will be subject to disgorgement or a constructive trust. Generally speaking (at [26]):

... a gain is a ‘wrongful gain’ only if it is attained through ‘wrongful conduct’; i.e. the wrongful conduct must *cause* the gain. Consequently, for the amount subject to disgorgement and constructive trust to be a *common* issue in this class action, the pleadings and evidence must demonstrate a way to prove on a *class-wide basis* that the alleged wrongful conduct (i.e. ‘the failure to warn’) caused the gain (i.e. ‘proceeds from Zyprexa sales’).

Lederman J doubted the correctness of Cullity J’s conclusion that such a connection had been established. Referencing the underlined portion of

Cullity J's reasons quoted above, he found that Cullity J made a significant assumption in assuming that the defendants would not have derived any proceeds but for their breach of duty. To make such an assumption, there would have to be evidence to support the inference that the class members would not have agreed to take Zyprexa if properly warned of the risks associated with the drug or that Zyprexa would not have been approved for sale if Health Canada was properly warned of the risks associated with the drug. Absent these inferences, the only way to determine the amount for which the defendants could be ordered to account in waiver of tort is to investigate whether each member of the class would not have taken Zyprexa if properly warned.

including class members, three years after Health Canada ordered Eli Lilly to issue warnings regarding the possible risk of developing diabetes when taking Zyprexa. There is also nothing in the pleadings or the evidence to support the inference that Zyprexa would not have been approved for sale if Health Canada was properly warned of its associated risks. And since Health Canada was in fact warned about the risks of Zyprexa use in late 2003 and has not ordered the drug off the market, it is difficult to infer that Health Canada would not have approved Zyprexa in the first place if it received these same warnings in the early 1990's.

Lederman J concluded that there was good reason to doubt the correctness of Cullity J's decision to certify as a common issue the amount of the

Lederman J concluded that there was good reason to doubt the correctness of Cullity J's decision to certify as a common issue the amount of the alleged wrongful gain that is subject to disgorgement and/or a constructive trust.

Lederman J characterised this factual inquiry as 'the antithesis of a common issue'. Citing Feldman JA in *Chadha v Bayer*, he noted that before a court certifies a common issue based on assumptions, the assumptions must be supported by sufficient evidence.

Lederman J then stated (at [32]):

In this case, and with great respect, it is not clear to me that the pleadings or the evidence support the assumption made by Cullity J that Eli Lilly's gain was caused by its wrongful conduct. While the pleadings explicitly say the primary plaintiffs would not have taken the drug if they had been informed of its alleged side-effects (see Cullity J's reasons at para. 47), neither the pleadings nor the evidence support the inference that all members of the class would have done the same. This is perhaps not surprising, given that Zyprexa continues to be prescribed and used by persons,

alleged wrongful gain that is subject to disgorgement and/or a constructive trust. The public importance of the issue justified granting leave to appeal (at [33]):

In the context of a claim in waiver of tort, accounting and disgorgement and constructive trust remedies have the power to make defendants liable for truly enormous amounts of money. The ramifications of exposure to this type of liability will extend beyond the parties to affect not just the pharmaceutical industry as a whole, but also the securities market given that most pharmaceutical companies are publicly traded. It is therefore important for an appellate court to clarify the circumstances under which proof of the amount of the 'wrongful gain' associated with these remedies is truly a common issue in a class proceeding.

Conclusions

Waiver of tort will continue to vex litigants in Canada until the country's highest court ratifies or rejects the significant modification that *Serhan* makes to the fundamental policies and principles that have historically shaped Canadian tort law. The expanded doctrine of waiver of tort creates tremendous financial exposures for defendants given the extent it expands the ambit of traditional Canadian tort law recovery. A successful application of the new doctrine will result in substantial windfalls for plaintiffs that are repugnant to the limited compensatory purpose of tort law.

