TAB 3

Waiver of Tort on Trial

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The Civil Litigation Summit

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

WAIVER OF TORT ON TRIAL

Andersen v. St. Jude Medical Inc.

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1. Introduction

In September 2011, closing submissions were heard in *Andersen v. St. Jude Medical Inc*., a products liability class action regarding, broadly, the design, manufacture, distribution and pre and post-market testing of the St. Jude Medical prosthetic heart valve coated with Silzone. The action, which was commenced in 2001 and certified by order of Justice Cullity in 2003,[3] proceeded to trial in February 2010. The trial spanned twenty months and included the evidence of twenty-three experts. The case is the first products liability class action in Canada to proceed to trial. The decision in *Andersen* remains under reserve by Justice Joan Lax of the Ontario Superior Court of Justice.

Amongst the most eagerly anticipated aspects of Justice Lax's decision in *Andersen* is her ruling with respect to waiver of tort. After decades of academic commentary and robust judicial pronouncements at the certification stage, the doctrine of waiver of tort will finally be considered in the context of a full evidentiary record.

This paper puts into context the nature of the arguments advanced in the *Andersen* trial with respect to the doctrine of waiver of tort. After reviewing briefly the historical inception of the doctrine and the relevant Canadian jurisprudence at the certification stage, it goes on to provide a detailed overview of the submissions of both the plaintiff class and the defendants with respect to the application of waiver of tort in this case.

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[3] See the certification order of Justice Cullity in *Andersen v. St. Jude Medical Inc.* [2003] O.J. No. 3556; supplemental reasons at [2004] O.J. No. 132.

2. Waiver of Tort – History and General Principles

(a) General Principles

The doctrine known as "waiver of tort" is often treated as an offshoot of the civil law of restitution. The principle underlying the doctrine is that a plaintiff who has been wronged may elect not to claim a tort remedy and may instead claim a restitutionary remedy. The plaintiff is thus – somewhat inaptly – said to "waive the tort". This description is inapt because it inaccurately connotes that the plaintiff has put the tort claim aside. In point of fact, the plaintiff has put aside only the tort law remedies for the claim in order to access alternate and sometimes more lucrative remedies available from the law of restitution. These may include a constructive trust, and an accounting or disgorgement of the defendant's unjust enrichment or ill-gotten gains. In their treatise, *The Law of Restitution*, *6th edition*, Goff and Jones explain the concept in the following way:

> A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to "waive the tort". Waiver of tort is a misnomer. A party only waives a tort in the sense that he elects to sue in restitution to recover; he has a choice of alternative remedies. But the tort is not extinguished. Indeed, it is said that it is the *sine qua non* of both remedies that he should establish the tort has been committed.[4] (Emphasis added.)

Similarly, in *The Law of Restitution*, Maddaugh and McCamus note that waiver of tort:

> […] seems to have engendered an undue and needless complexity . . . In essence the concept is really quite simple: in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages.[5]

It is important to further clarify what is meant by "waiver of tort" as this area of law is often clouded with imprecise terminology that has confused the principles underlying the doctrine.

The problem apparently stems from the use of the term "unjust enrichment". In describing cases where the remedy awarded to the plaintiff is measured by the defendant's wrongful gain, jurists often have commented that the remedy is for "unjust enrichment" or to provide "restitution". However, these references do not refer to the cause of action in unjust enrichment, which requires evidence of a tripartite cause of action, namely: (1) enrichment to the defendant; (2) corresponding deprivation to the plaintiff; and (3) absence of a juristic reason for the

[4] Jones, G and R. Goff, *Goff and Jones: The Law of Restitution* 6th edition (London: Sweet and Maxwell, 2002) at 775.
[5] See Maddaugh, P. and J. McCamus*, The Law of Restitution,* loose-leaf (Aurora: Canada Law Book, 2009) at p. 24-1.

enrichment. Accordingly, on a conceptual basis, it is more helpful to refer to situations where disgorgement of the defendant's gain is awarded as cases of "wrongful enrichment", "restitution for wrongs", "unjust enrichment by wrongdoing" or "disgorgement".

The difference is attenuated when we consider the difference between the cause of action for unjust enrichment and the remedy of disgorgement. In the case of the former, the defendant is required to "give back" property acquired from the plaintiff, which constitutes the "corresponding deprivation". In the case of the remedy of disgorgement, the defendant is required to "give up" property acquired from any source as a result of the wrong committed against the plaintiff.

(b) Waiver of Tort and *Assumpsit Indebitatus*

Waiver of tort has a long and complex history. The doctrine arose in the common law courts as a response to the limitations of the ancient forms of pleading applicable to torts.[6] Faced with the limitations of the old forms of pleading and the growing influence of the Court of Chancery, the common law courts resorted to the use of *assumpsit indebitatus* in order to provide a remedy where the action failed as a tort claim.[7] Accordingly, the doctrine was founded in the desire of the common law courts to provide a remedy which would do justice between the parties in circumstances where tort law was deemed inadequate to do so, and was based on the principles of good conscience, fairness and justice.

Historically, actions in *assumpsit* were used to bring claims that would now clearly be pleaded as claims in negligence. Early cases of an express *assumpsit* (which were essentially claims based in contract) were brought in connection with the negligent performance of a contractual undertaking. In these cases, the plaintiff sought to recover damages for physical injury to person or property caused by the defendant's failure to perform a contractual undertaking.[8]

In *Moses v. Macferlan*,[9] which is widely regarded as the origin of both waiver of tort and of the law of restitution, Lord Mansfield rejected the argument that no action in *assumpsit* could lie where there was no express or implied contract. He stated: "[if] the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action

[6] Archibald, T. and R. Echlin, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" (2008) Annual Review of Civil Litigation, 409 at pp. 415-417**;** Beatson, J., "The Nature of Waiver of Tort" (1979) 17 U.W. Ontario L. Rev. 1 at pp. 6-7.
[7] *Ibid.*
[8] Ames, J.B., "The History of Assumpsit" (1888) 2 Harv. L. Rev. 1 at pp. 2-4.
[9] *Moses v. Macferlan, (*1760), 2 Burr 1005.

