

**DIV. COURT FILE NO.: 392/04**

**DATE: 20041101**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**AHMAD SERHAN, deceased, by his Trustee  
without a will, ZEIN AHMAD and  
BEVERLEY GAGNON**

*Plaintiffs*

**- and -**

**JOHNSON & JOHNSON, LIFESCAN  
CANADA LTD. and LIFESCAN INC.**

*Defendants*

) Paul J. Pape  
) *for the Plaintiffs*

) Michael Barrack  
) Caroline Zayid  
) *for the Defendants*

) **MOTION HEARD: October 15, 2004**

**GROUND J.**

[1] On the hearing of this motion, counsel for the Plaintiffs advised the court that it is his position that Justice Cullity certified the class action based on the pleadings disclosing a cause of action, being waiver of tort.

[2] It is agreed that Justice Cullity declined to certify the class action on the basis of the nominate courts pleaded of negligence, negligent and fraudulent misrepresentation, breach of Section 52(1) of the *Competition Act* and conspiracy as the applicability of all such causes of action and the elements of causation and damage would have to be determined on an individual basis.

[3] It is implicit in the Reasons of Justice Cullity that he was not satisfied that the four criteria set out by Chief Justice McLachlin in *Soulos* to satisfy a finding of constructive trust based on wrongful conduct, as opposed to unjust enrichment, could be met in the case at bar.

[4] The question of good reason to doubt the correctness of Justice Cullity's Order and the existence of conflicting decisions on the matter both centre on the issue of whether "waiver of tort" constitutes a cause of action in its own right or is a principle which is applied to the choice of a plaintiff, having established an actionable wrong, to seek a remedy by way of restitution,

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disgorgement or an accounting rather than by way of damages to compensate the plaintiff for his or her loss.

[5] In dealing with the issue of waiver of tort, Justice Cullity stated at paragraphs 34 and 35:

Waiver of tort, by that name, has not been pleaded but, as well as the general – and by themselves probably inadequate – references to good conscience, paragraphs 74-76 of the statement of claim do, I believe, allege material facts that if proven, could entitle the plaintiffs to a remedy on the basis of the doctrine. Such facts would constitute a cause of action for which the remedies of a constructive trust or, alternatively, an accounting of revenues, are claimed. Claims based on waiver of tort seek “restitution” of benefits received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss. The basis of the doctrine is encapsulated in a passage from an American decision that is quoted by Maddaugh and McCamus, at page 739:

The point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched. (*Federal Sugar Refining Co. v. United States Sugar Equalization Board* 268 F. 575 (S.D.N.Y., 1920), at page 582).

Waiver of tort, as a cause of action, is said to have the advantage for a plaintiff that proof of loss as an element of the tort is not required; see *Ameritek Inc. v. Canadian Commercial Corporation*, [2003] O.J. No. 3177 (S.C.J.); *Transit Trailer Leasing Ltd. v. Robinson*, [2004] O.J. No. 1821 (S.C.J.); Maddaugh and McCamus, at pages 743-4. If it exists, this advantage may have a special significance when common issues are to be identified for the purposes of the CPA.

and further stated at paragraph 65:

Insofar as a claim based on a waiver of tort presupposes that a tort has been committed the individual issues involved in the claims of fraud and misrepresentation would preclude acceptance of other restitutionary claims as common issues based on those wrongs. However, the plaintiffs also allege that the defendants conspired to cause products that they knew to be dangerously defective to be marketed, that the conspiracy was directed towards diabetics and potential users of the products – including class members – and that the defendants knew that it was likely to cause injury and loss to such persons. As part of the conspiracy, the defendants are alleged to have agreed with each other

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to submit false information to regulatory bodies, to conceal the existence of the defects from class members and to mislead them with respect to the efficacy and safety of the products. The seriousness of these allegations is reflected in the heavy fines paid in the United States. If the allegations are proven at a trial of common issues and if, in law, no proof of loss is required for restitutionary remedies available in cases of waiver of tort, the defendants may be found liable to disgorge all or part of the benefits they received from marketing the products. In these circumstances, either the proprietary remedy of a constructive trust, or a personal remedy for an accounting and disgorgement, might be granted. Whether the doctrine of waiver of tort applies – and, if so, which of the remedies would be available – are not questions to be determined on this procedural motion. I am concerned with the identification of common issues of fact and law – not with their resolution.

