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ARTICLE

An Oxymoron Becomes a Misnomer – The Waiver of Tort Debate Rages on in Newfoundland

Writing for the majority of the Newfoundland Court of Appeal, Justice Green has recently provided welcome elucidation of the ever-elusive "waiver of tort" doctrine within the context of class action proceedings. In *Atlantic Lottery Corporation Inc. v. Babstock*, the Court addressed the intractable debate of whether "waiver of tort" constitutes an independent cause of action or a remedy and, incidentally, whether such determination can be made at the certification stage of a class action without the benefit of a full factual record.

In the past, other courts have been reticent to decide the issue at a pleadings or certification stage, without the benefit of a full factual record as it "involves matters of policy that should not be determined at the pleadings stage" (see, for example, *Serhan Estate v. Johnson & Johnson*, 85 O.R. (3d) 665 (Div. Ct.), leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd. [2006] S.C.C.A. No. 494). According to the Newfoundland Court of Appeal, the answer is that waiver of tort is a cause of action and — apparently — that no full factual record is needed to make that determination.

In *Babstock*, the claimants alleged that video lottery terminals were deceptive. Among other causes of action, they alleged negligence on the part of the gaming corporation that operated the terminals, but did not claim any specific damages. Instead, they claimed to "waive" the tort of negligence in favour of a claim to "a remedy in restitution", so as to ensure that the appellant Lottery Corporation "should retain no benefit from the breaches pleaded." Additionally, the claimants pleaded waiver of tort as a separate cause of action which, as the Court noted, in itself attracts remedies of constructive trust, disgorgement, and accounting. Justice Green concluded that the application judge did not err in deciding not to strike the claims based on waiver of tort (or, as Justice Green re-labelled them, "claims based on unjust enrichment gained by alleged tortious wrongdoing"), as it was not plain and obvious that such claims could not succeed (the standard under the first requirement of the test for certification).

Justice Green pointed out that the waiver of tort analysis "is in some respects affected by terminological and conceptual confusion and inconsistency, not only in the pleadings and in the arguments that have been presented, but also in the case law and academic writings in the area." Accordingly, Justice Green provided the following definitions:

"[94] I propose therefore to limit the use of the term *restitution* to situations where the remedy includes the *reversal of a transfer* of wealth from the defendant to the claimant. I will use the term *disgorgement* to describe the remedy that involves the award to the claimant of a benefit acquired by the defendant from a source that does not necessarily include a deprivation to the claimant. The term *unjust enrichment* can describe any enrichment of the defendant, however that enrichment is derived, and which a court determines to be *unjust*, thus justifying either a restitutionary or disgorgement remedy."

Justice Green further noted that "the law has progressed to the point where it is reasonable to conclude that, depending on proof at trial, a court could find on the facts as pleaded that a claim for disgorgement is actionable.... based on unjust enrichment of the appellant as a result of tortious wrongdoing." Such a claim, where it is based on a claim of negligence, does not depend on proof of damage to individual tort victims. Proving a breach of a duty of care, *i.e.* the "wrong that forms the basis of the tort", is sufficient.

Waiver of tort has often been described by legal commentators as an oxymoron. In *Babstock*, Justice Green concluded that "waiver of tort" "is now a misnomer" causing "much confusion in current jurisprudence on the subject" and that it "does not depend on an artificial concept of "waiver" (*i.e.* a giving-up of a fully independently-actionable tort in favour of another claim), but on separate wrongful conduct leading not to injury to the claimant but to the unjust acquisition of a benefit." Accordingly, proclaiming that the "time has come to jettison the terminology of waiver of tort", Justice Green effectively moved to recognize waiver of tort as a separate cause of action that allows for a restitutionary or disgorgement remedy where certain defined circumstances apply.

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