In Ontario, an increasing number of product liability actions are being certified where loss is doubtful or unrecoverable in tort or where plaintiffs seek to recover both damages and disgorgement.²⁹ These increased exposures place a tremendous burden on manufacturers and, until such time as the law is clarified by the Supreme Court of Canada, will undoubtedly affect their assessment of class actions and their settlement strategies. It remains to be seen if certification judges in other provinces will follow the lead of Ontario and whether the novel doctrine will be embraced by other common law jurisdictions. Given the propensity for product liability actions to be pursued on a national basis in Canada, waiver of tort will remain a controversial feature of Canadian product liability jurisprudence for the foreseeable future and there will be numerous opportunities for the debate to continue in Canadian courts as courts explore the circumstances in which gains based awards can appropriately be used. ●



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Endnotes

1. In *Cunningham v Wheeler* [1994] 1 SCR 359 (SCC), Cory J held for the majority of the Supreme Court of Canada that the principle of recovery in an action for tort is to compensate the injured party as completely as possible

for the loss suffered as a result of the negligent action or inaction of the defendant. This fundamental principle was affirmed by McLachlin J (as she then was), who stated that the ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more. She stated that the watchword is restoration: what is required to restore the plaintiff to his or her pre-accident position.

2. In *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 1 SCR 85 (SCC), LaForest J, writing for the court, created an exception to the historic prohibition against recovery of pure economic loss in tort and permitted recovery for the costs of repairs for structural defects that were not merely shoddy but substantially dangerous. LaForest J addressed the policy concerns about indeterminate liability by limiting the potential recovery to the costs of repairs and no more.

3. In *Chadha v Bayer Inc* (2003) 63 OJ (3d) 22 (CA), Feldman JA, writing for the court, concluded that the issue of liability, including proof of loss, could not be a common issue in a class action brought by home purchasers who alleged to have suffered loss from a price-fixing conspiracy which affected the cost of iron oxide pigments used to colour concrete brick and paving stones. The plaintiffs were not direct purchasers of iron oxide from the defendants and alleged that because of the price-fixing activities they overpaid for their homes. The Divisional Court had set aside the certification order because the actual losses could not be proved on a class-wide basis or on the basis of statistics. Proof of loss could only be established on an individual basis. In the Court of Appeal, Feldman JA found that the motion judge erred by relying on expert evidence which did not address the issue of what method could be used at a trial to prove that all end-purchasers overpaid for their houses as a result of the conspiracy. The expert effectively assumed that the higher costs of products containing the iron oxide pigment would have been passed on to end-users. Feldman JA noted that 'it is that assumption that is the very issue

that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such' (at [30]).

4. *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL); *Oughton v Seppings* (1830) 1 B & Ad 241; *Turner v Cameron's Coalbrook Steam Co* (1850) 5 Ex 932; *Commercial Banking Co of Sydney v Mann* [1961] AC 1; *Chesworth v Farrer* [1967] 1 QB 407.

5. See, for example, *Zidaric v Toshiba of Canada Ltd* [2000] OJ No 4590 (Ont SCJ), where Cumming J struck out a statement of claim as disclosing no reasonable cause of action where the plaintiff claimed pure economic loss in respect of a computer which due to a defect permitted undetected data loss or the writing of wrong data. The plaintiff sought, among other things, a claim for profits made by Toshiba relying on waiver of tort; however, the court held that waiver of tort could not be established as no tort had been made out.

6. *Attorney General v Blake* [2004] 4 All ER 385 (HL), where a former British spy, in breach of the terms of his employment, revealed official and confidential information he gained as a result of his employment in a book published in the Soviet Union, where he had defected. Although the government acknowledged that it could not establish any damages had been suffered as a result of Blake's breach of contract, the House of Lords decided the Attorney General was entitled to recover the amount of the benefit derived by Blake in breach of his contract, as the normal remedies for breach of contract would be inadequate.

7. [1980] 2 SCR 834 (SCC), which held that unjust enrichment will occur when there is (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.

8. Maddaugh P D and McCamus J D *The Law of Restitution* (Canada Law Book, Aurora 2005), 24-17.

9. Beatson J 'The nature of waiver of tort' in J Beatson (ed) *The Use and Abuse of Unjust Enrichment* (Clarendon Press, Oxford 1991); Friedmann D



'Restitution for wrongs: the basis of liability' in Cornish W (ed) *Restitution: Past, Present and Future* (Hart Publishing, Oxford 1998).

