

Panacea or Pandemic: Comparing “Equitable Waiver of Tort” to “Aggregate Liability” in Cases of Mass Torts with Indeterminate Causation

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The equitable doctrine of “waiver of tort”, in which a plaintiff surrenders the right to tort damages and seeks instead a disgorgement of the defendant’s wrongful profits, has received a mixed reception in Canadian courts. In this article, the author explains the doctrine and its difficult history, and proposes that the problem against which waiver of tort is usually being applied — indeterminate causation in mass tort claims — is very real. However, the author concludes that the use of the doctrine of waiver is a partial solution at best, and advocates instead for a more fundamental rethinking of our approach to causation in class actions.

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I. Introduction

Is the equitable doctrine of waiver of tort, as they say nowadays, “a thing”? If so, should it be the “next big thing” in mass tort class actions?

My answers to these questions are a qualified “yes” and an emphatic “no”. Waiver of tort should be recognized as a cause of action, I will argue, and may at times be useful, but it should not be the doctrine of first, or even second, resort in mass tort class actions, as it is generally inferior to the available alternative: the evolution of tort law to permit the aggregate determination of causation in large-scale claims.

What exactly is waiver of tort? After 20 tumultuous years during which it has been pleaded and occasionally argued before the courts in Canada, we still do not know much about the rather obscure doctrine. In its most robust formulation, waiver of tort allows a plaintiff who is able to prove all the constituent elements of a traditional wrong *except* that they have suffered a loss as a consequence of the defendant’s breach to

“waive” tort compensation and claim only “disgorgement”¹ of the profits that the defendant earned as a result of the wrongful behaviour. As the Supreme Court of Canada noted in its decision in *Pro-Sys Consultants Ltd v Microsoft Corporation*² (“*Microsoft*”): “[a]n action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all”.³

The doctrine is based on the intuitively appealing notion, deeply rooted in equity, that a defendant ought not be able to profit from wrongdoing. It also bears on deterrence: equitable waiver allows a plaintiff who has not suffered from harm to perform a corrective role in depriving a wrongdoer of profits, disincentivizing antisocial behaviour. But where a class of persons have suffered harm as a result of a mass wrongdoing, one might ask, why would they give up what may well be the overwhelming bulk of their claim?

One answer is straightforward: a waiver of tort claim “may be the easiest cause of action to prove”,⁴ because disgorgement flows from the wrongdoing of the defendant, rather than the harm caused to the plaintiff. Under its theory, it is enough for a plaintiff to show that the defendant behaved in a way that *was wrong* — usually that it breached a duty somewhat “at large” or generic — but the plaintiff need not establish *a wrong* — that is, there is no requirement that all the elements of a complete tort be present. So, if a manufacturer produced a dangerously defective product, or failed to provide a necessary warning to its customers, or if an issuer of shares deliberately or negligently misrepresented facts in a prospectus, or if a factory breached pollution standards and exposed its neighbours to risk, the defendant could lose whether or not the plaintiff

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1. The cases and literature on waiver of tort often use the language of a number of equitable remedies — “accounting”, “disgorgement” or “constructive trust”. But no matter how it is cast, the effect is the same: some amount equivalent to the defendant’s ill-gotten profits will be calculated and surrendered to the plaintiff or class.
 2. 2013 SCC 57 [*Microsoft* SCC].
 3. *Ibid* at para 93.
 4. Paul Perell, “Field Notes on Products Liability Claims in Class Actions” (2011) 38:2 *Advocates’ Quarterly* 149 at 163 (describing possible advantages in the context of products liability claims).

could prove a direct connection between the wrongdoing and his or her loss. This is the attraction of the resort to equity: it is often a very difficult task to prove the necessary causal link, particularly where the loss is indirect, or issues of reliance or scientific uncertainty are in play in an individual case.

When it first appeared on the class action scene in the 2004 decision of *Serhan Estate v Johnson & Johnson*⁵ (“*Serhan*”), waiver of tort was welcomed as a panacea for class claimants, allowing them to vault over many of the traditional rules of tort that barred recovery even where defendants had miserably failed in their duties of care or had been shown to have been fraudulent or malevolent. Waiver of tort claims, generally pleaded in the alternative, became a routine feature of class action pleadings,⁶ and as they began to trickle before the courts, the class action bar held its collective breath.

It was a long wait. In the intervening two decades, judicial skepticism, or at least ambivalence, had calcified into what appears to be a trend of qualified rejection, and it appeared to some observers that the doctrine was a dead letter.⁷ However, in the recent certification decision of *Microsoft*, a unanimous Supreme Court of Canada refused to strike a waiver of tort claim and permitted it to proceed to trial, holding that it was not “plain and obvious” that it could not succeed.

Judicial reluctance, however, remains in the wake of *Microsoft*, as exemplified by the subsequent decision of *O’Brien v Bard Canada Inc*⁸ (“*O’Brien*”), where Justice Perell, while allowing that disgorgement through waiver of tort may be a suitable remedy in some cases, found it wildly *inappropriate* for a mass tort premised on personal injury with

5. (2004), 72 OR (3d) 296 (Sup Ct J) [*Serhan* Sup Ct], aff’d (2006), 85 OR (3d) 665 (Div Ct) [*Serhan* Div Ct].

6. See Perell, *supra* note 4 at 160-63.

7. Charles Murray, “An Old Snail in a New Bottle? Waiver of Tort as an Independent Cause of Action” (2010) 6:1 Canadian Class Action Review 5; H Michael Rosenberg, “Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings” (2010) 6:1 Canadian Class Action Review 37; and Kit Scotchmer, “Waiver of Tort: A Potential Sea Change in Class Action Law” (2011) 7:1 Canadian Class Action Review 159.

8. 2015 ONSC 2470 [*O’Brien*].

substantial potential damages.

In this article I will argue that the reluctance of Perell J to permit plaintiffs to rely on waiver of tort was well placed, even if the doctrine might have some residual utility. However, the problem that it sought to address still looms unbearably large in the legal landscape: what to do when a mass wrong has clearly been committed, where people have been harmed, but where it is difficult or impossible to identify the actual victims, or the degree of their individual loss, with any precision, if at all?

I suggest here that large-scale claims premised on widespread defendant wrongdoing can be usefully broken into two categories, only one of which is truly amenable to the application of waiver of tort. I conclude that, in cases where a defendant has committed a wrong of a type that is so serious that deterrence is called for even when it does not produce legally-cognizable harm (and particularly when the wrong is, by its nature, elusive of ordinary damages claims), waiver of tort can provide an important behaviour modification device where no other is available. This category might include criminal acts, some regulatory offences, and intentional common law or equitable wrongs such as fraud, deliberate misrepresentation or a wanton or otherwise egregious flouting of legal duties.

However, with respect to most true mass torts with individual causation issues, where it is known that the defendant was negligent and that this *had* caused harm but it is not knowable with certainty which victim's injuries could be attributed to the wrong as opposed to other causes, waiver of tort is not the preferable analysis when compared to other devices that are (or should be) available as a matter of tort law. In particular, I propose, the most appropriate solution in most cases is an aggregate or global treatment of causation issues: treating causation of harm as something that occurs in a *population* of persons, rather than a collection of *individuals*.

My argument here proceeds as follows. In Part II, I describe the doctrine and its origins, and trace its recent somewhat lurching progress through 20 years of Canadian class action jurisprudence. In Part III, I identify the built-in limitations of the doctrine and other problems that would be inherent in its widespread adoption. In Part IV, I describe the

principal alternative: the assessment of causation in mass tort cases on an aggregate, rather than individual basis, and suggest why, in such cases, it is preferable to waiver of tort. In my conclusion I outline and defend the classification of large-scale claims into the two categories I have earlier mentioned, only one of which should be dealt with through recourse to waiver of tort.

I argue here that resort to equitable waiver is not the preferable solution to the problem of indeterminate causation or a lack of nexus otherwise between wrongdoer and victim, for three reasons.

First, divorcing damage from wrongdoing *altogether* risks distorting the historical role of tort by removing an important (and occasionally maligned, including by me) limiting principle: restricting recovery through a nexus of harm-causation prevents the emergence of a purely-regulatory civil litigation regime where busybody plaintiffs and their lawyers are incentivised to ferret out even harmless wrongdoing, leading to a costly, inefficient and wasteful court “policing” of the economy that does little to advance the role of the civil courts as fora for the vindication of aggrieved victims. Having identified this problem, though, I suggest that it is not insurmountable and can be addressed through a principled application of the rules of standing.

