Supreme Court doesn't gamble on waiver of tort

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The Supreme Court of Canada has refused to certify a class action, which alleged that video lottery terminal games were illegal. Importantly, the Supreme Court clarified that the doctrine of "waiver of tort" is not an independent cause of action in Canada.

Disgorgement of profits is available as a remedy for wrongdoing, but the plaintiff must prove all the elements of the underlying claim against the defendant, like breach of contract or breach of fiduciary duty. Prior to this decision, it was an open question whether plaintiffs could obtain disgorgement without having first proved any loss.

The appeal in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 stemmed from an application for certification of a class action against Atlantic Lottery Corporation (ALC). The application was on behalf of Newfoundland and Labrador residents who paid to play video lottery terminal games (VLTs) in the province. The plaintiffs claimed that VLTs are inherently dangerous and deceptive, and relied on three causes of action: waiver of tort, breach of contract and unjust enrichment. The plaintiffs sought a gain-based award made up of the profit ALC earned by licensing VLTs.

The certification judge dismissed ALC's motion to strike the claim and certified the action. The Court of Appeal of Newfoundland and Labrador substantially upheld the certification judge's conclusions, allowing all three causes of action to proceed. The majority of the Supreme Court of Canada allowed ALC's appeal, set aside the certification order, and struck the plaintiffs' statement of claim in its entirety.

Key takeaways

1. Waiver of tort does not exist in Canada

The plaintiffs alleged that ALC breached a duty of care to warn VLT users of the inherent dangers of the games – specifically, the alleged risk of addiction and suicidal ideation. The Court unanimously rejected the concept of waiver of tort as an independent cause of action, finding that the novel cause of action does not exist in Canadian law and had no reasonable chance of succeeding at trial.

The term itself, the Court found, is a misnomer. Rather than forgiving or waiving the wrongfulness of the defendant's conduct, plaintiffs relying on the doctrine are simply

electing to pursue an alternative, gain-based remedy. Given the confusion surrounding the meaning, Justice Brown suggested abandoning the term itself.

2. Disgorgement is not a cause of action, but is available as a remedy for provable torts

Disgorgement for wrongdoing is one of the gain-based remedies available to plaintiffs who have been wronged by a defendant. However, the Supreme Court pointed out that the plaintiffs in this case were attempting to rely on disgorgement as an independent cause of action.

The Supreme Court clarified that disgorgement is *not* an independent cause of action – it is a remedy for wrongful conduct. In order to make out a claim for disgorgement, a plaintiff must first prove the elements of an underlying wrong (*i.e.* in tort, contract or equity, or if specifically provided for as a remedy in a statute). Brown J. expressed this principle in no uncertain terms, writing that "granting disgorgement for negligence without proof of damage would result in a remedy arising out of legal nothingness, and would be a radical and uncharted development."

The Court found that what the plaintiffs had referred to in their pleading as waiver of tort was in effect the remedy of disgorgement. As disgorgement is not an independent cause of action, the Court struck the claim for it. Notably, the decision in this case did not change the law related to which torts entitle a plaintiff to the disgorgement remedy, although it did limit the circumstances in which disgorgement is available for breach of contract.

3. Disgorgement will rarely be a remedy for breach of contract

The plaintiffs also alleged that it was an implied term of the contract between ALC and paid users of VLTs that ALC would provide safe games and act in good faith. The plaintiffs alleged ALC breached this implied term by supplying "deceptive" VLTs. The plaintiffs were only seeking *non-compensatory* remedies (*i.e.* disgorgement and punitive damages) for breach of contract and not ordinary damages for breach of contract, usually measured by the position they would have been in had the contract been performed.

The majority of the Court held that disgorgement for breach of contract is only available in exceptional circumstances where (1) other remedies of damages, specific performance and injunction are inadequate; and (2) a plaintiff had a legitimate interest in preventing a defendant's profit-making activity.

Because the plaintiffs in this case had sufficient evidence to advance a claim for compensatory damages for the gambling losses they incurred, the exceptional circumstances required for disgorgement were not present.

4. Claims for nominal damages are not certifiable

Finally, the majority of the Court noted that a class action where the plaintiffs are only claiming for nominal damages should not be certified, because a class action is not the "preferable procedure" for such a claim. Moving forward, defendants may attempt to rely

on this holding to argue that plaintiffs must show some basis in fact to demonstrate that the class suffered more than nominal damages on a certification motion. However, it may be possible that the Court only intended this holding to apply to nominal damages awarded where the plaintiff has not suffered any actual damages, and not to claims for actual damages, even where each class member's damages are minimal. The dissenting judges of the Court would have certified a claim for nominal damages.

Final thoughts

This decision will have a significant impact on Canadian law and will be of significant interest to a wide variety of litigators and their clients, given the intersection between tort law, civil procedure and class action proceedings.

Perhaps most notably, the majority's decision to abandon the concept of waiver of tort and clarify the availability of disgorgement as a remedy will make it more difficult for plaintiffs to advance class actions in cases where damages cannot be proven on a class-wide basis.

The need to prove causation and damages on an individual basis often renders class actions unmanageable. When plaintiffs do decide to commence class action proceedings, the effect of the Supreme Court's decision could lower settlement ranges, particularly in large consumer class actions where the spectre of a potential disgorgement remedy was impactful.

It is probable that the representative plaintiff in *Babstock* expressly intended to forego any claim to compensatory damages specifically in order to make the case appear more suitable for certification. In the past, representative plaintiffs have often chosen to seek certification only of non-compensatory damages for this same reason. The majority's decision has effectively stripped would-be plaintiffs of this previously viable strategy.

Finally, the majority has signalled a more liberal approach to striking out pleadings than in some previous cases, writing that:

> a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed **critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings** . This is because such claims present 'no legal justification for a protracted and expensive trial' ... [emphasis added]

Some might interpret this as pushback against some cases that suggested that if a party could not point to a case where the same claim was struck, it would survive a motion under s. 5(1)(a) of the Ontario *Class Proceedings Act* or a motion under Rule 21 of the Ontario *Rules of Civil Procedure* (and those statutes' equivalents).

Overall, would-be defendants will warmly receive the Supreme Court's decision in *Babstock*, as it likely makes class actions more difficult to have certified, and novel claims easier to have struck.

By

Kathryn Shani, Graham Splawski, Ashley Thomassen

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749