[to recover money had and received to the plaintiff's use] founded in the equity of the plaintiff's case, as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it)."[10]

It is commonly assumed that waiver of tort originated with cases concerning the usurpation of public office, particularly where the usurper had sold goods improperly collected in connection with that office. Such actions were used as a basis to recover monies received by a usurper of a public office. The use of *indebitatus assumpsit* had procedural advantages as well, allowing plaintiffs to avoid the problems associated with the strict requirements of the old form of pleadings.[11]

In order to do so, however, a legal fiction had to be created. The courts first found that the plaintiff waived or ratified the wrongful conduct on which a claim in tort would lie. The courts then imposed a fictional contract, usually of agency, under which the claim for *indebitatus assumpsit* was based.[12]

As noted by Viscount Simmons L.C. in *United Australia Ltd. v. Barclays Bank Ltd*., the action for waiver of tort subsequently "crept in by degrees":

> Suffice it to say that the device of "waiving the tort" and suing in *assumpsit* soon spread. A learned author includes among torts which can be waived conversion, trespass to land or goods, deceit, occasionally action upon the case, and the action for extorting money by threats: Winfield on the Province of the Law of Tort, p. 169. An extreme instance is provided in *Lightly v. Clouston*, where the defendant had wrongfully taken the plaintiff's apprentice into his employment, and the plaintiff, instead of suing for seduction, successfully claimed in assumpsit against the defendant who had tortiously employed him.[13]

In *United Australia Ltd*. the House of Lords noted that historically, waiver of tort was seen as nothing more than a choice between possible remedies at a time when it was not permitted to combine remedies or to pursue them in the alternative.[14] The House of Lords held that the presumed exclusivity of the remedies was incorrect. Waiver of tort does not require a plaintiff to make an irrevocable election regarding the nature of his or her claim. Rather, the House of

[10] *Moses, supra* at p. 1008; Goff and Jones, *supra* at pp. 6-8.
[11] Maddaugh and McCamus, *supra* at pp. 24-11 – 24-14; see also: *United Australia Ltd. v. Barclays Bank Ltd.,* [1941] AC 1, [1940] 4 All E.R. 20 at pp. 35-37 (H.L.).
[12] Maddaugh and McCamus, *supra* at pp. 24-11 – 24-14; *United Australia*, *supra* at pp. 35-37.
[13] *United Australia, supra* at pp. 25-26.
[14] *Ibid.* at p. 26.

Lords concluded, waiver of tort was to be seen as an election of remedies which was available until such time as judgment was satisfied.[15]

3. Modernizing an Ancient Doctrine – Waiver of Tort and Class Proceedings

Recent class action jurisprudence has significantly altered the scope of the doctrine of waiver of tort. The discussion below canvasses a few of the seminal decisions that have emerged in this context.

The first significant decision with respect to waiver of tort in the class proceedings context was the decision of Justice Cullity in *Serhan v. Johnson & Johnson*.[16]

In *Serhan*, Justice Cullity refused to certify an action based on the nominate torts of negligence, negligent and fraudulent misrepresentation, breaches of the *Competition Act* and conspiracy, reasoning that the elements of causation and damages would have to be determined on an individual basis. However, he certified the proceeding on the basis of a "cause of action" grounded in waiver of tort.

Serhan involved a class action brought against the manufacturer of a blood glucose test. The defendant allegedly distributed the product at a time when it knew the tests were faulty. In order to bring the product to market, the defendant was alleged to have submitted false reports to the FDA in the United States. The evidence on the motion revealed that all of the members of the class had received the product free of charge from hospitals and diabetic clinics. The evidence also revealed that none of the class members had a contract with the defendant, and that none of the members of the class had suffered any damage apart from the pain involved in obtaining additional blood samples. Notwithstanding this, the plaintiffs sued to recover all the revenues the defendant had received by distributing the blood tests.

Adjudicating on this issue, Justice Cullity noted that in order to succeed on the certification motion, the defendant had to show it was "plain and obvious" that the claim in waiver of tort based on conspiracy had no chance of success. Justice Cullity concluded that this test was not

[15] *Ibid.*
[16] [2004] O.J. No. 2904, aff'd [2006] O.J. No. 2421 (Div. Ct.). Leave to appeal to the Ontario Court of Appeal refused without reasons (16 October, 2006); leave to appeal to the Supreme Court of Canada refused (12 April 2006).

met, and that the cause of action in waiver of tort should be certified.[17] The defendants subsequently were granted leave to appeal this decision to the Divisional Court.

Upholding Justice Cullity's decision, the Divisional Court held as follows: "the law with respect to this issue has not been authoritatively settled. Clearly, it cannot be said that an action based on waiver of tort is sure to fail."[18]

In so doing, a majority of the Divisional Court (per Justice Epstein) placed much reliance on Maddaugh's and McCamus' discussion in *The Law of Restitution,* where the authors argue that waiver of tort should be an independent cause of action.[19] The Divisional Court held that it was not plain and obvious that the claim should not succeed, and, accordingly should not be struck on a preliminary basis.

Another relevant case is the decision of the Ontario Superior Court of Justice in *Heward v. Eli Lilly & Co.*[20] In *Heward*, the defendant was the manufacturer of the anti-psychotic medication Zyprexa. The plaintiff alleged that, to the knowledge of the defendant, the drug carried serious side effects, and that the defendant had failed to warn of these risks. The plaintiff's claim comprised damages for negligence. In the alternative, the plaintiff pleaded an entitlement to "waive the tort" claim in negligence, and instead elect to claim payment of the revenues collected by the defendant. Relying on his earlier decision in *Serhan*, *supra,* Justice Cullity noted:

> […] in certain circumstances, when tortious acts have been committed by a defendant, the person affected will be permitted to elect between the remedy of compensatory damages and an accounting for a disgorgement of profits. The tort is not waived in any meaningful sense as it provides the basis for whichever of the two remedies is chosen.[21]

Speaking to the controversy over whether waiver of tort should be conceptualized as a remedy or an independent cause of action, Justice Cullity observed:

> […] I am no longer satisfied that it is helpful – or even meaningful – to ask simply whether the concept is, or is not, a cause of action. A question framed in this manner may obscure the essential nature of the inquiry under section 5(1)(a) – namely whether the material facts that would, or could entitle the plaintiffs to a

[17] *Serhan, supra* at para. 46.
[18] *Serhan* (Div. Ct.)*, supra* at para. 68.
[19] *Ibid.* at para. 53.
[20] [2007] O.J. No. 404 (S.C.J.); aff'd, [2008] O.J. No. 2610 (Div. Ct.).
[21] *Heward, supra* at para. 24.

