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July 24, 2020

Waiver of tort is dead, long live waiver of tort!

Waiver of tort has long been a contentious subject in Canadian law. Many, many courts have permitted waiver of tort claims to proceed in class actions. Yet no court had definitively ruled as to whether waiver of tort in fact existed. It was for this reason that the Supreme Court of Canada's decision in *Atlantic Lottery Corporation v Babstock* has been so highly anticipated. Most expected that the Supreme Court would finally answer whether a waiver of tort existed as an independent cause of action under Canadian law. This in turn would have significant consequences for many types of cases, including many types of class actions.

As it turned out, the Supreme Court of Canada's decision was noteworthy for many reasons. Most importantly, the Court rejected the existence of waiver of tort as a cause of action, while potentially preserving it under a different name as a remedial option. Yet the Court also commented on a number of other points that are significant for both class action lawyers and the commercial litigation bar.

Background

My colleague, Kelly Hayden, previously commented on this case after leave to appeal was granted by the Supreme Court of Canada, so I will not delve into the underlying decisions in too much detail. In short, the plaintiffs had brought a proposed class action against the Government of Newfoundland and Labrador in respect of the operation of video lottery terminals. The plaintiffs alleged that video lottery terminals were inherently dangerous and deceptive. They framed their claim primarily to seek a gain-based remedy quantified by the profits that the Atlantic Lottery Corporation had earned by licencing video lottery terminals. The claims advanced were for waiver of tort, breach of contract, and unjust enrichment.

At first instance, the Atlantic Lottery Corporation applied to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action and sought certification of the claim as a class action. At first instance, the claim was certified as a class action, and the Atlantic Lottery Corporation's application to strike was dismissed. The Court of Appeal essentially affirmed the application judge's decision and allowed the claims to proceed.

The Supreme Court of Canada unanimously rejected the viability of the waiver of tort claims in this case, and they were also unanimous in their analysis pertaining to waiver of tort. However, as to some of the other claims, the Court split on the result. The five-member majority held that none of the claims disclosed a reasonable cause of action. The dissent, by contrast, accepted that the claim did not disclose a reasonable cause of action in either waiver of tort or unjust enrichment. However, the dissent felt that the breach of contract cause of action was appropriate. Consequently, those four members of the Court would have allowed the claims to be certified as a class action only to proceed in respect of the breach of contract claim.

Waiver of Tort is No More… As a Cause of Action, Anyway

The most important takeaway from the Court's decision is that waiver of tort is not an independent cause of action under Canadian law. This resolved many years of judicial uncertainty after Courts had repeatedly dodged the question.

For those not familiar with the concept of waiver of tort, I will say at the outset that it is murky and complicated, I will not pretend to do justice to the significant judicial and academic commentary on the topic. However, at its most general, the basic concept of waiver of tort is that a plaintiff could advance a claim for some tortious wrongdoing by the defendant that would allow the plaintiff to recover the defendant's profits from that wrongdoing. At a high level, there were two broad schools of thought regarding what waiver of tort could be. One view was that waiver of tort was essentially remedial, such that a plaintiff that had established a particular cause of action could then "waive the tort" and instead recover the defendant's benefit. A second view was that waiver of tort was a freestanding cause of action that could allow a plaintiff to recover the defendant's gains from the misconduct, without evidence of the plaintiff themselves having suffered any loss.

This second view of waiver of tort had been particularly popular in class proceedings because the notion of a remedy based on the benefits to the defendant could help obviate any need for plaintiffs to prove class-wide loss to every member of the class.

This in turn could help plaintiffs seek certification of the class as class actions.

In its decision, the Supreme Court of Canada unequivocally decided that waiver of tort was not an independent cause of action.

The Court's primary reasons for rejecting waiver of tort as an independent cause of action were conceptual. The Court noted that proof of damages is an essential element of negligence. The Court held that it would be a fundamental transformation to the law of negligence to allow a disgorgement-based claim in the absence of any proof of damages. The Court accepted that while some causes of action, such as breach of fiduciary duty, allowed for the disgorgement of profits in the absence of proof of any damage to the plaintiff, the Court held that this was not appropriate for claims like negligence:

> It is therefore important to consider what it is that makes a defendant's negligent conduct wrongful. As this Court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff" (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16). There is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk (E. J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at pp. 153 and 157?58; R. Stevens, *Torts and Rights* (2007), at pp. 44?45 and 99). In other words, negligence "in the air" — the mere creation of risk — is not wrongful conduct. Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness" (Weber, at p. 424). It would be a radical and uncharted development, "[giving] birth to a new tort over night" (Barton, Hines and Therien, at p. 147).