A second and more serious concern regarding waiver of tort in class actions is not based on a fear that they could accomplish too much, but rather that they do too little, too easily. I will argue that where the wrongdoing has actually caused harm, disgorgement of profits is inferior to tort damages as a device of either compensation or deterrence, especially when measured against other possible innovations available to the courts.

This leads to my third and final argument for disfavouring the waiver approach in most cases: although it may be argued that “some compensation and deterrence is better than nothing”, reliance on waiver of tort risks creating a schism between the interests of the class and the public on one hand (who would want the defendants to pay the full cost of harm, not just of profits) and class counsel on the other. This is because a waiver of tort claim would provide “low hanging fruit” for lawyers, who would be incentivised to pursue a high volume of “quick and dirty”

settlements or judgments rather than seeking to maximise recovery for their clients.

I argue here that the problem of under-deterrence and under-compensation in mass claims where the defendant's wrongdoing is plainly established is very real, and it is something that the substantive law of tort should, and can, accommodate through rules of causation specific to mass torts, and in particular class actions. This requires that courts treat mass torts as fundamentally distinct from individual claims, as harm in populations, rather than individuals. This is an idea that underlay (or at least should have underlain) the attempts to utilize waiver of tort, but to put it simply, tort law can do it better. In this respect, I will suggest that very recent decisions of the Quebec Superior Court of Justice and the Ontario Superior Court provide us an intriguing glimpse of the future.

II. Waiver of Tort in Canadian Law

A. The Difficult Doctrine

In introducing the concept of waiver of tort it is difficult to do better than quote the description by Justice Epstein of the Ontario Divisional Court in *Serhan*:

[i]ts origin lies in the expression “waiver of tort and suit in assumpsit”, the latter being the historical antecedent of many modern common law “quasi-contract” restitutionary claims. In invoking waiver of tort, the plaintiff gives up the right to sue in tort and elects to base the claim in restitution, thereby seeking to recoup the benefits the defendant has derived from his wrongful conduct. The practical purpose behind it is that in certain situations, where a wrong has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages.⁹

Justice Epstein went on to quote Peter D Maddaugh and John D McCamus in *The Law of Restitution*:

[t]he 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 famous couplet penned by a pleader of old [J.L. Adolphus, “the

9. *Serhan Div Ct, supra* note 5 at para 50.

Circuiteers— An Eclogue” (1885) 1 L.Q Rev. 232, at p. 233]: “[t]houghts 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 with tort”.¹⁰

Historically, waiver of tort was restricted to a narrow and discrete class of “predicate wrongs”, cases involving conversion, detinue, trespass to chattels and deceit.¹¹ However, as *Serhan* (a products liability case) and its progeny suggest, and the Supreme Court of Canada’s decision in *Microsoft* (a competition class action) confirms, its possible application may be almost limitlessly broad.

Waiver of tort is not compensatory, and in this sense it is distinct from an equitable claim of unjust enrichment, which requires not only an unlawful profit by the defendant but also a corresponding loss by the plaintiff,¹² a transactional relationship which has historically been required to be quite direct.¹³ The waiver doctrine emerges from the basic equitable idea that holds (as more or less a standalone principle) that a wrongdoer should not be permitted to retain ill-gotten gains.

Much of the skirmishing around waiver of tort in class claims has so far centred on whether the doctrine’s availability in a particular claim or generally should be decided at the preliminary certification stage, where

10. *Ibid* at para 51, citing Peter D Maddaugh & John D McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 2005)(loose-leaf) at 24-1.

11. Paul Perell, “Serhan Estate v. Johnson & Johnson and Soulos v. Korkontzilas: Something Is Happening Here and We Don’t Know What It Is”, Case Comment, (2007) 33:1 *Advocates’ Quarterly* 375 at 375-76.

12. The well-known elements required to establish an unjust enrichment are: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason (such as a contract) for the enrichment: see *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 82 [*Alberta Elders*]; *Garland v Consumers’ Gas Co*, 2004 SCC 25 at para 30; *Rathwell v Rathwell* [1978] 2 SCR 436 at 455; *Pettkus v Becker* [1980] 2 SCR 834 at 848.

13. But see *Microsoft* SCC, *supra* note 2 at para 87 (where the Supreme Court of Canada permitted an unjust enrichment pleading to survive the certification stage, notwithstanding that it was brought by indirect purchasers).

the test is the low threshold of “plain and obvious” and where novelty, the Supreme Court of Canada has held, cannot be a necessary bar to a legitimate claim lest it become a barrier to the progress of tort law through the discovery of new or evolved causes of action.¹⁴ The Supreme Court of Canada seemed to settle this aspect of the controversy when it upheld the certification of the waiver claim advanced in *Microsoft*.¹⁵ But the *Microsoft* decision, and those other “demurrer” cases that came before and since, put off the central questions to another day: if it exists as an independent cause of action, what would it look like? Clearly it must be premised on wrongdoing by the defendant. But could any kind of wrongdoing found recovery? And recovery by whom?

B. The Jurisprudence

It was the 2004 decision of Justice Cullity in *Serhan*, upheld by a majority of the Divisional Court two years later, that firmly fixed waiver of tort in Canadian legal consciousness. *Serhan* was a products liability class action brought by users of a device used to monitor blood glucose levels.

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14. *Alberta Elders*, *supra* note 12 at para 20 (noting that the first criterion for certification of a class action is that the plaintiff’s pleading must disclose a cause of action); and *Hollick v Toronto (City)*, 2001 SCC 68 at para 25 (where the Supreme Court of Canada confirmed that this requirement is assessed on the same basis as a motion to dismiss, as set out in *Hunt v Carey Canada Inc* [1990] 2 SCR 959 at 980: the question is, assuming all facts in the Statement of Claim are true, whether it is “plain and obvious” that the plaintiff’s claim cannot succeed).
15. However, see *O’Brien*, *supra* note 8 (where Perell J suggested that Cromwell J’s *dicta* should not apply in a products liability case, and he rejected waiver of tort as a legitimate cause of action in the facts before him: “*Pro-Sys Consultants Ltd.* was a competition law action. The case at bar is a products liability tort case. For decades, going at least as far back as *Donoghue v. Stevenson*, [1932] AC 562 (HL), and continuing to this day, courts have determined matters of policy in tort claims at the pleadings stage and if it were necessary to do so I would decide whether waiver of tort is a cause of action and, if it is a cause of action I would decide whether it is a viable cause of action for a products liability proposed class action so as to satisfy the cause of action criterion of certification” at para 158).

The device was admittedly defective, and, possibly as a consequence, harmful. But it appeared likely that none of its thousands of users in Canada could show any harm that could be attributed to the defect, and they had all received it for free. Class members seemed to have no real claim, in other words, under traditional tort or contract law, or under any statutory regime. Nevertheless, Cullity J found that the plaintiffs had pleaded material facts sufficient to support a claim under waiver of tort, notwithstanding that it had not been specifically invoked. On appeal, Epstein J of the Divisional Court allowed certification to proceed on the equitable claim, and the case settled in 2011 with the application of waiver of tort still deeply in doubt.¹⁶

Following *Serhan*, a number of Ontario decisions permitted waiver of tort claims to proceed through the certification, based primarily on the idea that the operation of the doctrine was not so settled so as to make such claims certain to fail on the “plain and obvious” standard.¹⁷ A number of other decisions disposed of waiver of tort claims on the basis

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16. *Serhan v Johnson & Johnson*, 2011 ONSC 128, (The settlement provides replacement devices for diabetics, and educational programs and other methods of *cy-près* distribution, totalling \$4.5 million. In approving the settlement, the Court recognized that the case likely turned on the waiver of tort issue. In discussing the “likelihood of success” criterion for determining the reasonableness of the settlement, Horkins J wrote: “[m]ost importantly, does waiver of tort exist as an independent cause of action or is it only a remedy applicable to another tort? This difficult question is at the heart of this case. While Ontario Class Counsel were confident that a court would find that it was an independent cause of action, there was a considerable risk that it would not” at para 69).
17. *Griffin v Dell Canada Inc*, 2009 CanLII 3557 (Ont Sup Ct J); *Haddad v Kaitlin Group Ltd*, 2008 CanLII 66627 (Ont Sup Ct J); *Heward v Eli Lilly & Co* (2007), 39 CPC (6th) 153 (Ont Sup Ct J), *aff’d* (2008), 295 DLR (4th) 175 (Ont Div Ct); *Pollack v Advanced Medical Optics Inc*, 2011 ONSC 1966; *Peter v Medtronic Inc* (2009), 83 CPC (6th) 379 (Ont Sup Ct J), *aff’d* 2010 ONSC 3777; *Tiboni v Merck Frosst Canada Ltd* (2008), 295 DLR (4th) 32 (Ont Sup Ct J), leave to appeal refused (2008), 304 DLR (4th) 220 (Ont Sup Ct J).

that the operation of the doctrine, if applicable, was moot.¹⁸ In each of these latter cases the claim was defeated either at a preliminary stage or after trial because no predicate wrong to support waiver of tort had been established (that is to say, not only that there was no completed tort, but that there was also no breach of duty or other illegality on which to found the waiver).