[6] I interpret Justice Cullity's Reasons as concluding that waiver of tort is a cause of action disclosed by the pleadings and one that can be determined on a class basis and accordingly he certified the proceeding as a class proceeding based on such cause of action.

[7] It appears to me that such conclusion is in conflict with the judicial consideration of waiver of tort in other decisions where it has been regarded as, in effect, a choice of remedies after an actionable wrong has been established.

[8] In *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1 (HL) Viscount Simon, L.C. stated at page 18:

When the plaintiff 'waived the tort' and brought *assumpsit*, he did not elect to be treated from that time forward on the basis that no tort had been committed; indeed if it were understood that no tort had been committed, how could an action in *assumpsit* lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution.

[9] In *Zidaric v. Toshiba of Canada Ltd.*, [2000] 5 CCLT (3<sup>rd</sup>) 61 Cumming J. stated at page 64:

The plaintiff submits that such profits should be disgorged "as a waiver of tort or unjust enrichment". However, the so-called "waiver of tort doctrine" is inapplicable unless the defendant has committed a tort which gives rise to a cause of action to the plaintiff. I find there is no reasonable cause of action in tort disclosed by the pleading. Further, the waiver of tort doctrine is inapplicable unless the defendant is unjustly enriched. Where the claim is in negligence, as here, the defendant does not *acquire* a benefit. There is no unjust enrichment to the defendant. See G.H.L. Fridman, *Restitution*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1992) at pp. 355-359; *United Australia Ltd. v. Barclays Bank Ltd.* (1940), A.C. 1 (U.K. H.L.) at 11-19 per Viscount Simon.

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[10] I note that these references to waiver of tort as a choice of remedy are consistent with the treatment accorded this principle by leading legal scholars. In Maddaugh and McCamus "The Law of Restitution" Canada Law Book (1990) the authors stated at pages 507 and 508:

The doctrine known as "waiver of tort" is perhaps one of the lesser appreciated areas within the scope of the law of restitution. From the outset, it seems to have engendered an undue amount of confusion and needless complexity. The almost mystical quality that surrounds the doctrine is attested to by the following couplet penned by a pleader of old:

Thoughts much too deep for tears subdue the Court  
When I *assumpsit* bring, and god-like waive a tort.

One source of this confusion stems from the doctrine's very name. As one writer has pointed out, not entirely facetiously, it has "nothing whatever to do with waiver and really very little to do with tort". Although the phrase might be interpreted to mean that the plaintiff is somehow excusing the defendant from his wrongful act and thereby forgoing his remedy at law, the plaintiff, in fact, does no such thing. Rather, the plaintiff is simply giving up his right to sue in tort and instead electing to base his claim in restitution, thereby seeking to recoup the benefits that the defendant has derived from his tortious conduct. In essence, then, 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 his normal tort damages.

[11] Also in Goff & Jones, "The Law of Restitution" 6<sup>th</sup> ed. London Sweet & Maxwell (2002), the author stated at paragraphs 36-001:

A person upon whom a tort is 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 the defendant's unjust benefit rather than to sue in tort to recover damages; he has a choice of alternative remedies. But the tort is not extinguished. Indeed it is said that is in a *sine qua non* of both remedies that he should establish that a tort has been committed.

[12] On the basis of the above authorities, I must conclude that there is good reason to doubt the correctness of Justice Cullity's Order certifying the class proceeding on the basis of waiver of tort as a cause of action disclosed by the pleadings and that there are conflicting decisions of other courts on this matter.

[13] Counsel agree that if I should find that there is good reason to doubt the correctness of Justice Cullity's Order or that there are conflicting decisions on the matter, the appeal involves matters of importance to the administration of justice and the development of the law and that it is desirable that leave to appeal should be granted.

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[14] Accordingly, leave to appeal is granted. The costs of today's proceeding are reserved to the panel disposing of the appeal.



Ground J.

Released: November 1, 2004

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**COURT FILE NO.:** 392/04  
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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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*Plaintiffs*

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**REASONS FOR JUDGMENT**

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**Ground J.**

**Released: November 1, 2004**