> disgorgement remedy have been pleaded. I believe it is likely to be even more confusing to ask whether waiver of tort is a cause of action.[22]

Justice Cullity further noted:

> There are two relevant issues relating to waiver of tort on which there appears to be no definitive authority that is binding on this court and on which the commentators are divided in their opinions. One is whether all of the elements of an actionable tort must be proven – including loss or injury. The second is whether the election is permitted only in the case of certain torts – such as, for example, intentional torts or those that affect a plaintiff's proprietary interests – or whether it will be available, at least *prima facie*, whenever a defendant was enriched as a result of its tortious conduct.[23]

With respect to the first issue, namely whether all of the elements of an actionable tort must be proven, including loss or injury, Justice Cullity noted that this issue was settled (for the purposes of pleadings) in *Serhan, supra*.[24] To that end, Justice Cullity observed that it was not plain and obvious that a claim based upon waiver of tort cannot succeed without proof of loss.

As for the second question, namely, identification of the tort to which waiver of tort applies, the defendants proposed that the inquiry should be guided by a distinction between two types of torts: "anti-harm wrongs" and "anti-enrichment wrongs".[25] Anti-enrichment wrongs would include the torts of conversion, detinue, trespass to land and chattels and deceit and it was the defendants' submission that waiver of tort was permissible with respect to these torts. Juxtaposed against "anti-enrichment" wrongs were "anti-harm wrongs", which would include negligence, nuisance, defamation, assault and battery. The defendants argued that waiver of tort was not permissible with respect to these torts (which would encompass most product liability claims).

The distinction proposed by the defendants in *Heward* with respect to "anti-enrichment" and "anti-harm" wrongs was suggested by Professor Peter Birks in his seminal treatise, *Unjust Enrichment*, 2nd ed., and was adopted by Justice Gerow in *Reid v. Ford Motor Co*.[26] Applying this conceptual distinction, Justice Gerow held that waiver of tort was not available in a case of negligence.

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[22] *Ibid.* at para. 31.
[23] *Ibid.* at para. 28.
[24] *Ibid.* at para. 29.
[25] *Ibid.* at para. 32.
[26] [2006] B.C.J. No. 712 (S.C.) [*Reid*].

In *Heward*, Justice Cullity rejected the holding of Justice Gerow in *Reid*, noting that he could not see the feasibility in classifying torts in the manner proposed by Professor Birks. He observed that there would have to be a solid policy reason for the distinction, but that the issue should more properly be resolved on the basis of a full factual record:

> […] there may well be important issues of policy to be considered when drawing the line between cases where a disgorgement remedy should be granted and those in which it should be denied. These are questions that must be surely confronted on the basis of a full factual record.[27]

Leave to appeal in *Heward* was denied on the question of whether the pleadings disclosed a cause of action in waiver of tort arising from negligence. However, leave was granted on the question of whether causation could be determined as a common issue.[28] On this point Justice Lederman noted:

> […] to say with any confidence that Eli Lilly would not have derived proceeds from the sale of Zyprexa (the "gain") but for its failure to sufficiently warn of its side effects (the "wrongful conduct"), the pleadings or evidence must at the very least support one of the following inferences: (1) the class members would not have agreed to take Zyprexa if properly warned of the risks associated with the drug, or (2) Zyprexa would not have been approved for sale if Health Canada was properly warned of the risks associated with the drug. Absent these inferences, it seems the only way to determine the amount for which the defendants could be ordered to account in waiver of tort is to investigate whether each member of the class would not have taken Zyprexa if properly warned. This is the antithesis of a common issue.[29]

Waiver of tort was also considered in *Peter et al v. Medtronic, Inc*. *et al*.[30] In *Medtronic*, the plaintiffs alleged that the defendants breached their duty to warn of a defect in the batteries contained in certain implantable cardioverter defibrillators and cardiac resynchronization therapy defibrillators, and were otherwise negligent in their design, testing, manufacture and distribution. The plaintiffs also alleged that the defendants conspired to conceal information relating to the potential battery shorting defect. The plaintiffs sought damages or, in the alternative, an accounting and disgorgement of revenues based on the doctrine of waiver of tort.

Considering the arguments under Section 5(1)(a) of the *CPA*, Justice Hoy noted that the law in Ontario is uncertain as to whether waiver of tort is an independent cause of action or only a

[27] *Heward, supra* at para. 48.
[28] See: [2007] O.J. No. 2709 (Div. Ct.) per Lederman J.
[29] *Ibid.* at para. 29.
[30] [2007] O.J. No. 4828 [*Medtronic*]; leave to appeal denied, [2008] O.J. No. 1916 (Div. Ct.).

choice of remedy after an actionable wrong has been established. To this end, Justice Hoy cited with approval the decision of the Divisional Court in *Serhan*, *supra*.[31]

In its submissions, counsel for Medtronic argued that the Divisional Court's decision in *Serhan* supported an argument that waiver of tort would not be available where the alleged wrongful conduct was negligence.[32] In particular, counsel from Medtronic pointed to a passage from *Serhan* where Justice Epstein distinguished the decision of the British Columbia Supreme Court in *Reid, supra*, which dismissed a claim for waiver of tort. Justice Epstein noted that several factors distinguished *Reid*, not the least of which was that the claim in *Reid* was framed in negligence, unlike the situation in *Serhan* where claims in fraud and conspiracy, in addition to negligence, were advanced.