There was a somewhat different, but no more conclusive, outcome in *Koubi v Mazda Canada Inc*¹⁹ (“*Koubi*”), where the British Columbia Court of Appeal decertified a waiver of tort class action on the basis that the predicate wrong alleged was breach of statutory standards for which the legislation itself provided comprehensive and exhaustive remedies — essentially finding that, at least with respect to those Acts, the statutory remedies had displaced all other private modes of redress, including waiver of tort.

Koubi was indicative of a trend whereby British Columbia’s courts took, overall, a somewhat more restrictive view of waiver of tort than their Ontario counterparts, rejecting certification of claims in *Reid v Ford Motor Company*²⁰ (“*Reid*”), and *Strata Plan LMS 3851 v Homer Street Development Limited Partnership*²¹ on the basis that “anti-harm” wrongs such as negligence could not provide the predicate breaches to found the restitutionary remedies available under the waiver of tort doctrine. In *Reid*, Justice Gerow cited *Networth Industries Ltd v Cape Flattery*,²² for the proposition that unjust enrichment could not be founded on negligence, and therefore it was plain and obvious the claim for waiver of tort was similarly bound to fail. She held:

[r]estitutionary claims are not made in negligence and nuisance because they are in the main “anti-harm wrongs” in relation to which it is impossible, even if they lead to an enrichment of the wrongdoer, to elevate the prevention of

18. *Aronowicz v Emtwo Properties Inc*, 2010 ONCA 96 (shareholder dispute); *Arora v Whirlpool Canada LP*, 2012 ONSC 4642 at para 300 (allegedly defective laundry machines); *Andersen v St Jude Medical Inc*, 2012 ONSC 3660 (allegedly defective heart valves).

19. 2012 BCCA 310.

20. 2006 BCSC 712 [*Reid*].

21. 2011 BCSC 569.

22. [1997] BCJ No 3174 (SC) [*Networth*].

enrichment to the level of a primary purpose.²³

The British Columbia Court of Appeal was somewhat more generous with anti-competition claims, permitting waiver of tort pleadings to survive certification in *Pro-Sys Consultants Ltd v Infineon Technologies AG*.²⁴ Justice Smith, writing for the Court, allowed that the plaintiffs might not need to show damage if the doctrine were applied, and that an aggregate monetary award could be certified as a common issue. Similarly, in *Steele v Toyota Canada Inc*,²⁵ Justice Hinkson (as he then was) permitted a waiver of tort claim premised on breach of the provincial competition legislation to proceed, also acknowledging that if waiver of tort were an independent cause of action, proof of caused damage may not be necessary in order for a global remedy to be available.

In *Microsoft*, the plaintiffs were indirect purchasers of Microsoft's operating systems who claimed that the software giant had conspired to fix prices. Two judges at first instance had certified a claim including waiver of tort;²⁶ the majority of the Court of Appeal overturned certification without expressly addressing that cause of action, simply holding that indirect purchasers of Microsoft's product had no competition claim (only the dissenting judge, Justice Donald dealt with it, finding that it did disclose a cause of action).²⁷ On appeal to the Supreme Court of Canada, the certification was reinstated, including waiver of tort as a possible cause of action.²⁸

There is one decision since *Microsoft* that deserves more than mention. *O'Brien* was a products liability and failure to warn class action involving the manufacturers of pelvic mesh implants. The claim involved 19 different products and thousands of class members, who were alleged to have suffered one or more of a host of complications and injuries

23. *Reid*, *supra* note 21 at para 29, citing *Networth*, *ibid* at paras 24-26.

24. 2009 BCCA 503, leave to appeal refused, [2010] SCCA No 32.

25. 2011 BCCA 98.

26. *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2010 BCSC 285; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2006 BCSC 1047; and *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2006 BCSC 1738.

27. *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2011 BCCA 186.

28. *Microsoft SCC*, *supra* note 2.

as a result of the implants. Justice Perell, while allowing that waiver of tort might be viable as a cause of action in some cases, said that where mass tort claimants were pursuing possibly billions of dollars in personal injury claims it was not a viable alternative pleading. I will have more to say about Perell J's concerns below.

So what is the state of the law in Canada today? Well, waiver of tort, like Professor Schrödinger's famous cat, presently appears to be both alive and dead (or perhaps it is better to say neither alive nor dead) pending an examination.²⁹ In order to make out a claim it would be necessary for the plaintiff to show a wrongdoing of the defendant (predicate wrong), and a profit that has accrued to the defendant from the activity that was unlawfully conducted. These conditions may in turn be subject to the overriding objectives of equity itself.

At virtually every step of the way, lawyers representing defendants in class actions have loudly — and as it turned out somewhat prematurely — declared that waiver of tort, as an independent cause of action, was dead or at least dying.³⁰ But it has proven stubbornly resilient, and I suggest that this is because the problem that it is being used to remedy is real: what happens when the plaintiffs can establish (i) that the defendant

29. Physicist Erwin Schrödinger proposed a thought experiment in 1935 in which decaying radioactive material would either kill a hidden cat or not. According to quantum theory of superposition, the cat would be both alive and dead until it was observed to be one or the other, a result Schrödinger regarded as absurd.

30. See *e.g.* Brandon Kain, "Waiver of Tort Gets a Reality Check at the B.C. Court of Appeal" (23 July 2012), *Canadian Appeals Monitor*, online: <www.canadianappeals.com/2012/07/23/waiver-of-tort-gets-a-reality-check-at-the-b-c-court-of-appeal/>; Christopher Naudie et al, "Class Actions Development: B.C. Court of Appeal Slams the Door on Waiver of Tort in Statutory Cases" (20 July 2012), *Osler, Hoskin & Harcourt LLP*, online: <<https://www.osler.com/en/resources/critical-situations/2012/class-actions-development-b-c-court-of-appeal-sl>>; Peter Kryworuk & Rebecca Case, "Waiver of Tort — So Long, It's Been Nice to Know You?" (2 September 2015), *Lerners* (blog), online: <http://lernerclassactionplaintiff.ca/blog/post/waiver-of-tort-so-long-it-s-been-nice-to-know-you?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>.

committed a breach of some statutory or common law duty and; (ii) that the breach caused a certain amount of harm in persons who have been exposed through purchase or use of a product; but (iii) it is difficult or impossible to link, on a balance of probabilities, any *particular* victim with the wrong?

If waiver of tort exists, what are the elements in modern Canadian law? What constitutes a predicate wrong? Does negligence qualify? Some breaches of statute (competition laws, for instance) seem to be covered, where others that contain exhaustive recovery regimes (consumer protection legislation) may not be. Who can claim under the doctrine, if this is not to be determined by who has been harmed by the wrong? These questions might eventually be answered with reference to the equitable principles underlying the cause of action. So we might ask, first, whether the wrong is such “that in equity and good conscience [the] defendant should not be permitted to retain that by which it has been enriched”;³¹ and second, whether there is some connection or nexus between the plaintiff (or class) and defendant such that the former may equitably pursue and receive the benefit of the disgorgement. But at this point all of these matters remain unresolved.

