

Damages in Waiver of Tort

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Introduction

This paper aims to answer one question: what does waiver of tort allow a plaintiff to recover? While the approach outlined in this paper is not settled law (there is very little in the waiver of tort that *is* settled law), it is an approach that is fair to both plaintiff and defendant, and one that makes contextual and logical sense.

Waiver of tort allows a plaintiff to recover the gain/benefit obtained by the defendant as a result of his/her wrongdoing. Nothing more, nothing less. Waiver of tort does not seek to compensate a plaintiff for his/her loss. Nor does it seek to remedy a loss by restoring to the plaintiff the defendant's corresponding gain. Nor yet does it seek to punish a defendant for wrongdoing. Instead, waiver of tort seeks to prevent a defendant from benefiting from his or her wrongdoing by compelling the disgorgement of the resulting gain. Thus, the amount that can legitimately be claimed in waiver of tort is the amount of the defendant's benefit or gain, net of any reasonable expenses the defendant incurred in order to obtain that gain.

The first part of this paper contains a very brief explanation of the historical development of waiver of tort, which is necessary in order to understand the gain-based nature of the relief. The second part explains how 'disgorgement damages' in waiver of tort differ from compensatory, punitive, and even restitutionary damages in unjust enrichment. The third part provides a practical illustration of how disgorgement in waiver of tort should work.

(i) What is waiver of tort?

Waiver of tort has existed since the 17th century. It originated as a somewhat desperate effort to find a contractual basis for what was essentially a restitutionary claim, before the concept of restitution was recognized.

The doctrine's origin lies in the expression 'waiver of tort and suit in *assumpsit*'. *Assumpsit* was the historical antecedent of many modern common law 'quasi-contract' restitutionary claims. When waiver of tort first came into being, the idea was that the plaintiff had to genuinely 'waive' the tort in order to bring a claim in *assumpsit*. By waiving the tort, the plaintiff would actually ratify the defendant's conduct, thereby creating a quasi-contractual relationship which allowed the claim in *assumpsit*. The court could then hold that the defendant had acquired the benefits on the plaintiff's behalf. Of course, this was all an elaborate fiction. In *United Australia, Ltd. v. Barclay Bank*, [1940] 4 All E.R. 20, the House of Lords recognized that so-called 'waiver of tort' does not require the plaintiff to waive a tort claim or ratify the defendant's tortious conduct.¹

Waiver of tort is thus a misleading name for a doctrine that enables the victim of tortious conduct to obtain disgorgement of benefits rather than compensatory damages. As Professor McCamus explains, "the basic idea of a waiver of tort claim is a simple one. Suppose that a defendant converts the plaintiff's property and later sells it at a profit. In tort, the damages are the value of the property at the time of the conversion. If, however, the defendant has sold at a price in excess of the value, a disgorgement or waiver of tort claim would allow the plaintiff to recover

¹ *Hill v. Perrott* (1810), 3 Taunt. (274) 109; *Abbotts v. Barry* (1820), 2 Brod. & B. (368) 1009 at p. 1010; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20 (H.L.) at pp. 29-30; J.D. McCamus, "Restitution as an Alternative to Damages in Contract and Tort", in [2005] Special Lectures of the Law Society of Upper Canada: The Modern Law of Damages (Toronto, Irwin Law, May 2006), pp 123-151.

the defendant's windfall and claim the full proceeds of the defendant's sale.”² So the plaintiff does not have to ‘waive’ the tort; rather, s/he pursues the tort claim and then elects to ‘waive’ the remedy of damages, claiming instead the defendant’s wrongfully obtained benefit.³

The law on waiver of tort is far from settled in Canada. There remains disagreement as to whether waiver of tort is simply an alternative remedy to damages in tort, or whether it stands as an independent cause of action. This matters because if waiver of tort is no more than a remedy, the plaintiff will always have to prove a complete tort (duty of care, causation, damages) in order to obtain disgorgement. If waiver of tort is an independent cause of action, disgorgement of wrongfully-obtained benefits might be available even in situations where the wrongful conduct has caused no actual harm to the plaintiff.⁴

There is also considerable debate as to what kinds of tortious conduct give rise to waiver of tort. One school of thought states that waiver of tort is available only in ‘proprietary torts’ or ‘anti-enrichment’ torts, such as conversion or trespass; it would therefore have no application to ‘personal’ or ‘anti-harm’ torts such as negligence, nuisance, assault, or battery.⁵ Another school of thought argues that this distinction is meaningless and that waiver of tort should be available in any case where tortious conduct has resulted in a benefit to the defendant.⁶

² J.D. McCamus, “*Restitution as an Alternative to Damages in Contract and Tort*” at p. 139.