10. [2006] OJ No 2421. Both the Court of Appeal for Ontario and the Supreme Court of Canada have subsequently denied leave to appeal, without giving reasons: [2006] SCCA 494 (SCC).

11. *Zidaric*, above note 5; *Reid v Ford Motor Co* [2006] BCJ No 993 (BCSC). In *Ross v HVL D Systems (1997) Ltd* (1999) SJ No 68, the Saskatchewan Court of Appeal noted that a waiver of tort is a means by which a party can claim a specified amount as compensation for certain wrongful acts instead of pursuing a claim for damages; however, the claim remains grounded in tort.

12. *Heward v Eli Lilly & Company* 2007 CanLII 26607 (Ont SCJ).

13. (2004) 72 OR (3d) 296, per Cullity J.

14. Above.

15. [1997] 2 SCR 217 (SCC).

16. *Federal Sugar Refining Co v United States Equalization Board* 268 F 575 (SDNY 1920) at 582. This case involved an intentional interference with contractual relations. The American authority that applies waiver of tort appears to be limited to intentional wrongdoing, where there is evidence of loss or detriment to the plaintiff and the actual commission of a tort. See, for example, *Colorado Interstate Gas Co v Natural Gas Pipeline Co* 885 F 2d 683 (10th Cir Wyo 1989) (restitutionary damages available for tortious interference with contract); *Raven Red Ash Coal Co v Ball* 185 Va 534 (CA 1946) (intentional trespass); *Mullins v Equitable Prod Co* 2003 US Dist LEXIS 13024 (trespass); *Olwell v Nye & Nissen Co* 173 P 2d 652 (Wash 1947) (conversion); *Schwan v CNH Am LLC* 2006 US Dist LEXIS 28516 (toxic tort claim where alleged defendants used plaintiffs' property to dispose of pollutants and thereby save the expense of collecting and disposing of pollutants).

17. [1952] 1 All ER 796 (CA).

18. [2004] OJ No 1821. This case was an action for unjust enrichment

and conversion of the plaintiff's trailer. The defendant was required to pay the entire benefit wrongfully gained and punitive damages. Cusinato J found that on the facts before him the unjust enrichment test had been met, including a finding of a corresponding deprivation (that is, loss) to the plaintiff. The reference to *Strand Electric* was therefore obiter in *Transit Trailer Leasing* and hardly the foundation on which to build a new freestanding doctrine of waiver of tort with no requirement of loss or deprivation to the plaintiff.

19. Quoting Waters D W M *The Constructive Trust: The Case for a New Approach in English Law* (University of London Athlone Press 1964) 55–56.

20. [2004] OJ No 4580 (Ont SCJ).

21. Above.

22. [1997] BCJ No 3174 (BCSC).

23. [2001] BCJ No 631 (BCCA).

24. Citing *Boulanger v Johnson & Johnson Corp* [2003] OJ No 2218 (Ont CA) and *Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario* [1992] 3 SCR 762.

25. Above.

26. At [221].

27. 2007 CanLII 26607 (Ont SCJ).

28. [2007] OJ No 404 (Ont SCJ).

29. A recent example is the spate of class actions commenced in Canada against the manufacturer and distributors of tainted pet food products which caused renal failure and death of cats and dogs that consumed the products. In the recent carriage motion decided in *Joel v Menu Foods GenPar Ltd* [2007] BCJ No 2159 (BCSC, issued 2 October 2007), Hinkson J noted that the British Columbia representative plaintiff had recently amended their statement of claim to plead waiver of tort, seeking a disgorgement of revenues from the defendants in respect of their sale of the tainted product, in addition to damages. For that claim to survive in British Columbia, the representative plaintiffs will obviously have to satisfy the certification judge that *Reid* may not be correctly decided and that *Serhan* should be followed in British Columbia.