I should conclude my discussion of the Canadian cases by disposing of one issue that has caused some angst among both academics and jurists: is waiver of tort a stand-alone cause of action, or is it simply a remedy?³² If the latter, the doctrine would only permit disgorgement where a complete wrong (usually including proof of caused loss) is independently established.

As the Supreme Court of Canada noted in *Microsoft*: “[t]he U.S. and U.K. jurisprudence as well as the academic texts on the subject have largely rejected the requirement that the underlying tort must be

31. *Federal Sugar Refining Co v US Sugar Equalisation Board*, 268 F 575 (SDNY 1920 (US)) at 582 [*Federal Sugar*].

32. The controversy is well described in *Serhan Div Ct*, *supra* note 5 at paras 45-76, and I need not detail it here.

established in order for a claim in waiver of tort to succeed”.³³ The Court appeared less persuaded by other cases restricting the doctrine to cases where the full tort, including proof of loss, was required³⁴ and permitted the waiver claim to proceed, apparently on the assumption that it might provide an independent basis for recovery, notwithstanding Microsoft’s assertion that it had been pleaded only as remedy.

But in any event, the Supreme Court’s analysis accords with a practical reality: if providing a remedy (disgorgement of profits) is *all* waiver of tort does, then it is a weak doctrine in most cases. Indeed it would be largely redundant with punitive damages, which courts recognize can, and perhaps often should, be measured by the profits of the defendant, with the equitable and deterrence objectives of depriving the defendant the fruits of his wrongdoing.³⁵

It is difficult to see how equitable disgorgement, as a remedy, could improve on this, and indeed it appears far less efficacious than punitive damages which can be increased or decreased according to other relevant factors, including ensuring proper deterrence.

So if waiver of tort is to mean anything, it must be an independent cause of action, one that can succeed where ordinary tort or contract claims cannot, and the remainder of my analysis of its efficacy and desirability is premised on this, more robust, view of the doctrine.

33. *Microsoft SCC*, *supra* note 2 at para 96, citing *inter alia*, *National Trust Co v Gleason*, 77 NY 400 (App Ct 1879 (US)); *Federal Sugar*, *supra* note 31; *Mahesan v Malaysia Government Officers’ Co-operative Housing Society Ltd*, [1979] AC 374 (PC (Malaysia)); *Universe Tankships Inc of Monrovia v International Transport Workers Federation*, [1983] 1 AC 366 (HL).

34. *Microsoft SCC*, *supra* note 2 at para 96, citing *United Australia Ltd v Barclays Bank Ltd*, [1941] AC 1 (HL) at 18; *Zidaric v Toshiba of Canada Ltd* (2000), 5 CCLT (3d) 61 (Ont Sup Ct J) at para 14; *Reid*, *supra* note 20.

35. *Whiten v Pilot Insurance Co*, 2002 SCC 18 (where the Supreme Court of Canada held “it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others” at para 72).

III. What is Wrong With a Waiver of Tort Claim

A. What is the Problem, Exactly?

I propose here that there are two categories of cases where courts might apply the doctrine. They suggest two different problems, and the fact that waiver of tort is good at addressing one and poor at the other leads to my conclusion that it should not be a preferred doctrine in most mass-wrong cases.

The first category consists of cases where a defendant has profited from a wrong, but there has been no loss to the plaintiff giving rise to an ordinary cause of action. In such circumstances, waiver of tort can provide a measure of deterrence of activity that is potentially harmful and antisocial but did not cause harm “this time around”. Whether any particular wrong should give rise to disgorgement is a question rife with policy considerations. Presumably, the intervention of the courts is warranted to deter wrongs of a type which society has an interest in absolutely prohibiting (such as a crime), instead of just regulating (such as, at least on one view, negligence). But even after this question is answered, the court might further ask: is the plaintiff or class the appropriate “prosecutor” of such an action, given that it is essentially regulatory in ambition?

The second category of cases to which waiver might apply is where we know the defendant has committed complete torts — that is, we know *some* people have been harmed by the wrong but we simply cannot tell which ones. Typically, this will arise in the context of mass claims that can be prosecuted through the device of the class proceeding. In such cases, I will argue, resort to waiver of tort is inappropriate and ineffective, and a much more straightforward solution — the determination of causation class-wide, in a population of persons exposed to the risk of harm — is available and preferable.

In order to justify my arguments in this regard, I must review the objections that are taken to waiver of tort as a cause of action. I hope to show that the problems with the doctrine are most acute in the second category of cases (*i.e.* where harm has in fact occurred but is indeterminate), and are insignificant, or at least manageable, in the first

category.

B. Wrongs “In the Air”

We know that crimes, fraud and other malfeasance can form the basis of a waiver of tort claim. But what of negligence-based cases, such as products liability or toxic tort claims? Should different principles apply? Some courts have expressed discomfort, at least in *obiter*, that waiver of tort claims could relate to “anti-harm” wrongs like negligence, which are overtly premised on compensatory rather than regulatory principles.³⁶ Causation — not just factual but *legal* causation — has proven to be an important limiting device in negligence law, and not just from the point of view of compensation objectives. Tort scholars might disagree on the *reason* why the right to pursue negligence claims has been limited to those whom the defendant has harmed through its fault, but it certainly has. And it may be that disconnecting the causation link altogether will unnecessarily depress socially or economically useful activity as “busybody plaintiffs” (or more likely lawyers) set themselves to ferreting out “wrongdoing” and launching a wave of litigation with no good purpose.

So there are good arguments why waiver of tort claims have never been, and should not be, prosecuted entirely “at large”: that is, a person who is a complete stranger to the defendant and the wrong ought not be able to sue to obtain the defendant’s profits. On this view, there should be *some* relationship between the wrong and the plaintiff sufficient to permit the plaintiff to obtain standing on the basis that the plaintiff is in an equitable position to pursue the claim.

I would suggest this nexus could be established on a couple of different bases. First, if the plaintiff (or the class) was “within the ambit of the risk” of harm created by the defendant’s wrong,³⁷ they could

36. See for instance *Reid*, *supra* note 20 at paras 15, 29; *Serhan Div Ct*, *supra* note 5 at paras 66-67.

37. Individual plaintiffs who cannot prove causation but who fall within “the ambit of the risk” may be able to take advantage of exceptions to the traditional “but for” test in individual causation cases: *Resurfice Corp v Hanke*, 2007 SCC 7 at para 25 [*Resurfice*].

claim. So, for instance, consumers of a product, purchasers of shares, or victims of diseases epidemiologically linked with a pollution source or toxic substance might qualify as appropriate plaintiffs in a waiver of tort claim, where mere bystanders or busybodies might not. Thus in *Serhan*, for instance, it made sense to permit the purchasers of the medical device to bring the (eventually settled) waiver of tort claim. Another way of assessing the proposed plaintiff might be whether there will be some remedy (or settlement term) aside from simple disgorgement that will benefit the plaintiff. So, to again use *Serhan* as an example, each user of the diabetes testing device was, as part of the settlement, entitled to a replacement device.

In many class action cases, the “busybody” problem will not arise because waiver is almost always pleaded in the alternative to tort, fraud or unjust enrichment claims, and so the class is defined with regard to persons who have suffered harm as the result of the wrongs. If those pleadings survive certification, which would require that the tort claims have, at least “some basis in fact”,³⁸ then this might provide a sufficiently restrictive class who should have standing to pursue waiver claims in the alternative.

Nevertheless, the separation of wrongdoer from victim that waiver of tort entails must be counted among the difficulties to a widespread use of the doctrine.

C. Under-Compensation and Under-Deterrence

Another obvious but more serious problem with resort to waiver of tort emerges in cases where we can know that the defendant’s wrongdoing did in fact cause some harm. In some cases, application of the doctrine might represent a windfall for plaintiffs, who might have suffered little or no loss from a wrong associated with a highly profitable product or activity of the defendant. In many other cases, the harm will be of such a magnitude that any disgorgement of profits will be little more than

38. Brandon Kain, “The Supreme Court of Canada and the Still-Curious Requirement of ‘Some Basis in Fact’” (2015) 68 *Supreme Court Law Review* (2d) 77.

token.

