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No Harm, No Remedy: The Availability of Non-Compensatory Remedies under the Consumer Protection Act

By playing their essential gatekeeping role, class action judges have in numerous decisions clarified the necessary elements of various causes of action and the availability of specific remedies in a particular case. What constitutes harm that is compensable, for example, has featured in numerous product liability class actions and the failure to show harm has put an end to many of them. For strategic and practical reasons, some class actions do not seek compensation for losses that the class members suffered. Instead, the strategy is to pursue remedies that do not correspond with personal losses such as disgorgement, nominal damages and punitive damages. *Hoy v Expedia Group Inc* is a recent example.

Hoy is a proposed class action concerning breaches of the *Consumer Protection Act* for alleged systemic misleading advertising practices by Expedia, Bookings and Trivago. Justice Perell dismissed the motion for certification which was then appealed to the Divisional Court (Justices Sachs, Stewart and Mew). The Panel affirmed Justice Perell's finding that the remedies of disgorgement, nominal damages and punitive damages were not available on that particular record. In doing so, the Panel clarified the availability of these remedies under the *Consumer Protection Act*.

The Plaintiffs in this case allege that they were harmed by algorithms used by the defendants who are major players in the online accommodations booking market. Many who have booked on these websites may recognize the practices under attack. As examples, they include the order in which accommodations appear (which depends in part on the commissions paid by the provider) or the representation that there is "one room left at this price". While these practices were addressed by regulators in other jurisdictions, there have been no enforcement proceedings in Canada.

While the motion judge found that there was some basis in fact that these practices breached the *Consumer Protection Act*, there was no evidence of compensatory harm. Justice Perell wrote:

> [85] In any event, the Plaintiffs do not purport to quantify the compensatory harm that they allege they and the putative Class Members suffered. There is no evidence the Plaintiffs or the Class Members did not receive the accommodation they booked. There is no evidence that the Plaintiffs or the Class Members received accommodation that was less in quality than promised. There is no evidence that in any particular case, or on a class-wide basis, that alternative qualitative similar accommodations were available that would meet Class Members' needs equally well at a lower cost, or that would better meet Class Members' subjective needs. There was no explanation or evidence as to how to monetize this compensatory harm based on the Class Members' disappointment in not choosing psychologically more satisfying accommodation.

Accordingly, there was no economic component to the harm alleged. Rather, the only compensatory harm alleged was psychological harm in the form of after-the-fact decision regret. This type of harm is not compensable.

Without compensable harm, the path to victory was whether disgorgement and punitive and nominal damages were available under the *Consumer Protection Act*. The answer on this record was "no".

Ramdath v George Brown College of Applied Arts and Technology is the leading authority on remedies available under s. 18(2) of the *Consumer Protection Act*, which speaks to the available remedy where rescission is not possible. Two paragraphs in *Ramdath* featured:

> [50] …GBC argued, both at trial and on appeal, that to claim and be awarded damages under s. 18(2), a consumer still needs to establish causation. I agree. **However, the necessary causal link is the link between the damages and the agreement, i.e. that the consumer suffered damages that flowed from entering into an agreement after or while an unfair practice was occurring**.
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> [94] …In his text, The *Law of Damages*, referred to by the trial judge, Professor Waddams discusses the measure of damages in statutory remedies for misrepresentation,

> including the Ontario Consumer Protection Act.
> **He explains that the language of s. 18(2) that prescribes the compensation entitlement for a plaintiff, together with the availability of punitive and exemplary damages in s. 18(11), give a court complete flexibility to award whatever damages would be appropriate at common law including the restitutionary measure**.

Here, the Panel found that first, there was no attempt to show that the consumer suffered damages; second, that disgorgement is not a restitutionary measure; and third, that disgorgement was not "appropriate at common law" in this case. The Panel emphasized that disgorgement is available in limited circumstances such as breach of fiduciary duty or in exceptional circumstances flowing from a breach of contract. At its core, this case was one of misrepresentation.

The Panel then disposed of the claim for nominal and punitive damages under the *Consumer Protection Act*.

With respect to nominal damages, while they are available for causes of action, like breach of contract, that do not require proof of loss, the claim here was a breach of regulatory legislation. Even though such legislation is interpreted favourably for consumers, the nature of the claim and the tactics employed do not merit compensation in the absence of harm.

Turning lastly to punitive damages. The Panel accepted that there may be a case where punitive damages are available as a free-standing remedy in the absence of other remedies. Regardless, the pleaded facts must still support a claim for punitive damages and that was not made out:

> [104]… … the Plaintiffs claim for punitive damages is based on no more than the pleaded fact that the Defendants may have breached the unfair practices provisions of the Ontario *Consumer Protection Act*, 2002 and the comparable provisions from the other provinces and territories. However, as the Supreme Court pointed out, there must be something more than a breach of the *Consumer Protection Act* for an award of punitive damages.

This appellate decision is a welcome development for defence counsel. Consumer protection legislation is typically interpreted in favour of consumers as they are usually argued to be in a vulnerable position. However, the pro-consumer interpretative exercise cannot simply set aside the entire context of the statutory scheme, as recognized by the Divisional Court. It is

important to critically examine requests to extend the scope of remedies available under a particular legislation, especially when the remedies being sought in the class action are unconnected to the actual loss.