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• NO HARM, NO REMEDY: LIMITING PRINCIPLES UNDER THE ONTARIO *CONSUMER PROTECTION ACT* •

Jonathan Chen, Partner, and Christine Windsor, Associate, Lenczner Slaght LLP

Jonathan Chen

Christine Windsor

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INTRODUCTION

Consumer protection class actions continue to be one of the most common types of class proceedings. One reason for this is the early development in Ontario that proof of individual reliance is not necessary to establish liability (e.g. the existence of an unfair practice) under the Ontario *Consumer Protection Act* and be entitled to a remedy. The extent of the available remedies and the preconditions to access them continue to be tested. Case law tells us that, at least where a consumer is seeking damages, there must be evidence that the consumer suffered damages. It is not always the case though that an unlawful act results in damages. When that happens, in some contexts, the remedial inquiry shifts to what was earned by the wrongdoer. For class counsel, this shift is often strategic and lucrative if successful. Are consumers who cannot prove damages under the *Consumer Protection Act* entitled to remedies unconnected to their loss? The Divisional Court of the Ontario Superior Court of Justice in *Hoy v. Expedia Group Inc.*[1] says "no".

BACKGROUND

In *Hoy,* the Divisional Court (Justices Sachs, Stewart and Mew) affirmed the dismissal of the certification motion finding, on the particular record, that the remedies of disgorgement, punitive damages and nominal damages were not available under the

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Please address all editorial inquiries to:

General Editor
Danielle Royal
Firm: Stikeman Elliott LLP
Tel.: (416) 869-5254
E-mail: DRoyal@stikeman.com

LexisNexis Canada Inc.
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: cadq@lexisnexis.ca
Web site: www.lexisnexis.ca

Consumer Protection Act. *Hoy* concerns alleged breaches of the *Consumer Protection Act* for systemic misleading advertising practices by Expedia, Bookings, and Trivago, all major players in the online market for booking accommodations. The plaintiffs alleged that they were harmed by the defendants' respective algorithms, which, for example, determined the order in which certain accommodations appeared or represented on the website that there was only "one room left at this price." Unlike certain other jurisdictions, Canadian regulators have not brought enforcement proceedings addressing these practices.

Plaintiffs' counsel did not seek compensatory damages because they appeared to not have any evidence that compensable damages were incurred. Pivoting from that, the proposed class pursued remedies unrelated to any personal losses and sought an award of disgorgement, punitive damages and nominal damages.

The Divisional Court, while agreeing with the finding below that there was some basis in fact that the defendants' practices breached the *Consumer Protection Act,* concurred that disgorgement, punitive damages and nominal damages were not available. In the absence of an available remedy, the action could not be certified.[2]

THE REASONS OF THE DIVISIONAL COURT

(a) Disgorgement

Section 18 of the *Consumer Protection Act* gives consumers the right to rescind contracts procured through unfair practices.[3] Section 18(2) of the *Consumer Protection Act* institutes a remedy for situations where rescission is unavailable.[4] *Ramdath v. George Brown College of Applied Arts and Technology* is the leading authority on remedies available under section 18(2). *Ramdath* involved a class action against George Brown College ("**GBC**") by post-graduate students for negligent misrepresentation and unfair practices under the *Consumer Protection Act* stemming from an allegedly misleading statement in GBC's course calendar.

Notably, even though *Ramdath* dealt with the question of aggregate damages (i.e., provable compensatory losses) and not disgorgement, the

plaintiffs relied on *Ramdath* for support. As a result, the applicability of propositions raised in *Ramdath* were explored in *Hoy*. Two paragraphs from the Court of Appeal for Ontario's decision in *Ramdath* featured in the reasons of the Divisional Court:

> [90] ...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.[5]

Having considered these two paragraphs, the Divisional Court found that: (1) there was no attempt to show that the consumer suffered damages; rather, the plaintiffs asserted that they established a causal link between unfair practices and damages *to the market*[6]; (2) that disgorgement is not a restitutionary measure[7]; and (3) that disgorgement was not "appropriate at common law" in this case. The Divisional Court emphasized that disgorgement is available in limited circumstances, such as a breach of fiduciary duty or in exceptional circumstances flowing from a breach of contract.[8]

Proof of Loss is Required

Compensation without proof of individual loss can be seen as the holy grail for class counsel. It typically means that class counsel will not have to spend significant time and effort on leading individual damages cases for a large number of claimants, which raises a host of procedural and substantive questions. Where the focus is not on individual loss but what was earned by, for example, a corporation, the records are derived from the historical records of the corporation – a much simpler path to success for the proposed class. In most cases, these figures are likely significant, and therefore, an unpleasant result that defendants strenuously defend against.