Rejecting Medtronic's submission, Justice Hoy noted that Justice Epstein had cited Professor John McCamus who, in relation to disgorgement relief, observed that "the scope or ambit of the doctrine in terms of the list of torts for which disgorgement claims are possible remains a matter of some uncertainty." On this basis, Justice Hoy held that a claim based on waiver of tort for disgorgement of profits, arising out of negligence, is not certain to fail.[33]

It is important to note that Justice Hoy also relied on the decision of Justice Cullity in *Heward*, *supra*, to support her conclusion that a waiver of tort plea could be advanced when the underlying wrongful conduct was negligence. In that regard, Justice Hoy noted that in *Heward*, Cullity J. concluded that a deliberate breach of a duty of care was not a precondition to a disgorgement remedy and that the plaintiffs' claim to the disgorgement remedy was not bound to fail. She noted that while leave to appeal this decision to the Divisional Court was granted, leave was not granted on that issue.[34]

The issue of waiver of tort was considered again by Justice Cullity in *LeFrancois v. Guidant Corp.*[35] In *Guidant*, the plaintiffs sought general and punitive damages or, alternatively, a disgorgement of revenues or net income from the defendants in respect of alleged negligence and conspiracy relating to their development, marketing and sale of defibrillators. In its submissions under subsection 5(1)(a) of the *CPA*, counsel for the defendants submitted that disgorgement is an inherently equitable remedy that applies only to gains the defendant should

[31] *Ibid.* at para. 47.
[32] *Ibid.* at para. 48.
[33] *Ibid.* at para. 51.
[34] *Ibid.* at para. 52.
[35] [2008] O.J. No. 1397 (S.C.J.) [*Guidant*]; leave to appeal denied, [2009] O.J. No. 4464 (Div. Ct.).

not in good conscience be permitted to retain. Counsel for the plaintiffs responded that allegations with respect to the defendants' intentional and deliberate conduct could satisfy that test, and Justice Cullity accepted that submission. Specifically, Justice Cullity noted that "[i]f proven, the allegations of deliberate wrongful conduct might well be found to be egregious and cynical to a degree sufficient to shock the conscience of the court."[36] Rejecting the defendants' submission that a waiver of tort of negligence was not permitted in any circumstances, Justice Cullity cited the decisions of *Heward* and *Medtronic, supra*.[37]

Leave to appeal Justice Cullity's decision in *Guidant* was sought and denied.[38]

Justice Cullity considered the issue of waiver of tort again in *Tiboni v. Merck Frosst Canada Ltd.*[39] This action involved Vioxx, a pain reliever and anti-inflammatory drug that was developed, manufactured, marketed and sold in Canada by the defendants. It was approved for sale by Health Canada in October of 1999, and until its withdrawal by Merck in 2004, it was available in Canada as a prescription medicine for the treatment of osteoarthritis, rheumatoid arthritis, dysmenorrhoea and acute pain. Within days of its withdrawal, class proceedings were commenced on behalf of users of the drug in most of the Canadian provinces with class proceedings legislation.[40]

In their statement of claim, the plaintiffs sought damages in negligence against the defendants and, in the alternative, an order for disgorgement of revenues received from the sale of Vioxx in Canada. The plaintiffs alleged that Vioxx was a dangerously defective medication, in that its use carried an increased risk of cardiovascular events such as heart attacks and strokes. The plaintiffs asserted that the defendants, acting in concert, were negligent in the design, development, testing, manufacturing, distribution and sale of the drug in Canada They further alleged that the defendants knew or ought to have known of the cardiovascular risks associated with Vioxx some years before the drug was marketed in Canada, that the defendants downplayed or concealed the relevant information from physicians and the public and regulatory authorities, and that they continued to market and distribute the drug as safe and effective when evidence of the risks continued to accumulate.

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[36] *Ibid.* at para. 49.
[37] *Ibid.* at para. 50.
[38] [2009] O.J. No. 36 (Div. Ct.).
[39] [2008] O.J. No. 2996 (S.C.J.) [*Merck*].
[40] *Ibid*. at para. 1.

The defendants objected to the pleading of the disgorgement remedy based on waiver of tort. Specifically, they argued it was deficient in that it ignored the possibility that the relevant laws of other provinces and territories may not be the same as those of Ontario. They also argued that the waiver of tort plea was essentially an invitation to depart from the approach taken in other decisions.[41]

In adjudicating this issue, Justice Cullity explicitly rejected the defendants' contention that the absence of fraud or wrongdoing sufficient to give rise to a disgorgement remedy distinguished this case from *Serhan*. Justice Cullity noted the statement of claim's allegation that, in order to maximize its profits, Merck had engaged in a strategy of misinformation and made representations with respect to the safety of the drug that it knew or ought to have known were false. It was further alleged that, despite having received clear evidence of the cardiovascular risks associated with Vioxx, Merck had not included Health Canada information relating to the risks. The plaintiffs further alleged that Merck issued a press release in April of 2000 which denied the existence of the risks and thereafter continued to downplay and conceal them.[42] Justice Cullity noted that this conduct also was alleged to have been sufficiently deliberate and callous, with intentional disregard for the safety of consumers, to warrant punitive damages. In the circumstances, Justice Cullity noted it was not "out of the question" that the alleged conduct might support a claim for disgorgement.[43]

It is interesting to note that, in this case, Justice Cullity also turned his mind to issues concerning the way in which the restitutionary remedy would apply to members of various segments of the plaintiff class. Specifically, Justice Cullity noted:

> Issue 5 dealing with waiver of tort is acceptable subject to a few changes to cover the possibility that a disgorgement remedy might be granted with respect to only part of the revenue, or net income, for the benefit of one or more subclasses. In this connection, I note the comments of Cumming J. in the Divisional Court in *Heward*, at paragraphs 33 and 40:
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> > 33. The CPA provides a flexible mechanism for a common issues judge to modify the claim based on the evidence before him or her. In *Medtronic*, Hoy J. noted on this particular issue, as we do here that "it is open to the common issues judge to create a 'waiver of tort' subclass, or even subclasses, crafted with regard to his or her findings as to the boundaries of the doctrine of waiver of

[41] *Ibid.* at paras. 58-59.
[42] *Ibid.* at para. 61.
[43] *Ibid.*

> tort and remedy of disgorgement, including the requisite causal link." It is also open to the common issues judge to decertify common issues if he or she sees fit.
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> 40. Restitutionary relief may be available in class proceedings even in the case where only a portion of a class are victims of the wrongful conduct. See *Markson v. M.B.N.A. Canada Bank*, 2007 ONCA 344 (CanLII), 2007 ONCA 344 (CanLII). Subsections 24 (2) and (3) of the CPA afford the court a flexible mechanism for receiving and resolving individual claims in order to give effect to an aggregate damages award. This mechanism could be utilised in dealing with individual claims where an aggregate award is based upon restitution rather than damages.

