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Not Waiving, But Drowning: Supreme Court of Canada Kills Waiver of Tort as an Independent Cause of Action

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I. INTRODUCTION

1 After decades of uncertainty in the area of class actions and tort law, waiver of tort is dead. In its decision in *Atlantic Lottery Corp. v. Babstock*,[1] released on July 24, 2020, the Supreme Court of Canada ("SCC") killed off the concept once and for all, holding that, "[t]his novel cause of action does not exist in Canadian law and has no reasonable chance of succeeding at trial. In addition, the term waiver of tort' is apt to generate confusion and should be abandoned."[2] While the plaintiffs' claims in this case also included breach of contract and unjust enrichment, the focus of the SCC's decision was waiver of tort (on which the Court was unanimous), and that will therefore be the focus of this article.

2 What is waiver of tort, how did it arise in this case, and why its sudden demise?

II. WAIVER OF TORT EXPLAINED

3 As the SCC explained in its decision, waiver of tort originated in the writ of *assumpsit*, from which arose the legal fiction of an implied contract, which allowed plaintiffs to sue "even where the imputation of a promise to pay was nonsensical, as when the defendant acquired a benefit through the commission of a tort".[3] "Waiver of tort" occurred where a tort was established, but the plaintiff chose to waive a compensatory remedy in order to pursue a claim in *assumpsit* and thereby recover the defendant's ill-gotten gains by way of disgorgement. Historically, therefore, waiver of tort was an election of remedies.[4]

4 By contrast, certain academics have argued that waiver of tort should be a free-standing cause of action. This would allow waiver of tort claims to proceed where no loss has been sustained by the claimant at all; where loss or damage is an element of the cause of action, this means that the tort is not established. In such cases, waiver of tort would transform from a remedial device to an independent cause of action. Compensatory damages (which would return the plaintiff to the position that was occupied before the wrong) cannot be awarded in such cases because there is no loss. However, the defendants are held to have committed a wrong and benefitted from it, and are therefore made to disgorge the profits of their wrongdoing. The objective is to return the *defendants* to the position that they occupied before the wrong, as a means of deterring or regulating their conduct.[5] This was waiver of tort as pleaded by the plaintiffs in *Babstock*.

III. ***BABSTOCK*** *IN THE LOWER COURTS*

5 *Babstock* was a class action out of Newfoundland and Labrador. The defendant was Atlantic Lottery Corp. ("ALC"), a corporation constituted by the governments of the four Atlantic provinces, which approved the operation of video lottery terminals ("VLTs") in Newfoundland and Labrador. The representative plaintiffs applied for certification of a class action on behalf of residents of the province that had paid to play VLTs within the class period. They claimed that VLTs were addictive and deceptive, and pursued three causes of action: (i) waiver of tort; (ii) breach of contract; and (iii) unjust enrichment. They explicitly disclaimed any loss or damage as a result of the

defendants' actions,[6] and instead sought a gain-based remedy quantified by the profits earned by ALC from licensing VLTs.

6 In response to the application for certification, the defendant applied to strike the claim as disclosing no reasonable cause of action. The certification judge and the Court of Appeal dismissed the defendant's application and certified the class action.

7 The Court of Appeal's analysis of the waiver of tort claim is particularly remarkable. It confused the concepts of waiver of tort and unjust enrichment (which usually requires a loss on the part of the plaintiff that corresponds to the defendant's gain)[7] to create a new cause of action called "unjust enrichment by wrongdoing.".[8] Despite the new terminology, the cause of action -- stripping away ill-gotten gains from the defendant in the absence of loss to the plaintiff -- was essentially a free-standing claim in waiver of tort.[9] The Court justified its decision with reference to the principles of deterrence,[10] and particularly in reference to the aim of behaviour modification underlying class actions legislation.[11] In doing so, the Court of Appeal used a procedural device -- the class actions mechanism -- to justify the creation of a new substantive cause of action.

IV. THE SCC LAYS WAIVER OF TORT TO REST

8 The Supreme Court of Canada held that "waiver of tort" is a misnomer and that the plaintiffs were "simply electing to pursue an alternative, gain-based, remedy."[12] In pleading it as a cause of action, however, the plaintiffs were seeking to establish an entirely new tort -- one based not on negligence as the law currently recognizes that concept, but on negligent conduct (the defendants' failure to warn of the dangers associated with VLTs) without proof of damage.[13]

9 The Court found that granting a remedy for negligence without proof of damage would be "a radical and uncharted development, giving birth to a new tort overnight'."[14] It observed that such a development would give rise to liability where the defendant had simply created the risk of damage to the plaintiffs, even if that risk did not materialize. However, as certain private law scholars have posited, there is no right to be free from the risk of damage.[15] To create such a right would not only "result in a remedy arising out of legal nothingness'",[16] but would also entitle "any [one] plaintiff placed within the ambit of risk generated by the defendant . . . to *the full gain* realized by the defendant."[17] The Court held that there was no reason why any one plaintiff should realize that full gain, and that such an approach would promote "a race to recover by awarding a windfall to the first plaintiff who arrives at the courthouse steps".[18]

10 Such a development would be "radical and uncharted" and would not be within the remit of courts applying the common law.[19] The Court therefore held that it was plain and obvious that the plaintiffs' action could not succeed. It allowed the appeals, set aside the certification order, and struck the plaintiffs' statement of claim in its entirety.[20]

V. ANALYSIS

11 The SCC's judgment is clear, definitive, and welcome for many reasons. First of all, following many years of confusion and uncertainty, the Court has asserted once and for all that waiver of tort is not an independent cause of action (although it seems that it can still be used in the remedial sense).[21] This will provide much-needed guidance to many class action lawyers.