³ A more accurate name would therefore be ‘waiver of damages, claim for ill-gotten gains’ – but that doesn’t have much of a ring to it.

⁴ For judicial discussion of this, see: *Serhan Estate v. Johnson & Johnson*, 269 DLR (4th) 279 (Div Ct)

⁵ Peter Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1989), pp. 326-329. See also *Reid v. Ford Motor Company et al.*, 2006 BCSC 712 (CanLII), para. 29.

⁶ P.D. Maddaugh & J.D. McCamus, *The Law of Restitution*, loose-leaf ed. (Canada Law Book), p. 24-9; see also *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 (ON SC), where an Ontario court certified a claim for

Fortunately, we don't have to resolve any of these complex questions in order to answer the sole question posed in this paper: assuming that waiver of tort is available (whether as a remedy or a free-standing cause of action, whether in conversion, negligence, or any other tort), what exactly does the defendant have to disgorge?

(ii) Damages in waiver of tort: disgorgement of the defendant's gain

Waiver of tort allows a plaintiff to claim disgorgement of the defendant's wrongfully obtained benefit. It is important to understand how these 'disgorgement damages' differ from compensatory tort damages, punitive damages, and restitutionary damages in unjust enrichment.

Tort law seeks to compensate a plaintiff for the harm caused by the defendant's tortious conduct. Thus, the usual remedy in tort is compensatory damages – i.e. damages that compensate the plaintiff for the loss s/he suffered as a result of the defendant's wrongful conduct. The focus is entirely on the plaintiff's loss; the defendant's gain (if any) is irrelevant to that calculus.

In cases of egregious conduct, tort law will also award punitive or aggravated damages, over and above the plaintiff's loss. These are an add-on to the main claim for compensation, meant to punish the wrongdoer's particularly offensive actions. Since the underlying aim of tort law is to compensate for a loss, not to punish for wrongdoing, punitive damage awards are relatively rare.

Unjust enrichment, meanwhile, seeks to restore to a plaintiff a benefit that the defendant has unjustly obtained from that plaintiff. A claim can lie in unjust enrichment without any

disgorgement in a class action where the underlying tort was negligence. This was affirmed by the Divisional Court, 2009 CanLII 32303, para. 21.

wrongful conduct on the defendant's part, but it cannot lie without the plaintiff having suffered a loss or detriment. The loss and the gain must correspond. Thus, while unjust enrichment offers a gain-based remedy, that remedy is tied to the plaintiff's loss. The plaintiff does not necessarily recover everything the defendant gained; s/he recovers what s/he lost. Restitutionary damages are basically a refund.

Waiver of tort shifts the focus from the plaintiff's loss to the defendant's gain. The idea underlying waiver of tort is that it would be unfair to allow a defendant to benefit from his/her tortious conduct. How much the plaintiff lost is irrelevant to the measure of damages in waiver of tort; the question is how much the defendant gained.⁷ Thus, unlike restitutionary damages in unjust enrichment, disgorgement damages in waiver of tort can exceed the amount of the plaintiff's loss:

Briefly put, restitutionary damages are limited to those benefits wrongfully acquired from the plaintiff, whereas disgorgement damages include any gain that the defendant received as a result of committing a wrong against the plaintiff. So, while restitutionary damages are only capable of stripping gains that the defendant acquired from the plaintiff, disgorgement damages are able to strip gains acquired from any source, including, but not limited to, the plaintiff.⁸

⁷ This has nothing to do with the question of whether a plaintiff must suffer a loss in order for a claim in waiver of tort to lie (i.e. the cause of action vs. remedy debate). Irrespective of whether the plaintiff must suffer a loss, such loss does not determine what the plaintiff can recover in waiver of tort – the quantum of disgorgement damages is the amount of the defendant's gain.

⁸ M. Clapton, *Gain-Based Remedies for Knowing Assistance: Ensuring Assistants Do Not Profit From Their Wrongs* (2008) 45 Alta. L. Rev. 990, pp. 991-992; J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart, 2002).

(iii) How does disgorgement in waiver of tort work in practice?

The operation of disgorgement damages in waiver of tort is best explained using a simple example. Let's say that a horse worth \$100 is stolen from its owner. If the owner sued the defendant in conversion, his damages would be \$100. If the defendant later resold the horse for \$150, the owner's loss from the theft would not increase, but the defendant's gain would. An action for compensatory damages in conversion would not reach the gain beyond the owner's loss. If the plaintiff elected waiver of tort, however, the defendant could be compelled to disgorge his entire gain of \$150.