> Subclasses could also be created if the defendants are successful in establishing at trial that there are material differences in the law relating to the disgorgement remedy in different Canadian jurisdictions.[44]

4. Waiver of Tort on Trial

(a) Framing the Issues

It is against the significant jurisprudential history set out above that waiver of tort was argued on the basis of a full evidentiary record in the *Andersen* trial.

In November 2009, the plaintiffs moved before Justice Lax to amend their statement of claim to plead waiver of tort and to amend the certification order to include waiver of tort as a common issue. Prior to the amendment, the claim set forth a series of detailed allegations concerning the defendants' negligence in relation to the categories of conduct alleged, namely: negligent pre-market research, development, design and testing; negligent manufacture; negligent distribution and sale; and failure to warn/recall. The proposed amendment with respect to waiver of tort provided as follows:

> As a result of the defendants' conduct described herein, the plaintiffs reserve to themselves the right to elect at the trial of the common issues, or subsequently as the common issues judge may direct, to waive the tort of negligence and to have the damages assessed in an amount equal to the gross revenue received by the defendants, or alternatively, the net income received by the defendants as a result of the sale of the Silzone coated heart products.

The plaintiffs also sought leave to amend their prayer for relief in order to include a claim for:

[44] *Ibid*. at paras. 91-92.

> damages assessed in an amount equal to the gross revenue, or in the further alternative, damages assessed in an amount equal to the net income received by the defendants as a result of the sale of the Silzone coated heart products as established by an accounting, if necessary.

At the motion, heard on December 30, 2009, the defendants did not dispute that, for the purposes s. 5(1)(a) of the *CPA*, Ontario courts repeatedly have recognized waiver of tort as a cause of action. Rather, the defendants opposed the motion to amend on three broad grounds: first, that the motion was brought "on the eve of trial"; second, that the proposed amendments would fundamentally change the nature of the action; and third, that the defendants would be prejudiced if the amendments were allowed.

Rejecting these arguments, Justice Lax allowed the plaintiffs' motion. With respect to the defendants' argument regarding the timing of the amendment, Justice Lax noted that this argument had "little merit". She held that Rule 26 clearly contemplates that pleadings may be amended on a motion at any stage of an action, and noted that amendments frequently are granted on the "eve of trial".[45]

With respect to the defendants' submission that amending the claim to include a plea of waiver of tort would fundamentally change the nature of the action, Justice Lax again disagreed. She noted that the submission ignored that the waiver of tort claim, like the negligence claim, was "entirely focused on the defendants' conduct and alleged wrongdoing."[46] She noted that all of the material facts giving rise to waiver of tort had been pleaded with respect to the negligence claim and that there had been full discovery in that regard. She observed that what was being proposed was an alternative theory of liability based on the same factual matrix.[47] Further, the same evidence would be relied on to support or deny the waiver of tort claim. She noted that "while waiver of tort may be found to expand the basis for liability or remedy and has the potential to recognize new categories of wrongdoing, the action remains one where the plaintiffs must prove that the defendants' conduct was wrongful in order to establish liability whether in negligence or waiver of tort." Accordingly, Justice Lax held that the proposed amendments did not "fundamentally change the nature of the action" as suggested by the defendants.[48]

Finally, with respect to the argument suggesting prejudice to the defendants, Justice Lax noted that she was not convinced that prejudice would accrue. However, Justice Lax did afford the

[45] *Andersen v. St. Jude Medical Inc.* [2010] O.J. No. 8 (Ont. S.C.J.) at para. 11.
[46] *Ibid.* at para. 12.
[47] *Ibid.* at para.12
[48] *Ibid.* at para.12

defendants the opportunity of seeking a brief adjournment, which was subsequently sought and granted.

With respect to the certification order, the plaintiffs proposed the following additional common issues:

- Can all or part of the Class elect to have damages determined through an accounting and disgorgement of the proceeds of the sale of the mechanical heart valves, or annuloplasty rings coated with Silzone?
- If part, but not all, of the Class can so elect, which part or parts of the Class can so elect?
- If all or part of the Class can so elect, in what amount and for whose benefit is such an accounting to be made?

Justice Lax concluded she was satisfied the plaintiffs were entitled to have the certification order amended pursuant to s. 8(3) of the *CPA* to include the common issues set out above. She noted, however, that further discovery and hearing related to the last additional common issue would be deferred pending judgment of the common issues trial on the scope and application of waiver of tort contemplated by the other two additional common issues.[49]

(b) Evidence of Professor Trebilcock

In support of their submissions regarding the policy factors militating against recognition of waiver of tort in Canadian law (discussed in greater detail below), the defendants led expert opinion evidence from Professor Michael Trebilcock, a Professor of Law and Economics with the Faculty of Law, University of Toronto.

Professor Trebilcock was asked to provide his opinion with respect to the following questions in response to the additional common issues:

- Do law and economic policy considerations support a plaintiff's entitlement to seek disgorgement of the defendant's gross revenues, or alternatively, net income in a product liability case based on the doctrine of waiver of tort? If so, why? If not, why not?
- In what context, if any, could a plaintiff's entitlement to waive the tort be supported based on law and economics policy analysis?

[49] *Ibid.* at para.27

The plaintiffs challenged Professor Trebilcock's evidence under the *Mohan* criteria governing the admissibility of expert evidence. This challenge was the subject of a mid-trial evidentiary ruling.[50] Justice Lax determined that she would hear Professor Trebilcock's evidence prior to making a ruling.

