Cassels

Babstock, Class Actions, and the "End" of Waiver of Tort

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The fact that no one really knows what "waiver of tort" is has been part of the gallows humour among the class action bar for more than a decade. In fact, we have records of those jokes going all the way back to 1839. The doctrine has such a complicated past – and such a long one – that lawyers have struggled to explain it for centuries.

Last Friday, in *Babstock v. Atlantic Lottery Corporation*, the Supreme Court of Canada handed down its first waiver of tort decision in more than 60 years and turned class actions law on its head (or, from its head back on to its feet again) by deciding that it was not an independent cause of action, but that it might survive instead in its historical role as an election of remedies.

That distinction sounds like a harmless enough detail of civil procedure, but the result is that a handful of class actions may now be decertified, and the liability faced by defendants in dozens more could be scaled down by orders of magnitude.

How could something so old, so technical and so poorly understood be so important?

That takes some explaining.

Why Was Waiver of Tort Suddenly Such a Big Deal?

In 2004, despite the confusion surrounding the doctrine, the court in *Serhan Estate v. Johnson & Johnson* applied waiver of tort to certify a class action that was otherwise on the brink of failure. The plaintiffs in that case were complaining of a defective medical product, but they only had nominal damages because their provincial health insurers were the ones that actually paid for the item.

On its own motion, though, the Court decided that **"waiver of tort" seemed to allow a plaintiff to claim the defendant's profits arising out of wrongdoing, even if they had suffered no damages themselves**. On that basis, and on that basis alone, the Court certified the class action.

With that decision, 600 years of jurisprudence took a hard left turn and threatened to upend the system of compensatory private law we have been following since at least the early Christian period of the Roman Empire. For at least that long, we have been measuring liability for damages by what the plaintiff has suffered, and not by what the defendant has gained. In *Serhan Estate*, the Court said that it was at least

arguable at trial that our system of private law could operate the other way around.

In the ensuing 16 years, class action plaintiffs picked up on that decision and pleaded waiver of tort with great frequency – and for very good reason. If they were permitted to measure the amount of the claim by the defendant's profits, inconsistencies between damages suffered by class members ceased to matter. Perhaps even inconsistencies in the *kind* of harm suffered ceased to matter! Claims became much more homogeneous, and therefore much easier to certify.

Why didn't defendants simply move to strike out waiver of tort claims as failing to plead a reasonable cause of action? With waiver of tort as poorly understood as it was, defendants could not meet the standard of proving that it was "plain and obvious" that such claims could not succeed. The question was consistently put off for trial by certification judges in jurisdictions across Canada.

The result was a slough of claims that otherwise had no chance of success under standard tort principles, and/or no chance of being certified under the standard certification criteria, being certified as claims in waiver of tort.

This practice continued until 2018, when the Newfoundland Court of Appeal in *Babstock* took the extraordinary step of recognizing and affirming waiver of tort as an independent cause of action (though it changed the doctrine's confusing name in the process, at which point both sides of the Bar breathed a sigh of relief).

The defendants appealed that decision, and their argument at the Supreme Court of Canada culminated in last week's decision.

So What Was Waiver of Tort Really?

Waiver of tort has had a long and complicated history. If you are interested in a step-by-step analysis of its development from the 15th century onwards – and who wouldn't? – see my article here. (This historical analysis was adopted by the Supreme Court in its decision.)

To drastically oversimplify the issue, waiver of tort essentially allowed a plaintiff to prove that the defendant had committed a tort, but *then* to "waive the tort" and construct a legal fiction that the defendant had actually acted with the plaintiff's permission as an agent or employee. This was useful in property cases, where the defendant made money with the plaintiff's property – a horse, a servant, a right to profit from land – but the plaintiff did not actually suffer a loss.[1]

Here's a simple example of how the doctrine has historically worked (or why waiver of tort was necessary in the first place):

Suppose that a taxi driver took a day off; and a defendant stole his taxi, made $2,500 in fares, and returned the car with a full tank. The driver's damages would be virtually nil – just one day's wear and tear on the vehicle – and maybe he profited overall from getting the full tank.