We have seen previous admirable attempts by class counsel in pursuit of compensation without proof of loss. In *Atlantic Lottery v. Babstock*[9], the Supreme Court of Canada rejected the proposition that waiver of tort allowed plaintiffs to seek disgorgement for negligence "in the air", meaning without proof of loss.[10] In the recent intrusion upon seclusion trilogy, *Owsianik v. Equifax Canada Co*.[11], *Obodo v. Trans Union of Canada, Inc*.[12], and *Winder v. Marriott International, Inc*.,[13] the Court of Appeal for Ontario clarified that moral damages, to a limited extent, are available without proof of loss.

In *Hoy*, the plaintiffs argued that section 18 of the *Consumer Protection Act* permits a judge to order disgorgement of the wrongdoer's profits, when rescission is unavailable (and, in this case, it was unavailable). Since individual loss could not be proven[14], the theory advanced was that consumer protection legislation is designed to protect the efficiency of markets.[15] The Divisional Court rejected this argument. Reiterating *Ramdath*, the Divisional Court held that section 18 of the *Consumer Protection Act* focuses on "the damages suffered by the consumer (not the market) by virtue of the fact that they entered into an agreement while the unfair practice was continuing."[16] In doing so, the Divisional Court rejected the plaintiffs' invitation to conclude that the *Consumer Protection Act* assigns judges with the role of regulators, imposing penalties crafted "to drive home the message that unfair practices will not be tolerated."[17]

Corrective Justice Interpretation

The Divisional Court's interpretation of section 18 aligns with the doctrinal foundation for both contract and tort damages in Canada, which "does not treat plaintiffs 'merely as a convenient conduit for social consequences' but rather as 'someone to whom damages are owed to correct the wrong suffered.'"[18]

Consistent with a corrective justice interpretation of section 18, the Divisional Court emphasized the essential role that proof of harm plays in compensatory awards under section 18. Why, the Court asked, "should the plaintiffs be entitled to the full gain realized by the defendant when they have not established that they have suffered any harm by virtue of the defendant's conduct?"[19] In effect, this question confirms that corrective justice — enshrined in the need to show that a defendant's wrongdoing caused the plaintiff's damages — governs awards under section 18, which must be compensatory.

The Divisional Court's approach further recognizes an appropriate limit to the powers granted to judges under remedial statutes by focusing on the compensatory purpose of consumer protection legislation and by rejecting section 18 as a tool for wide-ranging behaviour modification. As the Court explained, "interpreting remedial legislation in a manner that furthers the important policy objective of protecting consumers and providing redress for unfair practices does not give courts liberty to ignore the entire context of the statutory scheme."[20]

Jurisprudential Support

The Divisional Court does not stand alone in its decision. *Hoy* is consistent with well-established jurisprudence from British Columbia.

In a recent case, *Vallance v. DHL Express (Canada) Ltd.*,[21] the British Columbia Supreme Court refused to certify a class action arising from alleged undisclosed fees charged for customs clearance imbedded in what were described as import duties and taxes charged by the Canadian Border Services Agency. In addition to the restoration of fees paid, the proposed class ambitiously also claimed for "disgorgement of profits or revenues" under the *Business Practices and Consumer Protection Act* ("**BCCPA**").

Justice Matthews refused the request and found ample support in the jurisprudence. First, Matthews J. reiterated *Babstock,* which clarified that "disgorgement is a type of remedy calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all."[22]

Second, Matthews J. relied upon previous decisions of the British Columbia Court of Appeal— *Koubi v. Mazda Canada Inc*.[23] and *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*.[24]— which confirmed that the BCCPA is an "exhaustive code for the regulation of consumer transactions and that so called "anti-enrichment" claims premised on breaches of the BCCPA are not available in law."[25] A breach of the BCCPA is not a wrong that opens the door for a disgorgement claim.