The plaintiffs' objection opposed Professor Trebilcock's evidence based on three of the four criteria under the *Mohan* framework. (The plaintiffs conceded that Professor Trebilcock was a duly qualified expert.)

First, the plaintiffs argued that Professor Trebilcock's evidence was subject to an exclusionary rule, as he was attempting to proffer an opinion on domestic law. (This is prohibited pursuant to the rules governing expert evidence.) Second, the plaintiffs argued that Professor Trebilcock's evidence did not satisfy the "relevance" criterion under the *Mohan* analysis. (The plaintiffs argued that Professor Trebilcock's opinion was not related to any factual matter before the court. Nor were his conclusions based on any proven facts. Rather, they were based on his experience as a law and economics scholar.) Finally, the plaintiffs argued that Professor Trebilcock's opinion did not satisfy the necessity criterion under *Mohan*. (In that regard, the plaintiffs argued that law and economic policies could be sufficiently addressed in legal argument, and did not require expert evidence.)

In her ruling released following Professor Trebilcock's evidence, Justice Lax found that the criteria for the admission of expert evidence pursuant to the *Mohan* framework had been satisfied. With respect to the plaintiffs' argument regarding the applicability of an exclusionary rule, Justice Lax held that Professor Trebilcock's evidence did not purport to address the availability of waiver of tort as a matter of law in product liability cases. Rather, she found that his evidence described the potential economic impacts or implications. She held that his evidence was more properly characterized as "social science evidence."[51]

With respect to the relevance criterion, Justice Lax held that this social science evidence could provide a context for the assessment of waiver of tort as an independent cause of action. Specifically she noted:

> […] social science evidence based on specialized knowledge gained through experience and study that is tendered to provide the court with a context to

[50] See the decision of Justice Lax regarding this issue: [2011] O.J. No. 1956.
[51] *Ibid.* at para. 7.

> assess some of the factual evidence that the court has heard about standards for product development of innovative technologies. […] It is logically connected to the determination of common issues related to recognition of the waiver of tort doctrine – a doctrine that can provide a measure of damages that is not the typical remedy in a negligence case and that requires a policy analysis.[52]

With respect to the necessity criterion, Justice Lax noted that Canadian courts have recognized the value in having experts testify on the societal and economic consequences of proposed changes in the law. The determination of novel legal issues has the potential for broad societal impact and is best assessed with evidence.[53]

Accordingly, the evidence of Professor Trebilcock was admitted.

(c) Waiver of Tort – Submissions of the Plaintiff Class

At trial, the submissions of the plaintiff class with respect to waiver of tort were anchored around three key arguments. First, the plaintiffs submitted that waiver is tort is an independent cause action that is not parasitic or contingent on an underlying predicate tort. Accordingly, in the context of a negligence action, proof of damages is not required, as the focus of this restitutionary remedy is the defendants' gain and not the plaintiffs' loss. Second, the plaintiffs stated that their contentions with respect to waiver of tort were to be circumscribed to their application in the context of the relationship between a manufacturer of a permanently implantable medical device and a patient. Finally, the plaintiffs submitted that disgorgement of the defendants' profits should be limited to the cost of the devices implanted in the individual class members.

With respect to the first argument, the plaintiffs submitted at trial that waiver of tort is an independent cause of action available in negligence cases, and not dependent on the existence of an underlying tort. Rather, waiver of tort is potentially available whenever a defendant obtains profits from tortious or wrongful conduct, regardless of whether this wrongful conduct is the basis of an action in tort where waiver of tort traditionally has been recognized.

These submissions were premised on the approach taken by the Supreme Court of Canada in developing a principled approach to the law of restitution as it relates to unjust enrichment and constructive trusts. In keeping with this approach, the plaintiffs argued that the court must

[52] *Ibid*. at para.12.
[53] *Ibid*. at para.25.

consider the underlying principles of waiver of tort which encompass good conscience, fairness and equity.

With respect to the possible characterization of waiver of tort as parasitic, the plaintiffs submitted that was an historical anomaly that now should be rejected. Rather, waiver of tort, as a form of restitution for wrongful or tortious conduct, should be founded on the principles underlying restitution. The plaintiffs argued that it would be inconsistent with the Supreme Court of Canada's approach to the development of those principles to view waiver of tort as being restricted to specific wrongs for which a disgorgement remedy has been available in the past.

In support of this proposition, the plaintiffs cited the long line of certification decisions that have canvassed this issue. This included the decision of Justice Epstein in *Serhan* (discussed above), where it was noted that Maddaugh and McCamus, along with Professors Beatson and Friedmann, argue that waiver of tort is an example of general restitutionary principles:

> Friedmann adds his support to Beatson, rejecting the parasitic theory, which "envisages a process under which developments in the law of torts (or equitable wrongs) must always precede those in the law of restitution." The independence theory "assumes that developments within the law of restitution may lead to recognition of new interests as worthy of protection, even if they are not protected against damage caused by their infringement or if the protection afforded by another branch of the law does not extend to the particular invasion which occurred."[54]

The plaintiffs' submissions with respect to waiver of tort also attempted to clarify the modern "confusion" surrounding the doctrine by reference to its historical roots. Citing Professor Beatson, the plaintiffs submitted that the origin of the view that waiver of tort is parasitic and not an independent cause of action was probably linked to the discredited implied contract theory of quasi-contract. It was the influence of the implied contract theory "with its tendency erroneously to require that all quasi-contractual actions be founded upon a genuine implied contract, [which] might lead to assertions that the 'waiver' action is, in substance, an action in tort." The plaintiffs further relied on Beatson's conclusion that there are "good reasons for treating [waiver of tort] as an entirely different claim – a restitutionary claim". As a restitutionary claim, waiver of tort is not parasitic, but an independent claim based in restitution, a proposition which Beaton asserted was supported by the case law.

[54] *Serhan* (Div. Ct.), *supra* at para. 56.

