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Meanwhile, On The West Coast…

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Waiver of tort has vexed the courts in British Columbia just as it has in Ontario.

The doctrine appears no less frequently in proposed class pleadings in BC, and its mysterious bounds have meant that waiver of tort allegations can generally satisfy the "cause of action" criterion for certification. Almost perpetually, since so few class proceedings go to adjudication on the merits, and so few non-class proceedings invoke the doctrine: Waiver of tort remains in a sort of suspended animation/arrested development.

An emerging judicial desire seeks to change this. The BC Court of Appeal, in a decision released in July 2012, has expressed dissatisfaction with the eternally nascent status of the waiver of tort doctrine, and has commenced the process of bringing some clarification to it. Although any prediction as to the ultimate fate of waiver of tort would be foolhardy, the Court has begun to sketch out a "no go" territory for the doctrine in BC. Class action practitioners in the province will be watching closely for any resulting trends, but it is clear that the Court of Appeal has sent a clear message that certification judges should be scrutinizing waiver of tort claims to ensure that the alleged "legal wrong" is one that can support the would-be cause of action. In particular, where the pleaded wrong arises from a statutory breach, the court should satisfy itself that the Legislature intended to grant plaintiffs the right to seek independent restitutionary relief by way of a civil action.

Koubi v. Mazda Canada

Alisha Koubi brought an action on behalf of owners and lessees of Mazda3 vehicles, seeking a disgorgement of profits from Mazda Canada and others for an alleged failure to provide timely notification of defective driver's door locks. The defects were facilitating widespread break-ins, and eventually Mazda Canada initiated a vehicle recall to install remedial device. Ms. Koubi did not experience a break-in, but she noticed other Mazda3 cars with break-in damage, and she became concerned about her vehicle's security. In her resulting action, Ms. Koubi did not then allege a specific tort or seek damages for breach of contract, but instead pleaded that the defendants had breached the Sale of Goods Act ("SGA") and BC's Business Practices and Consumer

Protection Act ("BPCPA"). At first instance, the court granted certification. The defendants appealed.

Madam Justice Neilson delivered the reasons for the Court (*Koubi v. Mazda Canada Inc.*, 2012 BCCA 310). Prior BC decisions had not definitively resolved whether waiver of tort was a stand-alone cause of action or just a remedial alternative, and Neilson J.A. was satisfied on the unsettled state of the law that there was at least an arguable case that it might be the former. That said, Her Ladyship noted approvingly Justice Lax's recent comments in *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660, to the effect that the courts might be in a position to resolve details about the doctrine absent evidence, on the "plain and obvious" standard that governs at certification.

In that connection, the Court turned to whether – on the assumption that waiver of tort was a cause of action – breaches of the SGA and/or BPCPA could make out the requisite wrongdoing. To the extent that the Court was aiming to resolve details about the doctrine, it found opportunity to do so here.

Saskatchewan Wheat Pool and Legislative Intent

The Court in *Koubi* held that, "[i]f the doctrine of waiver of tort is viewed as an independent cause of action, it appears to have two constituent elements: a legal wrong by the defendant, and a benefit flowing to the defendant as a result" (at para. 41). But what kind of wrongdoing will suffice? The certification judge had considered the statutory breaches alleged by Ms. Koubi and held that her waiver of tort claim was not bound to fail and met the test for certification. The Court of Appeal, however, agreed with the defendants' challenge to that finding.

The Supreme Court of Canada's decision in *Canada v. Saskatchewan Wheat Pool* ([1983] 1 S.C.R. 205) is oft-cited for the principle that there is no nominate tort of statutory breach. Breach of a statute, instead, may stand as evidence of negligent conduct. In its own recent jurisprudence, the BC Court of Appeal has expanded on *Saskatchewan Wheat Pool* to articulate an approach for the enforcement of statutorily-conferred rights. (See, e.g., *Macaraeg v. E. Care Contact Centers Ltd.*, 2008 BCCA 182.) Following that line of authority in *Koubi*, the Court asked whether the Legislature intended in either the SGA or the BPCPA to allow rights-holders to seek enforcement by way of a civil action in restitution, rather than under the provided-for statutory or administrative apparatuses.

The BPCPA, which is itself a mainstay of class proceedings in BC, was adopted in 2004 as an amalgamation of six formerly separate pieces of consumer protection legislation. Besides setting up a regulatory authority and prescribing various offences, the Act provides that a consumer may bring an action to recover pecuniary loss, or to seek declaratory or injunctive relief. Where the court grants a declaration or injunction, it may also make a restitutionary order. And where the court convicts a person of a statutory offence, it may order the person to compensate the aggrieved party.

In this legislative mix, Madam Justice Neilson found "a clear intent to provide an exhaustive code regulating consumer transactions" (at para. 63). She held that there

was “nothing in the BPCPA to support the view that the legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort” (at para. 64). It followed that the alleged breach of the BPCPA could not stand as the predicate “legal wrong” for the prospective cause of action.

The SGA, on the other hand, was clearly not intended as a “complete code.” Still, Neilson J.A. held that Ms. Koubi’s restitutionary claims were inconsistent with the relevant provisions of that Act, which limit Ms. Koubi’s remedies “to the loss [she] has suffered from the breach or, in the case if a breach of a warranty of quality, the difference between the value of her Mazda3 at delivery, and the value had it not had the defective door lock.” Madam Justice Neilson continued: “Nothing in s. 56 [which prescribes the statutory remedies] suggests a legislative intent to give the court discretion to award a remedy for breach of warranty beyond those stipulated” (at para. 76). In short, breach of the implied warranty under the SGA cannot constitute a “legal wrong” for waiver of tort. The Court decertified Ms. Koubi’s claims.

What’s the “Take Away”?

Both the plaintiffs’ and defendants’ class action bars benefit from clarity as to the scope and application of waiver of tort. While *Koubi* is but an initial and incremental exploration of the topic, it brings important guidance to practitioners as well as certification judges. Indeed, in an exceptional passage in her reasons, Neilson J.A. noted that her conclusion might conflict with other certification orders made in the province (see para. 66). Applications to decertify such cases can be expected to follow.

No doubt *Koubi* will also bring fodder for the academics continuing the debate about the waiver of tort doctrine. But its most important legacy may well be the bold tone it strikes with respect to the application of the “bound to fail” test for certification. As Madam Justice Neilson stated in a concluding passage, “[W]hile one might admire the strategic and creative use of a novel doctrine to transform individual loss to a common issue in a class proceeding, I am satisfied it does not benefit the parties or the court to permit such a claim to proceed when it has no hope of success” (at para. 82). One can expect the courts in BC, following *Koubi*, will linger longer on the merits when facing waiver of tort claims.

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