The main objectives of tort law are usually expressed in terms of compensation and deterrence. Though scholars will disagree about which has primacy, the question is usually moot: tort law operates by making the defendant pay the cost of the harm it has caused to the person it has injured. This achieves compensation for the victim and forces the defendant to internalize the cost of the harm, thus providing the economically-optimal level of deterrence, or regulation, of the risky activity.³⁹

Disgorgement, as a sole remedy, upsets this balance. Certainly, in cases where the plaintiff has suffered little or no harm, the disgorgement of profits provides some disincentive to defendants to engage in risky or other antisocial behaviour. So we see cases like *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*,⁴⁰ where Lord Denning observed that in “[the] cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it, even though the plaintiff had lost nothing and suffered no damage”.⁴¹

But reliance on disgorgement as a deterrent is inferior to a system based on damages, particularly where “habitual defendants” may be systemically incentivised to take risks in the pursuit of profit. If all a defendant risks are its profits, it might, overall, take *more* risks to obtain *more* profits, on the expectation that there is no real “downside” to doing so. If a wrongdoer gets caught, it gains nothing but loses nothing either. If it does not get caught, it retains the benefit of the wrong. If it internalizes the true costs of the harm it has caused, on the other hand, the equilibrium provided by tort law is restored.

So in cases where the defendant’s wrong has *not* actually caused harm

39. See e.g. Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970)(the still-resilient “law & economics” analysis of tort law); see also Richard A Posner, “A Theory of Negligence” (1972) 1:1 *Journal of Legal Studies* 29; Richard A Posner, *Economic Analysis of Law*, 6d (New York: Aspen Publishers, 2003); Richard A Posner, “Utilitarianism, Economics, and Legal Theory” (1979) 8:1 *Journal of Legal Studies* 103.

40. [1952] 1 All ER 796 (CA).

41. *Ibid* at 800.

“this time around”, waiver of tort and disgorgement provides a rational means of providing some deterrence for activity that is inherently antisocial or risky, but did not cause harm in the particular event (such as in *Serhan* itself).⁴² The difficulty is that, in the majority of cases, *some* harm *has* actually been caused; the problem is that the connection between the defendant’s wrong and each member of a plaintiff class cannot be confidently established.

D. The Divergence of Interests of Class Counsel

There is one further problem with reliance on waiver of tort that may lead to systemic under-deterrence and under-compensation. That is that recovery under the doctrine is so easy that it may actually prevent legitimate damages claims from being brought, or at least from being aggressively pursued.

The success of class actions depends on the interests of class counsel being aligned with the class members’ own. The fact that this will not always be so has influenced many aspects of the class procedure, such as the requirements that class members be given notice of proposed settlements and an opportunity to object, and that settlements be approved by the court. The temptation is always that plaintiffs’ counsel can, implicitly at least, collude with defendants to produce a quick settlement for a small amount that provides substantial payment for the lawyers but little

42. It is tempting to say, as a consequence of the distinction I propose here (between cases where there is no damage versus true “indeterminate causation” cases where damage is known but particular victims cannot be certainly identified), that waiver of tort is never required in class actions, because in the cases where I propose that it should be available could be as easily pursued as individual actions. However this is probably too simplistic a view for three reasons: (i) because waiver of tort may legitimately be pleaded in the alternative in cases where it is not certain into which category the claim should properly fall; (ii) because it may be more fair or just to distribute the disgorgement more broadly than to a single individual; and (iii) because a class action will dispose simultaneously of the claims of all persons who would have standing to pursue them individually, therefore avoiding an inefficient multiplicity of competing claims for the same remedy.

benefit for the members.⁴³

In *O'Brien*, referred to earlier, Perell J found that even if it were a valid cause of action conceptually, waiver of tort should not be permitted to proceed to trial on the facts before him, not because it did too much but because it did too little:

[i]n *Serhan v. Johnson & Johnson*, which is the case that started the debate about the nature of waiver of tort, there were zero monetary damages for the tort claim and waiver of tort was the route to access to justice and behaviour modification. In the case at bar, assuming Bard were negligent, a waiver of tort cause of action would not provide access to justice to class members or any meaningful behaviour modification. It would be reprehensible for Class Counsel to take a contingent fee based on an award calculated on the disgorgement of profits. A judgment or a settlement based on waiver of tort would create enormous conflicts between Class Members as to how the disgorged funds should be distributed. It would be a waste of the court's and the parties' litigation resources to expend discovery and trial time calculating what profits, if any, Bard made from its Pelvic Mesh Products, when assuming liability, everybody should be spending their litigation resources calculating compensatory damages. In my opinion, in these circumstances, regardless of whether waiver of tort is a reasonable cause of action, it would not be reasonable to prosecute it as a class action. Even if the pleading of waiver of tort satisfied the cause of action criteria, the class definition, and the common issues criteria, in my opinion, the waiver of tort claim in the circumstances of the case at bar would not satisfy the preferable procedure and the representative plaintiff criteria. In these circumstances, I conclude that the waiver of tort claim in the case at bar does not satisfy the cause of action criterion for a class action. I would not certify the waiver of tort claim.⁴⁴

One might quibble with Perell J's mixing of the "cause of action" criterion with the other threshold requirements of class certification, particularly "preferability". And his concern over the problems of distribution of a class-wide award, which he saw as reflecting on the question of whether

43. See generally Bruce Hay & David Rosenberg, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy" (2000) 75:4 Notre Dame Law Review 1377.

44. *O'Brien*, *supra* note 8 at paras 162-65.

the representative plaintiff was appropriate, may have been overstated.⁴⁵ But at least this one of his concerns over the use of the doctrine should cause serious reflection: he worried that the class in *O'Brien* would be “sold out” if their recovery were limited only to recovery of the profits when the harm alleged was of a much higher magnitude.

When we come to appreciate that plaintiffs’ counsel in the class action bar approach their work from the point of view of investment and return, we can apprehend that there will come a point where a reliance on waiver of tort actually undermines the compensatory and behaviour-modification objectives of both tort law generally, and class actions in particular.

In the popular book *Freakonomics*, the authors identified a structural conflict of interest between realtors and their clients. The difficulty arises from the commission structures adopted by the industry: a realtor paid on commission has a comparatively small interest in maximising his client’s selling price: that is, a realtor being paid 3% commission on the sale of a house worth \$500,000 “loses” only \$1500 if she quickly sells the house for a \$50,000 discount. It will generally be easier to invest the realtor’s efforts in selling two such houses quickly and cheaply (earning \$27,000 commission) rather than taking the same time to sell one house for its full value (earning only \$15,000 commission), and the authors suggested that a study showed that is exactly what realtors did.⁴⁶

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45. *Ibid* at paras 125-26 (the distribution problem Perell J identified would apply to any lump-sum award, including punitive and exemplary damages in tort. The deeper problem was the plaintiff’s attempt to certify a single class for 19 distinct products, each with its own history and each with a different group of alleged victims).
46. Stephen J Dubner & Steven D Levitt, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (New York: Harper Collins, 2005) at 5-8, (The methodology was ingenious: the researchers compared realtors’ behaviour when listing and selling their own homes versus their clients’. They found that realtors took longer to sell their own properties, and realized higher sale prices. It might be observed as an aside that commission structures that are non-linear, such as those providing 7% on the first \$100,000 and 2% thereafter (usually split between the buyer’s and seller’s agents), are even more perverse in their incentives).

Justice Perell's caution in *O'Brien* seems well placed for the same systemic reasons. If the plaintiffs' counsel can get an easy but small recovery from a waiver of tort claim, why should they pursue lengthy, convoluted tort actions, at comparatively great investment risk? Judge Henry Friendly recognized the inclination in the context of an individual wrong in *Alleghany Corp v Kirby*,⁴⁷ when he wrote that a lawyer has "every incentive to accept a settlement that runs into high six figures or more regardless of how strong the claims for much larger amounts may be ... [A] juicy bird in the hand is worth more than the vision of a much larger one in the bush".⁴⁸

Yet if lawyers do not pursue the full measure of the harm, the tort "market" is distorted: defendants internalize only a fraction of the harm they have caused, and the class members receive only a fraction of their true losses.