The Court also noted there were practical difficulties associated with an independent cause of action for waiver of tort. It noted that if a plaintiff could claim a disgorgement without having suffered any losses themselves, this would allow the first plaintiff to get judgment to claim the entirety of that disgorgement. The Court held this was not appropriate.

While the Court rejected the notion that waiver of tort could be an independent cause of action, the Court did not rule out the possibility that disgorgement could potentially be awarded as a remedy for tortious conduct, where the elements of the tort are made out. However, in this particular case, the Court held that

this theory was not available. The Court noted that "[c]ausation of damages is a required element of the tort of negligence". Here, the plaintiffs did not plead that the misconduct by the defendants had caused any injury to the plaintiffs, so the Court held that they necessarily could not establish negligence.

The Supreme Court of Canada's decision definitively shuts the door on waiver of tort as a cause of action, while leaving the door open a crack for disgorgement-based remedies where negligence is made out. In the class actions context in particular—where waiver of tort was most often pursued for the reasons described above—the implications of this more limited approach to waiver of tort are significant. The Supreme Court's decision means that in order for a cause of action to be established on a class-wide basis, damages will have to be established by all class members. This may pose difficulties in certifying some cases as class actions where damages are not common across all members of the class.

The Other Implications of *Atlantic Lottery Corporation v Babstock*

While the most significant implication of *Babstock* relates to the Court's rejection of waiver of tort as a cause of action, the decision is remarkable for a number of other reasons that are worth noting. Because each of these issues could be the subject of a blog post in its own right, I do not intend to exhaustively address each of them, but merely highlight the issues that *Atlantic Lottery Corporation v Babstock* raises for future consideration.

First, the Supreme Court made it clear that the motion to strike should be a robust tool to weed out unmeritorious claims. Mostly importantly, the Court held that "a claim will not survive an application to strike simply because it is novel". The key part of the Court's analysis here is at paragraph 19 of its decision:

> Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such

> claims present “no legal justification for a protracted and expensive trial” (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy. [emphasis added]

This is a significant shift in approach and may require a greater degree of scrutiny in causes of action on motions to strike.

Second, the Court made passing reference to the duty of good faith in contract law. Since the Supreme Court’s decision in *Bhasin v Hrynew*, contractual claims rooted in the duty of good faith have proliferated. However, at paragraph 65 of the decision, the Supreme Court of Canada makes clear that “not every contract imposes actionable good faith obligations on contracting parties”.

> As this Court explained in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, however, not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations (para. 66). The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories. Nor did the plaintiffs advance any argument for expanding those recognized categories.

This suggests a potentially more constrained approach to the duty of good faith than some lower courts have been applying since *Bhasin*.

Third, the majority’s decision as it pertains to unjust enrichment claims in class actions is interesting to note. The Court held that it was plain and obvious that a pleading in unjust enrichment would fail because the plaintiffs alleged there was a contract between ALC and the plaintiffs. The Court noted that “[a] defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit”.

This in itself is not new law: it is well established that benefits given pursuant to a valid contract will not be subject to claims for unjust enrichment. However, what this decision does signal is that courts may be more willing to strike unjust enrichment claims at an early stage. In particular, if the pleadings plead there is a contract between the parties and there are no reasonable grounds to believe that contract was invalid, it

suggests that claims for unjust enrichment may not be tenable.

Implications

There is a lot to grapple with in *Atlantic Lottery Corp v Babstock* . The decision provides significant clarity to the law of waiver of tort, although it raises several other questions the Supreme Court will have to grapple with in future cases.

Broadly speaking, this decision will be favourable to parties who find themselves as defendants in class actions. It will undoubtedly mean that some claims that may have previously been certified cannot be certified. It will also likely mean that, in most cases, a defendant's exposure in the case is likely limited to the harm suffered to class members, rather than be measured by the defendant's benefit. However, the full implications of *Babstock* remain to be determined in future cases.