However, disgorgement damages in waiver of tort should not exceed the defendant's actual gain, because that would go beyond the objective of the doctrine, which is to prevent gain from wrongful conduct. Thus, reasonable expenses that the defendant incurred in order to obtain the gain must be deducted from the disgorgement damages awarded to the plaintiff, because those expenses were necessary in order to obtain the gain and they decrease the actual amount of the gain. To return to our example, let's say our defendant spent \$30 to sell the stolen horse. His total gain would then be \$120 [the sale price of the horse (\$150) - the cost of selling (\$30) = the defendant's net or actual gain (\$120)]. Forcing the defendant to disgorge the entire sale price of \$150 would in a sense be punitive, because it would exceed the amount that he had gained from his tortious conduct.⁹

The situation is more complicated if the defendant incurs expenses in attempting to remedy the wrong. If these expenses compensate a plaintiff for a loss, they can be set off against

⁹ Maddaugh & McCamus, *The Law of Restitution*, pp. 24-34 – 24-35.

that loss. If, however, these expenses are not directly related to a loss (for example, because the plaintiff has not suffered a loss from the wrongdoing), they cannot be set off against the defendant's gain in a claim for waiver of tort disgorgement. To explain this, we can contrast our simple horse example with the real-life case of *Serhan v. Johnson & Johnson*.

In the horse example, let's say that after stealing and selling the horse, the defendant had a *crise de conscience* and decided to remedy his wrong by replacing the stolen/sold horse with another horse of equal value (\$100) – i.e. by compensating the plaintiff for his loss. The plaintiff would still have a waiver of tort claim for disgorgement of the defendant's gain. The \$100 spent to compensate the plaintiff for his loss would be credited to that loss, and the plaintiff could compel disgorgement of the further \$20 gain.

But what if the cost of remedying the wrong does not correspond to compensating the plaintiff for a loss? This was a live issue in *Serhan v. Johnson & Johnson*,¹⁰ and discussed though not decided in the context of the settlement and counsel fee approval motion in that case. In *Serhan*, the plaintiffs brought a class action in negligence, negligent and fraudulent misrepresentation, breach of section 52(1) of the *Competition Act* and conspiracy relating to the manufacture, sale and distribution of allegedly defective blood glucose monitoring devices.

The peculiar factual twist of the case was that the class members had not suffered any substantial damage from the wrongdoing: no one got hurt, other than the pain involved in obtaining additional blood samples, and the class members had obtained the devices for free. The

¹⁰ *Serhan v. Johnson & Johnson*, 2011 ONSC 128 (CanLII)

plaintiffs thus sought disgorgement of the defendants' gain through waiver of tort rather than compensatory damages as a remedy.

The total gross revenue earned by the defendants from the sale of the allegedly defective devices was approximately \$16.5 million. Class counsel agreed that this could not be the amount of the disgorgement claim; the defendants would be entitled to deduct the cost of making, selling, and distributing the product, and might also be entitled to a further deduction for overhead incurred to obtain the gain. The total gross sale revenue minus these expenses would be the defendants' net gain to be disgorged.

However, class counsel did not agree that the defendants would be entitled to a credit for the cost of remedying the wrongdoing by means of a voluntary product recall undertaken when the defect was discovered. Unlike in our horse example, where the remedy for wrongdoing was direct compensation to the plaintiff for his loss, the voluntary product recall could not be said to have compensated the class members for their loss, since there was no substantial loss requiring compensation. The defendants could not claim for credit for this expense, because it could not be set off against a loss.

All told, class counsel's estimate of the disgorgement claim ranged from \$2.8 to \$4.1 million. This is a far cry from the total gross revenue of \$16.5 million, but it is a reasonable estimate of the amount targeted by waiver of tort – the actual gain resulting from the defendants' wrongful conduct.

Conclusion

In our view, the approach outlined in this paper reflects a reasonable broad-stroke approach to damages in waiver of tort. It puts the focus where it should be – on the defendant’s wrongfully-obtained benefit rather than the plaintiff’s loss – and strips that benefit without veering into the punitive by taking away more than was earned. Although there is no directly on-point jurisprudence confirming that this is the correct approach, and although real-life situations will doubtless add layers of complexity to the question, we believe that this is a logical and defensible starting point for counsel attempting to navigate the murky waters of waiver of tort.