So either of the present approaches — insistence on individual attribution of harm (with recovery denied in each case, even if the claims are economically viable one-by-one), or replacing that with limited recovery based on the profits of the defendant — are chronically unsatisfactory and will demonstrably lead to under-compensation and under-deterrence. Is there a better way?

IV. A Better Way

A. The Problem, Reiterated

As I hope is now apparent, the downsides of resorting to waiver of tort in large-scale claims are most acute in mass torts where it is possible to determine that the defendant's wrong has caused harm, but each plaintiff, or member of a class exposed to the risk of harm, cannot establish a causal link between the wrong and the damage they have suffered.

In a class action, it is possible to assess the harm on a collective basis, as harm caused within a *population* of persons, without the need to prove that any particular class member's harm was the result of a particular

47. 333 F (2d) 327 (2nd Cir 1964 (US)).

48. *Ibid* at 347.

defendant's misconduct. Damages can also be assessed in the aggregate, with only the problem of distribution remaining. As I will mention a bit later, this is often the basis of court-approved class action *settlements*.

The difficulty is that class actions are generally regarded as only a procedural device.⁴⁹ Class proceedings statutes generally permit the calculation of quantum of *damages* on an aggregate basis, but only once liability has been established.⁵⁰

This permits defendants to argue that, even if there can be collective determination of "general causation" (*i.e.* that the defendant's wrong can cause the type of harm alleged, or even that, viewed in the aggregate, it did cause harm),⁵¹ the claim cannot be legally made out until it is known which class member actually suffered the harm from the wrong. The Supreme Court of Canada has, from time to time, drunk of this water, as when it said that the judge "must still be satisfied on a balance of probabilities that *each* element is present for *each* member".⁵² In cases of indeterminate causation, it simply cannot be. As such, in mass tort cases where causation in individuals is indeterminate, tortious harm that can be plainly seen in the aggregate may go unaddressed by the tort system, which provides only, as some have called it, a "phantom remedy".⁵³

49. *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 (a class action is "only a legal procedure" at para 106); *Bisailon v Concordia University*, 2006 SCC 19 (a class action "neither modifies nor creates substantive rights" at para 17).

50. See Ontario's *Class Proceedings Act, 1992*, SO 1992, c 6, s 24(1) [Ont *Class Proceedings Act*]; or identically BC's *Class Proceedings Act*, RSBC 1996, c 50, s 29(1).

51. The same evidence that is used to establish *general* causation - that is that the wrong creates a risk of harm - is evidence for the proposition that it *did in fact* cause harm in a population, though the particular victims might not ever be identified.

52. *Bou Malhab v Diffusion Metromedia CMR Inc*, 2011 SCC 9 at para 53 [emphasis added].

53. William R Ginsberg & Lois Weiss, "Common Law Liability for Toxic Torts: A Phantom Remedy" (1981) 9:3 Hofstra Law Review 859 (examining how the economic realities of individual litigation, combined with causation and other challenges, effectively preclude individual claims for compensation in toxic tort cases).

A decade ago, Professor Jamie Cassels and I proposed that, in mass toxic claims, aggregate assessment of causation may prove not only necessary, but superior to assessments done case-by-case (in the sense that the former is both more accurate and more fair).⁵⁴ In 2005, we wrote:

[c]ausation of harm in the aggregate becomes clearer even as the individual identity of the victims, and their individual connection with each wrongdoer, is lost... in our opinion, viewing inherently probabilistic causation in the aggregate — as a definite harm in a percentage of the population rather than a probabilistic harm in an individual — provides several advantages in the resolution of mass tort claims.⁵⁵

In 2011, while the individual causation case of *Clements v Clements*,⁵⁶ was before the Supreme Court of Canada but before it was decided, I reiterated my concern that individual causation rules should not be crafted so as to frustrate mass tort claims:

[i]n such instances, we know that the defendant has, in fact, caused a certain number of the injuries suffered in the population. We simply do not know which of the afflicted were harmed by the defendant, and which would have been injured in any event. Why should this be an insurmountable obstacle to

54. See for instance, Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law Book, 2003); Jamie Cassels & Craig Jones, *The Law of Large Scale Claims: Products Liability, Toxic Torts and Complex Litigation in Canada* (Toronto: Irwin Law Book, 2005) [Cassels & Jones, *Large Scales*]; Craig Jones, “Reasoning Through Probabilistic Causation in Individual and Aggregate Claims: The Struggle Continues” (2011) 39:1 *Advocates’ Quarterly* 18 [Jones, “Reasoning Through Probabilistic Causation”]; Jamie Cassels & Craig Jones, “Rethinking Ends and Means in Mass Tort: Probabilistic Causation and Risk-Based Mass Tort Claims after *Fairchild v. Glenhaven Funeral Services*” (2003) 82 *Canadian Bar Review* 597 [Cassels & Jones, “Rethinking Ends and Means in Mass Tort”]. My and Professor Cassels’ work in this area was heavily informed by that of David Rosenberg, particularly two foundational articles: David Rosenberg, “Class Actions for Mass Torts: Doing Individual Justice by Collective Means” (1987) 62:3 *Indiana Law Journal* 561; and David Rosenberg, “Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases” (1996) 71:1&2 *New York University Law Review* 210.

55. Cassels & Jones, *Large Scales*, *ibid* at 208.

56. 2012 SCC 32 [*Clements*].

tort law?⁵⁷

Professor Cassels and I had written these things as a series of cases, especially *Fairchild v Glenhaven Funeral Services Ltd*⁵⁸ and *Resurfice Corp v Hanke*,⁵⁹ suggested a relaxation of the rules of causation permitting persons “within the ambit of the risk” to bring personal injury claims notwithstanding that they could not demonstrate causation. We posited that these techniques, applied in the context of a class action, could considerably ease the problem of indeterminate causation in mass torts. In this sense, it was disappointing that the Court seemed determined to rein in the idea of “probabilistic causation” in the individual personal injury case of *Clements*.

But it appeared that the Supreme Court was alive to the problem, and might be prepared to relax the rules of causation in mass tort class actions. In *Clements*, the Chief Justice (writing for a unanimous Court on this point), upheld and reiterated the individualistic “but for” test of tort causation in single cases, but then said this:

[t]his is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant’s acts induced an injury on some members of the group, but it is impossible to know which ones.⁶⁰

B. Assessment of Liability, Harm, and Damages on an Aggregate Basis

Let us take the example of a mass tort involving the exposure to a toxic substance or the use of a defective product, where evidence could establish a probability of harm over and above “background risk”, and that this harm could be attributable to the defendant’s wrong (sometimes called “general causation”). Let us further suppose that we could identify a class of persons who were exposed to the risk (consumers, or people living in

57. Jones, “Reasoning Through Probabilistic Causation”, *supra* note 54 at 22 [emphasis in original].

58. [2002] UKHL 22.

59. *Resurfice*, *supra* note 37.

60. *Clements*, *supra* note 56 at para 44.

a geographic area) and whom had suffered harm of a type that would be expected from the wrong. But even if we know that some of that group was actually harmed by the defendant, we also know that others would have suffered the harm without the occurrence of the wrong. We just do not know who is who.

The ordinary tort system would provide no remedy, because attribution of any individual's harm to the defendant's wrong would be impossible.⁶¹ However if we calculated the harm in the aggregate, we could impose liability on the defendant and recover damages in the amount of the harm they had caused. We would still, of course, have a problem of distributing the proceeds among the sufferers of harm. But the regulatory function of tort would be preserved through proper deterrence, and the longstanding tradition that negligence should be regulated by persons who had been harmed and only to the extent that it *has* caused harm, would be respected. Yes, it is only part fulfillment of tort's compensation/deterrence objectives, but it does provide the potential for *some* relief of victims, and more importantly, through deterrence, it helps avoid *all* harm to future victims who would be created if the tort system did nothing.