(b) Punitive Damages

Punitive damages were also sought by the proposed class in *Hoy*. While accepting that punitive damages might be available as a free-standing remedy in the absence of other remedies, the Divisional Court held that the pleaded facts must still support such a claim. The pleadings failed to do so:

> [111] It is not sufficient to simply recite in a pleading the words that are required to advance a claim for punitive damages. Courts must look beyond the labels used by parties and determine the true nature of the claim pleaded. […]
>
> [112] We agree with the motion judge's conclusion that what amounts to little more than a bare allegation that the Defendants may have breached the unfair practices provision of the Ontario Consumer Protection Act, without more, is insufficient to meet the punitive damages requirement for misconduct that is high-handed, malicious, arbitrary or highly reprehensible. The factual allegations that regulatory proceedings, in other jurisdictions, under different statutes, resulting in one adverse adjudicated outcome against one of the defendants in Australia, and undertakings not to engage in certain conduct given to EU and UK regulators by some of the Defendants, do not address the issue of how the Defendants' conduct in respect of Plaintiffs seeking redress under Canadian consumer protection legislation amounted to the exceptional circumstances that, if proven, would justify an award of punitive damages.[26]

Noteworthy, however, is that the Divisional Court arrived at a less definitive conclusion to

punitive damages than its holding on the availability of disgorgement. While there is support for the proposition that the issue of punitive damages could not be certified unless other relief is also certified[27], the Divisional Court left the door open on that issue. Rather, the Divisional Court suggested that "the question of whether, as a general proposition, punitive damages are available as a free-standing remedy in the absence of other remedies is not free from doubt."[28] Here, the Divisional Court refused the request by relying on the statutory text that punitive damages may be awarded "in addition to any other remedy in an action commenced under section 18." No other remedy was available.

There are certainly other reasons to reject the proposition that punitive damages can be available as a free-standing remedy. First, it can be argued that punitive damages, without being accompanied by any compensable loss, is a form of waiver of tort. Second, punitive damages should not be awarded lightly. In *Whiten v. Pilot Insurance Co.*[29], a leading case on punitive damages, Justice Binnie cautioned that "the notion of private enforcers, particularly where they act for personal gain, is worrisome unless strictly controlled."[30] Allowing plaintiffs to seek punitive damages as a free-standing remedy may invite class actions based on harmless acts and convert judges into quasi-regulators by imposing fines based solely on wrongdoing.

(c) Nominal Damages

Finally, the Divisional Court disposed of the plaintiffs' claim for nominal damages. The Divisional Court rejected the proposition that nominal damages are available in this case for breach of the *Consumer Protection Act*. Nominal damages may be available for certain causes of action. For example, nominal damages may be awarded for breach of contract, or in response to certain intentional torts such as trespass.[31] In such cases, nominal damages serve a symbolic purpose and to vindicate the rights of a party.[32]

Relying on the partially dissenting opinion in *Babstock*, the plaintiffs asserted that nominal damages may be awarded without proof of loss. That dissent, however, was focussed on a claim for breach of contract. No such claim was being advanced in this case. Further, the Divisional Court found that the nature of the claim being advanced in *Hoy* is not analogous to the kind of claim where nominal damages may be awarded without proof of actual damages.[33] Nominal damages are not meant to avoid making a claim for compensatory damages, especially when the compensatory claim was not seriously advanced for tactical reasons. To allow such a claim would violate the "compensatory injury principle, a principle that underlies the determination of suitability of an action for certification as a class proceeding."

CONCLUSION

Hoy demonstrates the continuing influence of the majority's reasoning in *Babstock*. *Babstock*'s careful articulation of private law doctrine, and its focus on corrective justice, are a powerful aid to defence counsel resisting attempts to use consumer protection legislation as a vehicle for seeking remedies that overcompensate claimants. Leveraging that decision, *Hoy* offers sound reasons to limit the availability of gains-based relief in a doctrinally justifiable way and appropriately limits the remedial scope of the *Consumer Protection Act* by recognizing the compensatory objective of that statute.