What matters here is that the *right to profit from that taxi is his*, not the defendant's. The defendant has no right to the money generated from that taxi. As a result, it is only the taxi driver that has the right to the profits that taxi makes. Before the Acts of Judicature in the late 19th century, however, plaintiffs had to choose between taking action in tort or in contract, and as a result the law seemed to get in its own way. Because the plaintiff was forced to choose between one action or the other, there was no scenario in which the driver could get satisfaction.

If he pleaded in tort, the defendant could admit that he stole the taxi and compensate him for the damage he suffered: less than zero. In fact, the defendant could counterclaim for the value of the additional gas.

If he pleaded in contract, then the plaintiff could claim that the defendant drove the taxi on his behalf, as his agent, and ask for him to pay over the $2,500 he earned – but the defendant could easily disprove that by saying, "We didn't have a contract – I stole your car!"

Faced with that dilemma, courts gradually came to allow the plaintiff to "waive the tort": to prove the tort that the taxi was wrongfully taken, but to waive the tort *damages* and instead elect to receive the damages he would have received from an action in quasi-contract (or *indebitatus assumpsit*), where the obligation to perform as though there was a contract is implied by the court.

Actions involving a waiver of tort came up only infrequently, especially with the advent of conversion as a tort of its own. Nevertheless, it remained on the books and continued to be a living part of the law.

In the late 1990s, however, Canadian jurisprudence lost track of the fact that this was a *proprietary* cause of action: an action to recover profits generated with the plaintiff's property. With that key component missing, it appeared that waiver of tort allowed a plaintiff to claim the defendant's profits without proving its own loss, without any limitation.

Misunderstanding But Not A Mistake

So was the use of waiver of tort in class actions all just a big mistake? Not necessarily.

As you can see from the birth of waiver of tort itself, our law is intended to develop new ideas to clear away obstacles standing between parties and justice. Even such cherished legal concepts as the criminal "beyond a reasonable doubt" standard were originally created to secure *more convictions*, not to protect the accused. But as time goes on, lawyers and the courts come up with new justifications for old concepts and breathe new life into them. Even though waiver of tort as it has been argued over the past 30 years has not lined up with what it has been historically, that did not necessarily mean that the court should not recognize and embrace it – if it made sense from the perspective of justice.

That argument was at issue here. Scores of academics embraced the new formulation of waiver of tort because, among other reasons, it provided a disincentive for antisocial behavior. If a defendant could make a significant profit by acting wrongfully, these scholars said, she should stand at risk of losing that profit rather than being rewarded by being permitted to "keep the change" after paying a fine or facing other negative consequences imposed by law. The law, they said, should not leave open an incentive to act illegally.

The battle lines were thus drawn: one camp argued that waiver of tort was an *independent cause of action*: that a plaintiff should be able to sue a defendant for the profits it earned in committing a wrong, regardless of whether the plaintiff was harmed or not.

The other camp argued that it was an *election of remedies* (or that it was "parasitic" on a proven tort): that a plaintiff first had to prove a tort, including her own damages, before having the option to waive the tort and seek the defendant's profits. Some thinkers went further, arguing that it should still be a proprietary cause of action and that even a proven personal tort like negligence or assault could not be waived.

Some went even further, arguing that the whole doctrine should be terminated as confusing and unhelpful, and that actions in conversion and unjust enrichment were well understood and covered the field sufficiently to ensure plaintiffs were compensated without resurrecting concepts understood by few.

The Newfoundland Court of Appeal in *Babstock* came down on the pro-waiver of tort side, "jettisoning" the name "waiver of tort" but acknowledging a cause of action for disgorgement on largely the basis urged by restitutionary scholars supportive of the independent cause of action (para. 170).

The Supreme Court reversed that decision last Friday.

The Supreme Court of Canada's Decision in Babstock

The plaintiffs in *Babstock* brought an action against the regulator of video lottery terminals in Atlantic Canada, claiming that the games are inherently deceptive and dangerous. Pleading three causes of action (breach of contract, unjust enrichment and waiver of tort as an independent cause of action), they pleaded

exclusively to receive an award based on the defendant's profits, unrelated to any harm they may have suffered.