The plaintiffs submitted that the historic limitation of waiver of tort to certain predicate torts and claims for liquidated damages only serves to obscure the independent nature of waiver of tort as a remedy based in restitution. In cases where courts have ordered an accounting of revenues (and the disgorgement of gains), the focus has been on the defendant's gain and not the plaintiff's loss. The fact that gains may match the losses is coincidence. The plaintiff's entitlement to an accounting of profits, however, is not dependent on the plaintiff's losses.

Further, the plaintiffs submitted that any conclusion that waiver of tort is dependent on proving not only the underlying wrongful conduct constituting a tort, but also on proving all elements of the cause of action in tort, including damages, unduly would restrict the development of waiver of tort as a restitutionary remedy. It effectively would subsume waiver of tort into the doctrine of unjust enrichment, making waiver of tort dependent on proof of the plaintiff's loss and a corresponding gain by the defendant.

Finally, the plaintiffs submitted that the proposed restriction of waiver of tort analysis to certain limited torts is not borne out by the jurisprudence. In that regard, the plaintiffs noted that courts in the United Kingdom and United States have long granted restitutionary remedies as an alternative to tort damages.

The plaintiffs proposed that the following conditions given rise to a presumptive remedy based on waiver of tort. The framework is premised on the decision of the Supreme Court of Canada in *Soulos v. Korkontzilas*:[55]

(1) The defendant (a) breached a duty owed to the plaintiff which is otherwise recognized and enforceable at law; or (b) breached some other right of the plaintiff which it knew or should have known would breach this duty;

(2) The defendant engaged in conduct which it knew or should have known would breach this duty or violate the plaintiff's rights and, as a direct result, realized a profit or other benefit from this wrongful conduct;

(3) The plaintiff can show a legitimate reason to claim a proprietary or personal remedy resulting in the disgorgement of property or profits gained through the defendant's breach of its duty;

(4) There are no other factors that would make it unjust to impose either a constructive trust over the defendant's gain or to require the defendant to account for and disgorge those gains.

[55] [1997] 2 S.C.R. 217 [*Soulos*].

A second key element of the plaintiffs' argument was the submission that the ultimate scope of waiver of tort need not be determined in the context of this trial. Rather, the plaintiffs submitted that the only finding they were seeking was the recognition of the availability of a remedy based in waiver of tort in the context of the relationship between the manufacturer of a permanently implantable medical device and a patient.

The plaintiffs' submissions with respect to this issue focused on the high degree of vulnerability that inheres in this relationship; a vulnerability that the Supreme Court of Canada has recognized through the imposition of a high duty of care. The plaintiffs submitted that this unique relationship mandates the court's intervention.

In support of their position, the plaintiffs pointed to the fact that the Supreme Court of Canada repeatedly has noted the particular vulnerability of patients who receive vaccines, medical devices and pharmaceuticals. For instance, in *Hollis v. Dow Corning,*[56] the Supreme Court recognized that manufacturers of medical devices are subject to a duty of care that corresponds to the greater capacity their products have to harm consumers. The intimate relationship between medical products and the resulting risk posed to consumers requires manufacturers to discharge a high standard of care in the design of their products and in the information they disclose regarding the potential risks posed by their products. At stake is the individual autonomy of the patient, his or her right to know the risks involved in undergoing medical treatment, and the right to make meaningful decisions based on a full understanding of such risks.[57]

Underlying these concerns is recognition that the relationship between the manufacturer of a medical device and a patient receiving the device is one marked by vulnerability and "complete dependency" on the manufacturer's knowledge and disclosure of risks. Manufacturers control this information, in part, to promote their products and to increase sales. Yet it is this very information that "often establishes the boundaries within which a physician determines the risks of possible harm and the benefits to be gained" by the patient.

The plaintiffs also pointed to the decision of the Supreme Court in *Hodgkinson v. Simms*[58] where Justice LaForest noted that:

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[56] [1995] 4 S.C.R. [*Hollis*].
[57] *Ibid*. at para. 23.
[58] [1994] 3 S.C.R. 377 [*Hodgkinson*].

> From a conceptual standpoint, the fiduciary duty may be properly understood as but one species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship but it is an important indicium of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.[59]

The plaintiffs argued that the dependency of patient class members on St. Jude meeting the standard of care was profound. The patient class members were not only completely dependent on St. Jude's decision to disclose risks, they were completely dependent on St. Jude's decision-making process at every step of the design, manufacture and testing of the Silzone Valve, as well as the completeness of its disclosure to regulators and implanting cardiac surgeons. The plaintiffs therefore argued that the relationship between patients and manufacturers of medical devices, while not a fiduciary relationship, has "fiduciary-like" aspects and met the "rough and ready" test for fiduciary relationships set out in *Frame v. Smith*.[60]

Addressing the policy concerns suggested by the defendants, the plaintiffs argued that a waiver of tort remedy does not undermine the purpose of the law of negligence. The aims of restitution and tort law are different, and proceed from different policy considerations. The theoretical risks of "decoupling" liability from actual harm suffered by a plaintiff is not a primary policy concern in the law of restitution, and will not undermine the law of negligence. A waiver of tort remedy is unlikely to be available in most cases involving negligence. Further, in the rare instances where a waiver of tort remedy may be available, it will serve as a further deterrent to negligent behaviour. The plaintiffs submitted that, as a matter of policy, the courts should not encourage manufacturers to take unreasonable risks in circumstances where, due to the complexities of establishing causation, it is unlikely that every individual harmed by a defective product will be able to successfully sue for compensation. Similarly, manufacturers should be encouraged to avoid designing and manufacturing products which pose an unreasonable risk of harm to consumers, rather than count on good fortune if no one is injured.

With respect to this aspect of the argument, the plaintiffs emphasized that the recognition of waiver of tort in the context of the relationship between a patient and the manufacturer of a permanently implantable medical device should be conceptualized as an incremental step in the

[59] *Ibid*. at para. 25.
[60] [1987] S.C.J. 49 at paras. 59-63.

law of restitution. To this end, the plaintiffs noted that what was being proposed was simply a "dusting off" of a doctrine that had existed for centuries and its application to a new set of circumstances.