[***Jonathan Chen*** *is a partner at Lenczner Slaght. His litigation practice focuses on class actions, business disputes, product liability and professional negligence matters.*

Christine Windsor *is an associate at Lenczner Slaght. She maintains a broad litigation practice, with a focus on complex commercial disputes and professional negligence matters.*]

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1 *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 (Ont. S.C.J.).

2 *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 6 (Ont. S.C.J.).

3 *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s. 18(1).

[4] *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, s. 18(2).

[5] *Ramdath v. George Brown College of Applied Arts and Technology,* [2015] O.J. No. 6850, 2015 ONCA 921 at paras. 90, 94 (Ont. C.A.), cited in *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at paras. 50, 57 (Ont. S.C.J.).

[6] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 53 (Ont. S.C.J.) [Emphasis added].

[7] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 62 (Ont. S.C.J.).

[8] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at paras. 58, 65-74 (Ont. S.C.J.).

[9] *Atlantic Lottery Corp. Inc. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 (S.C.C.).

[10] *Atlantic Lottery Corp. Inc. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 32-33 (S.C.C.).

[11] *Owsianik v. Equifax Canada Co*., [2022] O.J. No. 5124, 2022 ONCA 813 (Ont. C.A.).

[12] *Obodo v. Trans Union of Canada, Inc.*, [2022] O.J. No. 5123, 2022 ONCA 814 (Ont. C.A.).

[13] *Winder v. Marriott International, Inc.*, [2022] O.J. No. 5128, 2022 ONCA 815 (Ont. C.A.).

[14] The plaintiffs unsuccessfully argued that psychological harm in the form of "after-the-fact decision regret and disappointment because of what might have been the putative Class Member's accommodation if he or she had received differently ordered information about available accommodation" was compensatory harm. See *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 34 (Ont. S.C.J.).

[15] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 55 (Ont. S.C.J.).

[16] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 56 (Ont. S.C.J.).

[17] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 55 (Ont. S.C.J.).

[18] *Atlantic Lottery Corp. Inc. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 34 (S.C.C.).

[19] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 64 (Ont. S.C.J.).

[20] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 103 (Ont. S.C.J.).

[21] *Vallance v DHL Express (Canada), Ltd.*, [2024] B.C.J. No. 140, 2024 BCSC 140 (B.C.S.C.).

[22] *Atlantic Lottery Corp. Inc. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 23 (S.C.C.).

[23] *Koubi v. Mazda Canada Inc*., [2012] B.C.J. No. 1464, 2012 BCCA 310 at paras. 63-65 (B.C.C.A.).

[24] *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*., [2014] B.C.J. No. 167, 2014 BCCA 36 at paras. 55-66 (B.C.C.A.).

[25] *Vallance v DHL Express (Canada), Ltd.*, [2024] B.C.J. No. 140, 2024 BCSC 140 at paras. 111-112 (B.C.S.C.).

[26] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at paras. 111-112 (Ont. S.C.J.).

[27] See, for example, *R.G. v. The Hospital for Sick Children*, [2017] O.J. No. 5631, 2017 ONSC 6545 at para. 218 (Ont. S.C.J.), aff'd [2018] O.J. No. 6183, 2018 ONSC 7058 (Ont. S.C.J.).

[28] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para 96. See also para. 102 (Ont. S.C.J.).

[29] *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, 2002 SCC 18 (S.C.C.).

[30] *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, 2002 SCC 18 at para. 44 (S.C.C.).

[31] See, for example, *Pinnacle Millwork Incorporated v. Kohler Canada Co. (Canac Kitchens)*, [2014] O.J. No. 5046, 2014 ONSC 5782 at para. 19 (Ont. S.C.J.).

[32] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 75 (Ont. S.C.J.).

[33] *Hoy v. Expedia Group, Inc.,* [2024] O.J. No. 1256, 2024 ONSC 1462 at para. 83 (Ont. S.C.J.).