Tobacco litigation is paradigmatic of the problem, and has also been fertile ground for innovative solutions. The diseases caused by tobacco are, in the main, elusive of individual attribution: it is very difficult for an individual smoker who suffers from emphysema, or cancer, to prove with any certainty that he would not have contracted the disease "but for" smoking. All we can say for sure is that smoking increased the risk of the disease. But increased *risk* in an individual means increased *prevalence*

61. This is a problem for plaintiffs only, of course, if the background risk was higher than the probability of the harm resulting from the wrong. I suggest that this is the case in most toxic torts and many products liability claims, but I allow that in some cases the "balance of probabilities" in the individualistic system could result in *every* claimant succeeding even where we know that some of the harm was not defendant-caused. This does not, in my view, weaken the case for aggregate assessment of causation that I make in this article, and in fact the opposite: it is fairer to both defendants and plaintiffs because it neither over- or under-deters, and exacerbates neither the "sweetheart" or "blackmail" settlement problem.

in a population. We can know with scientific certainty that *some* smokers with cancer would not have got the disease “but for” smoking, and we may even be able to know, with some certainty, how many. To move to a further level of abstraction, if the smoker’s claim is based on a failure to warn, the question of whether an adequate warning would have prevented the smoking is elusive in an individual case, while we can at the same time know that warnings do reduce the prevalence of smoking in populations. Thus, it should be possible to determine how much tobacco-related disease could have been prevented by an adequate warning, even if each individual’s claim must, under the principles of tort law, fail. We can then place a dollar figure on the global loss.

In British Columbia a statute, the *Tobacco Damages and Health Care Costs Recovery Act*⁶² (“BC Tobacco Act”), swept aside the particularistic rules of tort in favour of an “aggregate action” by the government to recover damages caused by tobacco-related wrongs, regardless of whether any particular smoker could prove a complete tort. Rules were introduced permitting liability, harm and damages to be assessed collectively. The government filed its suit, and the defendant manufacturers challenged the BC *Tobacco Act*, *inter alia*, on the basis that such rules were unfair. The government argued that aggregate assessment of damages in cases of causal indeterminacy was superior to individual adjudication, because harm in populations can be more, rather than less, accurately measured as a whole rather than as a sum of parts. In *British Columbia v Imperial Tobacco*,⁶³ Justice Major, writing for the unanimous Supreme Court of Canada, wrote:

[t]he rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to reflect legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions.⁶⁴

This echoes the view of the trial judge, who had found in 2000, when reviewing an earlier iteration of the BC *Tobacco Act* that:

62. SBC 2000, c 30.

63. 2005 SCC 49.

64. *Ibid* at para 49.

[t]he basic tenet that causation within a population may be more accurately identified statistically than by means of attribution of individual causation in a multiplicity of conventional tort-based actions appears sound. The use of statistical and epidemiological evidence is an essential aspect of an aggregate action. The question in issue becomes causation in the group rather than of any individual member.⁶⁵

Justice Holmes reiterated this endorsement when a revised version of the BC *Tobacco Act* came before him again in 2003:

[t]here is nothing inherently unfair about an aggregate action. In fact, it may often balance unfairness of proceeding either by individual actions or by other forms of collective proceeding. Neither is the use of statistical or epidemiological evidence itself evidence of an unfair trial. They are aids to the resolution of issues in a unique but appropriate form of action.⁶⁶

The breathtaking possibilities of the true aggregate approach have been further demonstrated in the recent decision of the Quebec Superior Court in a pair of tobacco-related class actions, *Blais v JTI-Macdonald Corp* (“*Blais*”) and *Létourneau v JTI-Macdonald Corp*⁶⁷ (“*Létourneau*”). In those cases the plaintiffs had the benefit of some statutory provisions that eased their problems of proof and permitted the trial judge to assess liability, harm and damages in the aggregate.⁶⁸

The claim in *Blais* was by a class of smokers who had contracted

65. *JTI-Macdonald Corp v British Columbia (Attorney General)*, 2000 BCSC 312 at paras 74-75.

66. *R v Imperial Tobacco Canada Ltd*, 2003 BCSC 877 at para 156.

67. 2015 QCCS 2382 (*sub nom Blais v JTI-Macdonald Corp* 2012 QCCS 469) [*Létourneau*].

68. Quebec’s *Tobacco-Related Damages and Health Care Costs Recovery Act*, RSQ c R-2.2.0.0.1 (“[i]n an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant’s wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling”. This provision is made applicable to class actions by the last paragraph of section 25, which states that the rules in, *inter alia*, section 15 “also apply to any class action based on the recovery of damages for the (tobacco-related) injury”: ss 15, 25).

cancer and emphysema, allegedly from smoking. In *Létourneau*, the class members were smokers who were claiming for the harm of addiction. In both classes, individual causation was, at least, uncertain: given the nature of disease processes and other causal issues such as causation-reliance, no one could conclusively attribute any particular disease to smoking, nor disease or addiction to the wrong of the defendant.

The fundamental finding of the court was that the three Canadian manufacturers of cigarettes were at fault because they did not warn of the dangers inherent in their product, adequately or at all. But with the breach demonstrated, what then? Did the plaintiffs still have to show that every individual for whom recovery was sought had suffered a harm causally linked to the defendant's wrong? Justice Riordon did not think so. He documented a 50-year campaign of deception and misinformation, and then went on to impose staggering damages (\$15 billion, after interest) despite the fact that there had been no evidence that any particular class member had suffered harm.

The specific provisions of the Quebec legislation provided only that statistical and epidemiological evidence, including sampling, could be used to establish liability as well as damages. The defendants argued that this did nothing more than permit questions of individual harm to be decided with resort to such evidence. It did not, they suggested, extend to permitting proof of causation in populations and assessment of causation on an aggregate basis.

Justice Riordon rejected this interpretation. He wrote:

[t]he objective of the TRDA is to make the task of a class action plaintiff easier, inter alia, when it comes to proving causation among the class members. When the legislator chose to favour the use of statistics and epidemiology, he was not acting in a vacuum but, rather, in full knowledge of the previous jurisprudence to the effect that each member of the class must suffer the same or similar prejudice. It thus appears that the specific objective of the act is to move tobacco litigation outside of that rule.⁶⁹

This, the trial judge observed, effectively overrode the “previous jurisprudence calling for proof that each member suffered a similar

69. *Létourneau*, *supra* note 67 at para 692.

prejudice”.⁷⁰ In Riordon J’s analysis, this led to the conclusion that individual proof of causation was unnecessary altogether.

The *Blais* and *Létourneau* decision represents the first clear Canadian manifestation of what is, if class actions are to fulfill their promise as an effective compensatory and regulatory device,⁷¹ inevitable: the adaptation of *substantive* law of causation in tort to accommodate the scale and difficulties associated with truly massive wrongs.

Justice Riordon in *Blais* and *Létourneau* seemed sufficiently pleased with the aggregate approach that he mused openly about whether the techniques should be available in all class actions. He said:

[i]t will be interesting to see if the National Assembly eventually chooses to broaden the scope of this approach to have it apply in all class actions. Although such a move would inevitably be challenged constitutionally, its implementation would go a long way towards removing the tethers currently binding class actions in personal injury matters.⁷²

Justice Riordon’s decision, while singular in the Canadian jurisprudence, was not entirely without precedent. Judges faced with massive claims spanning large periods of time have before been driven to techniques of “wholesale justice” in order to “fit the forum to the fuss”. I have described and discussed the resulting innovations, such as “market share”⁷³ or

70. *Ibid* at para 693.

71. There are three commonly-accepted objectives of class actions in Canada: compensation; behaviour modification (that is to say, the deterrence of wrongdoing); and “access to justice”. The third objective may be seen as valuable principally to the extent that it facilitates the first two, although it can be argued also to be an independent social good.

72. *Létourneau*, *supra* note 67 at para 693, n 319.

73. Market share liability operates in individual cases as well as class actions, and holds defendants liable on the basis of their risk contribution, where a causal nexus between victim and wrongdoer can’t be established: *Sindell v Abbott Laboratories*, 26 Cal (3d) 588 (Sup Ct 1980 (US)). In Canada, the theory has been permitted to proceed through certification in *Garipey v Shell Oil Co* [2000] 52 OR (3d) 181 (Sup Ct J) at para 11, and referred to as a potential claim in *Ragoonanan Estate v Imperial Tobacco Canada Ltd* [2000] 51 OR (3d) 603 (Sup Ct J) at para 27.