12 Secondly, the confusion on the waiver of tort issue has arisen, in part, from courts' reluctance to determine at an interlocutory motion whether certain causes of action can proceed. Novel causes of action are more likely to be pursued in class actions, because the high stakes justify the cost of litigating those questions. The court is required, at the certification motion, to determine whether the pleadings disclose a cause of action. However, Canadian courts have tended to defer that determination to the trial stage -- even though the resolution of many of these questions does not require a full factual record. Most class actions are settled before the trial stage, and those questions are therefore rarely resolved. This adds to doctrinal confusion and creates uncertainty, expense and delay in the prosecution of class actions.

13 The SCC recognized this tendency and its impact on access to justice.[22] It held that courts should, where possible, resolve novel claims on certification motions or motions to strike, consistent with the "culture shift" to promote "timely and affordable access to the civil justice system" articulated in *Hryniak v. Mauldin*.[23] It therefore held that, where possible, "courts should resolve legal disputes promptly, rather than referring them to a full trial. This includes resolving questions of law by striking claims that have no reasonable chance of success . . . ."[24] This would be a welcome development in favour of proportionality and access to justice.

14 Thirdly, this decision delved into substantive issues in private law, which is relatively rare in a class action certification decision. In decrying claims for disgorgement based on tortious exposure to risk, the Court unquestioningly adopted Ernest Weinrib's corrective justice-based (and Kantian) view of tort law, holding that "[t]ort law does not treat plaintiffs merely as a convenient conduit of social consequences' but rather as someone to whom damages are owed to correct the wrong suffered'."[25] This provides some counterweight to the instrumentalist view of tort law that has manifested itself in some class action proceedings (particularly in competition law) whereby the aim of modifying the defendants' behaviour and endorsing the quasi-regulatory function of class counsel has been prioritized over establishing and compensating loss to the class members.[26] While both aims are important in class actions, the interests of class members should always come first.

VI. **CONCLUSION**

15 *Babstock* is a landmark decision that will profoundly impact the practice of class actions in Canada. Although it may also have a negative impact on actions where it is difficult to establish loss on a class-wide basis (as in competition and consumer claims), this should not be an issue as long as the representative plaintiffs can advance, at certification, a methodology for establishing loss on a class-wide basis at trial. Such actions are different from *Babstock*, which explicitly disclaimed *any* loss on the part of class members. Overall, the *Babstock* decision promotes clarity, efficiency and an emphasis on the interests of class members in the conduct of class actions.

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* Assistant Professor, Western Law. Suzanne Chiodo, BCF Class Action Netletter Issue 20, August 2020, LexisNexis.

1 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 (S.C.C.) [hereinafter "*Babstock*"].

2 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at court summary (S.C.C.). See also paras. 15, 30, 35.

3 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 28 (S.C.C.), citing Jeremy Martin, "Waiver of Tort: An Historical and Practical Study" (2012) 52 Can. Bus. L.J. 473.

4 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 29 (S.C.C.).

5 For a summary of the deterrence-based arguments in favour of waiver of tort as a free-standing cause of action, see Craig Jones, "Panacea or Pandemic: Comparing Equitable Waiver of Tort' to Aggregate Liability' in Cases of Mass Torts with Indeterminate Causation" (2016) 2 Canadian Journal of Comparative and Contemporary Law 301 at 302-304.

6 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at paras. 49-50 (N.L.C.A.).

7 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at para. 94 (N.L.C.A.).

8 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at para. 176 (N.L.C.A.).

9 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at para. 170 (N.L.C.A.).

10 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at para. 170 (N.L.C.A.).

11 *Babstock v. Atlantic Lottery Corp.*, [2018] N.J. No. 383, 2018 NLCA 71 at para. 176 (N.L.C.A.).

12 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 29 (S.C.C.).

13 *Atlantic Lottery Corp. v. Babstock*, [2020] S.C.J. No. 19, 2020 SCC 19 at para. 31 (S.C.C.).

14 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at para. 33 (S.C.C.) [footnotes omitted].

15 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at para. 33 (S.C.C.), citing Ernest J. Weinrib, *The Idea of Private Law*, rev. ed. (Oxford: Oxford University Press, 2012) at 153, 157-58; Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 44-45, 99.

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

17 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at para. 34 (S.C.C.) [emphasis in original].

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

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

20 Four of the judges (Wagner C.J.C., Karakatsanis, Martin and Kasirer JJ.) dissented in part. While they agreed that "a mere breach of a duty of care, in the absence of loss, cannot ground a claim for disgorgement" (at para. 76), they would have certified the common issues of breach of contract, punitive damages and the appropriateness of a disgorgement remedy.

21 The Supreme Court did not take a position on this point, and it therefore appears that the leading case, *United Australia, Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1, remains good law. I thank Jeremy Martin for making this point.

22 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at paras. 18-22 (S.C.C.).

23 *[2014] S.C.J. No. 7*, *[2014] 1 S.C.R. 87* at para. 2 (S.C.C.).

24 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at paras. 18, 67 (S.C.C.). Ironically, although Karakatsanis J. wrote the decision in *Hryniak*, she wrote the dissenting judgment in this case in favour of allowing some of the plaintiffs' claims to proceed.

25 *Atlantic Lottery Corp. v. Babstock*, *[2020] S.C.J. No. 19*, *2020 SCC 19* at para. 34 (S.C.C.), quoting Ernest J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 Theor. Inq. L. 1 at 6.

26 See, for example, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, *[2013] S.C.J. No. 57*, *[2013] 3 S.C.R. 477* (S.C.C.); *Steele v. Toyota Canada Inc.*, *[2011] B.C.J. No. 352*, *2011 BCCA 98* (B.C.C.A.).

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