A third key argument advanced by the plaintiffs was that the ability to disgorge the defendants' profits would be limited to the net profit accrued to the defendant with respect to the specific valve or valves implanted in the patient. This would address concerns regarding indeterminate liability and also countered any argument that a small number of class members could disgorge all profits with respect to the product, thereby creating inequity across jurisdictions.

(d) Waiver of Tort - Submissions of the Defendant, St. Jude Medical Inc. et al.[61]

For their part, the defendants' complete and very able submissions regarding waiver of tort were founded on traditional notions of liability, rooted in the elements of tort law.

One of the central arguments advanced by the defendants was the suggested principle that conduct below the standard of care is not wrongful if it causes no injury. The defendants argued that "to the extent that waiver of tort would permit a plaintiff to seek disgorgement of a defendant's net revenues or profits in a negligence case without proof of loss or a corresponding deprivation on the part of the plaintiff, it would vastly expand the categories of actionable wrong in Canadian law." Responding to commentators who suggest that a plaintiff should be entitled to an accounting and disgorgement of a defendant's gain in any case where tortious conduct has produced a profit, the defendants submitted that this was not the law in Canada. Rather, the defendants argued that the need to establish an underlying tort, including proof of loss, remains an essential aspect of a plaintiff's cause of action in Canadian law.

Adopting the views of other academic commentators, the defendants submitted that the law of restitution in Canada has not evolved to the point where a claim to a defendant's wrongful gain will be allowed without (i) a proprietary tort; or (ii) the tripartite test for unjust enrichment being established.

The defendants argued that, while the Supreme Court of Canada has allowed the proprietary remedy of a constructive trust in narrow circumstances, (e.g., where the plaintiff cannot establish a corresponding deprivation but where a fiduciary or equitable relationship exists

[61] Much of the text in this aspect of the paper is taken from the defendants' written submissions regarding waiver of tort.

between the parties and "good conscience" requires it), the factors articulated by the majority of the Supreme Court of Canada in *Soulos* do not apply to a plaintiff's claim for a disgorgement remedy based on the doctrine of waiver of tort.

Further, the defendants submitted that, even if *Soulos* could be seen as providing policy guidance on when a disgorgement remedy may be available generally in Canadian law, the majority in *Soulos* was clear that an equitable relationship would need to be established before considering whether such a remedy was appropriate. The defendants contended that *Soulos* was not a negligence case, but instead dealt with the need to deter fiduciaries from breaches of their professional responsibilities in connection with a claim to an interest in real property. The defendants argued that there accordingly were strict limits on "policy-based" disgorgement.

Based on the foregoing, the defendants argued that the plaintiffs could not satisfy the requisite elements for a disgorgement remedy as they had not pleaded nor established a proprietary tort, and also could not establish a "corresponding deprivation or loss" under the tripartite test for unjust enrichment. In particular, the defendants argued that the plaintiffs did not have a proprietary or other legally recognized interest in the revenues generated from St. Jude Medical's sale of the Silzone valves, and therefore did not have a claim to any profits St. Jude Medical may have received from that sale.

The defendants further submitted that the plaintiffs had not suffered any deprivation, (as no class members paid for their Silzone valves), and that the "vast majority of the plaintiffs received a life saving benefit from their valve."

With respect to the plaintiffs' submission that the relationship between a manufacturer of a permanently implantable heart device and a patient was "quasi-fiduciary" in nature, the defendants argued that this argument risked "debasing" the concept of a fiduciary; e.g., by creating equitable obligations for a vast array of product manufacturers where such obligations traditionally have not existed in law, and should not exist for compelling policy reasons.

Finally, the defendants argued that regardless of whether waiver of tort could be conceptualized as an independent cause of action, the plaintiffs would need to establish that St. Jude Medical's alleged "wrongful conduct" caused its "wrongful gain". The defendants argued that the plaintiffs had not discharged this evidentiary burden.

In addition to the legal arguments advanced, the defendants also put forward various suggested policy reasons militating against expansion of the law with respect to waiver of tort, or recognition of a disgorgement based remedy in a product liability negligence case:

a. Allowing the concurrent availability of a disgorgement remedy in a product liability negligence case would not accord with the prevailing rationale in negligence cases that a plaintiff only should be compensated for his or her damages; i.e. "returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position."

b. The plaintiffs allegedly failed to lead any policy evidence to explain why waiver of tort should be available in a product liability negligence case.

c. If a disgorgement remedy was permitted in this context, it would vastly expand the categories of actionable wrongdoing in Canadian law, and therefore represent a fundamental shift in the common law not in accord with the sound principle that judicial changes to the common law should be slow and incremental in nature. According to the defendants, applying waiver of tort in a negligence case would represent a major sea-change in the law that, if warranted, was best left to the Legislature.

In response to these suggested rationales, the plaintiffs pointed out that the defendants' policy arguments were not premised on any compelling body of evidence. The studies relied on by Professor Trebilcock spoke to the American and not the Canadian context. Further, many of the concerns expressed with respect to indeterminate liability would be ameliorated by the plaintiffs' submission that disgorgement be limited to the profits earned by St. Jude with respect to the individual devices that had been implanted. Finally, the plaintiffs noted that similar concerns had been expressed with respect to the recognition of punitive damages in Canada, but such damages had not suppressed or diminished innovative technologies or industry generally.

5. Conclusion

As the discussion above illustrates, there is good reason for the significant anticipation surrounding release of the decision in *Andersen* with respect to waiver of tort. The decision has the potential to answer many questions that, for decades, have captivated the attention of leading academic commentators and class proceeding jurists. These questions include the

viability of waiver of tort as an independent cause of action, the recognition of its application in product liability cases involving manufacturers of permanently implantable medical devices, and the method of quantification with respect to the disgorgement remedy. The decision also has the potential to re-affirm a principled approach to the law of restitution and its underlying values, including good conscience and fairness.

Whatever the outcome, the decision of Justice Lax in *Andersen* will represent a milestone in the development this centuries-old doctrine and will set the framework for the further development of waiver of tort in Canada.