Time to Make a Decision

Though the court split 5-4 on whether or not the plaintiff's breach of contract claim should be certified (the majority denied certification and struck the claim entirely), they were unanimous in deciding that **waiver of tort is not an independent cause of action**. Whether or not it could survive as an election of remedies (as in the taxi example above) was left for another day.

Writing for the whole court on this point, Justice Brown ruled that the time had come to resolve the question of waiver of tort's independence, over the plaintiff's objections at hearing that the proper time would be at the trial of the common issues. The Court cited the late Justice Lax in *Andersen v. St Jude Medical Inc.*, 2012 ONSC 3660, who determined at the end of a 138-day waiver of tort trial that a trial was not actually necessary in order to decide that specific question (and Her Honour was not ultimately required to do so in that case). Accordingly, the Supreme Court was ready to determine the matter at the certification stage in assessing whether or not the proposed action had pleaded a viable cause of action (paras. 17-20).

In so doing, the Court also raised a new policy point: that just because a novel cause of action cannot be struck simply for being unprecedented, that does not necessarily mean that unprecedented claims cannot be struck at all – in fact, the new culture of efficiency in our civil courts requires that judges be more decisive in vetting novel claims at an early stage (para. 18). The court also recognized the practical concern of defendants that the uncertainty in the law was resulting in certification, prompting significant settlements when the plaintiffs might not otherwise have much of a case (para. 21).

Death of the Independent Cause of Action

Venturing into the substance of the waiver of tort doctrine, the Court first drew a distinction between restitution and disgorgement. Restitution is a remedy that allows a plaintiff to claim a defendant's gains when she has suffered a corresponding loss, as in the case of unjust enrichment claims. Restitutionary causes of action were not at issue in this appeal. Disgorgement remedies, however – remedies where the plaintiff seeks the defendant's gain without reference to her own loss – were under the Court's microscope (paras. 23-25).

The Court observed that while other claims that result in disgorgement (such as claims for breach of fiduciary duty) are available, they are premised on actionable misconduct. The Court also noted that, as detailed above, historically the doctrine was not a cause of action but an election of remedies. Finally, the Court ruled that recognizing the plaintiff's claim of waiver of tort as an independent cause of action, which proposed to seek disgorgement without proof of damage, would be a "far leap" and a "radical and uncharted development" (paras. 32-33).

Part of the Court's reasoning was that if harm was not an element of the cause of action in waiver of tort, then there would be no necessary connection between the defendant's action and the plaintiff's rights. As Justice Moldaver said at the hearing, "On [the plaintiff's] theory, one person could sue and get $500 million in their bank account," and ultimately the Court determined that "no answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain".

With that, the Court ruled that recognizing waiver of tort as an independent cause of action resulting in disgorgement "is not the type of incremental change that falls within the remit of the courts applying the common law". Justice Brown, for a unanimous Court on this point, determined that as a novel cause of action, waiver of tort had no reasonable chance of success at trial.

What's Next?

What will likely follow from this decision is a slate of motions across the country seeking to strike waiver of tort as a cause of action from existing class actions – which in some cases may threaten the action itself. In other cases, the plaintiffs may merely undertake to pursue waiver of tort as a possible remedy once a tort has been proven at the trial of the common issues, ceasing to advance it as an independent claim in and of itself.

This may also mean that class actions pleading drastically different levels of damages as between plaintiff class members may be more difficult to certify, marking the second time in 2020 since the introduction of Bill 161 earlier this year that the difficulty of certification has been raised for plaintiffs in Ontario.

In any event, with this decision 16 years of confusion has been resolved at last. Waiver of tort lives on, in the same form it did before it took a sharp turn at the end of the 20th century and in the *Serhan Estate* case in 2004. It even may still have some limited use, as the remedies it can provide differs from claims in unjust enrichment and conversion in some interesting ways.

That being said, while we may still hear of waiver of tort from time to time as circumstances require, it appears at the moment that this quaint, arcane legal doctrine has largely slipped back into the dustbin from which it was unceremoniously shaken out.

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[1] N.B. The doctrine is actually much more complicated than this, and developed a bit at a time in response to different legal stimuli, but for summary purposes this will have to do.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.