“sampled” liability⁷⁴ and other rules facilitating proof of causation in populations, extensively elsewhere.⁷⁵

Recent Ontario decisions seem also to hint at the willingness of courts to entertain questions of liability on an aggregate basis. In *Ramdath v George Brown College*⁷⁶ (“*Ramdath*”), the defendant college had negligently misrepresented that completion of its courses would lead to three professional designations, something that was not true. At the trial of the common issues, Justice Belobaba found that the defendants had breached their duty to the plaintiffs both under the *Consumer Protection Act, 2002*⁷⁷ and under negligence law, but noted that this alone would not entitle them to recovery for the tort without proof that each had relied on the misrepresentation. He wrote:

*[f]urther evidence may still be needed to establish legal liability for negligent misrepresentation, namely, evidence of individual reliance. This question will no doubt be addressed in the next phase of this litigation. However, legal liability has been established under the CPA because, as already noted, under this statute, evidence of actual reliance is not required ... The common issues trial has now been concluded. The next step in this class proceeding is to schedule a case conference to discuss the “damages” phase of this lawsuit. Counsel should contact my office to arrange a convenient date for the case conference.*⁷⁸

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74. In *Hilao v Estate of Marcos*, 103 F (3d) 767 (9th Cir 1996 (US)) the Court directed that the class of claimants against the late Philippine dictator for human rights abuses could be sampled to determine the number of valid claims, to permit a global assessment of damages. Similar approaches adopted by federal trial judges in the US, however, were subsequently disfavoured by appeal courts: see *e.g.* *Cimino v Raymark Industries, Inc*, 151 F (3d) 297 (5th Cir 1998 (US)) and *McLaughlin v Philip Morris USA Inc*, 522 F (3d) 215 (DC Cir 2009 (US))(these decisions, which found that abandoning individual proof of causation was a violation of the 5th and 7th Amendments to the US Constitution or the “predominance” requirements of US Federal Rule 23 (establishing the class action procedure), have little utility in the Canadian analysis as these provisions have no equivalent here).
75. See *e.g.* Cassels & Jones, “Rethinking Ends and Means in Mass Tort”, *supra* note 54.
76. 2012 ONSC 6173 [*Ramdath* 2012].
77. SO 2002, c 30, Schedule A.
78. *Ramdath* 2012, *supra* note 76 at paras 94-95 [emphasis added].

On appeal, the College challenged the finding of the trial judge that the college owed a duty of care to its students, because the tort required “reasonable reliance”. The British Columbia Court of Appeal appeared to treat the question, central to liability, as an aggregate, generic issue, rather than an individualistic one, holding:

[t]he appellant’s concerns are primarily directed at whether each of the class members reasonably relied on the representations and can prove damages. The issue of damages was not certified as a common issue and will be determined, with evidence, at the individual issues phase of the trial.⁷⁹

So, without confronting the matter directly, the Court of Appeal appeared to believe that the question of individual reliance, an element of liability, could be dealt with simultaneously with the question of financial loss, thereby blending the concept of liability and damages.

This “blending” appeared complete when the question was returned to the trial judge for the damages phase of the hearing. By that time, counsel had agreed to proceed solely on the *Consumer Protection Act* remedy for “damages”. The main controversy was whether the legislative remedy still required, like negligence, a causal link between the wrong and loss. The trial judge had concluded in the prior hearing that it did not, but the matter was reargued before him again:

GBC, however, argues that even if reliance is not required to establish an unfair trade practice under the Act, or to rescind the consumer agreement and get a refund of monies paid, some measure of causation must still be shown if the consumer is claiming “damages”. The entitlement to claim damages, says GBC, does not vitiate the need to prove causation. There has to be at the very least some evidence of a causal connection or nexus between the unfair practice and the damages being claimed. And this nexus can only be determined, argues GBC, on an individual, *i.e.* not aggregate, basis. This issue - whether or not the s. 18(2) damages remedy requires proof of a causal connection - dominated both the written and oral submissions. The issue has not been addressed in the case law and is not self-evident. Fortunately, I do not have to decide the matter. I am satisfied on the uncontroverted findings that have already been made in this litigation that a sufficient causal connection (for the purposes of the s. 18(2) damages remedy) has been established. I refer in particular to the following findings in the Common Issues and Appeal Decisions: (i) It was the opportunity to complete the three industry designations that attracted the plaintiffs to GBC in the first place, not the GBC certificate. None of

79. *Ramdath v George Brown College of Applied Arts and Technology*, 2013 ONCA 468 at para 8 [emphasis added].

them wanted or needed another college graduate certificate. (ii) The plaintiffs claim they would not have enrolled in the Program but for the representation about the industry designations. For each of them, and for the students they represent, the value of the Program was the promised opportunity to complete the requirements for the CITP, the CCS and the CIFF “in addition to” the GBC graduate certificate. (iii) The promise of these industry designations made the program very attractive to prospective students. I also rely on the common sense observation that students applying for an eight-month college program (especially those that are coming from foreign lands) will most likely review the Program description before applying and paying a substantial tuition. In short, *I have no difficulty concluding that if the s. 18(2) damages remedy requires some nexus or causal connection with the unfair practice, this has been sufficiently established.*⁸⁰

So let us be clear on what is happening here. The trial judge found that the requirement of individual reliance in all members of the class (if indeed it was required), had been satisfied, not through individual evidence, but rather on (i) the representative plaintiffs’ own pleadings and evidence; and (ii) judge’s class-wide inference, based on “common sense” and the circumstances of the misrepresentation, that *all* the class members had probably relied. He then moved quickly to an assessment of aggregate damages.

Ramdath was followed by Justice McEwen in *Trillium Motor World Ltd v General Motors of Canada Limited*⁸¹ (“*Trillium*”), a case turning on “loss of chance”. There, the court decided it could award class wide damages to car dealers who had lost an opportunity to negotiate due to the default of the defendant. But *would* each in fact have negotiated? Even though the evidence had been specific to the representative plaintiff alone, the court felt comfortable extrapolating this causation question to the entire class, and disposing of it simultaneously with the question of class-wide, aggregate damages:

[t]he third precondition, s. 24(1)(c), is the most critical. In this regard, I must determine the aggregate or a part of the defendant’s liability to the Class Members and give judgment accordingly where the aggregate or part of the defendant’s liability to some or all of the Class Members can reasonably be determined without proof by individual Class Members. Justice Belobaba

80. *Ramdath v George Brown College*, 2014 ONSC 3066 at paras 17-19 [*Ramdath* 2014] [emphasis added, italics in original].

81. 2015 ONSC 3824.

recently analyzed this precondition in *Ramdath v George Brown College*, 2014 ONSC 3066 (CanLII), 375 D.L.R (4th) 488 at para 47, identifying three requirements: (a) the reliability of the non-individualized evidence that is being presented; (b) whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and, (c) whether the denial of an aggregate approach will result in "a wrong eluding an effective remedy" and thus a denial of access to justice. In my view, Trillium has satisfied all three requirements. The basis for Trillium's claim in aggregate damages is loss of chance. This chance relates to the affected dealers as a group, and the likelihood that negotiations of the terms of the WDA would have taken place between the group as a whole and GMCL. The non-individualized evidence is reliable, the use of the evidence does not result in any unfairness to Cassels, and to deny the Class Members the aggregate approach would amount to the denial of a remedy. Acting collectively in negotiations with GMCL is a critical component of the Class Members' claim against Cassels. An individualized approach to damages would not only be unfair to the individuals who would have banded together, it would be misguided given the nature of their action. Determining how much more money would have been available from GMCL for the Class Members had they had an opportunity to negotiate for it does not cause any injustice to the defendant Cassels by overstating its liability; rather, it simply quantifies that liability.⁸²

In other words, where it can be inferred that the wrong has had generic consequences across the class, and where there is no injustice to either plaintiff or defendant, the requirements of section 24(1) of the *Class Proceedings Act* of Ontario have been met, and group wide *liability* in the sense of causation can be assessed simultaneously with "monetary liability".⁸³ Section 24(1) of the Ontario Act, therefore, appears to be operating not as simply a procedural device, but at least as a framework

82. *Ibid* at paras 540-41 [emphasis in original].

83. Ont *Class Proceedings Act*, *supra* note 50 provides that aggregate damages may be awarded where: "(a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members": s 24(1).

within which courts may modify or extend the substantive law of tort.⁸⁴

It is a very short step from these cases finding, without individual evidence, causation in the entire class, to a court finding, on a similar basis, that causation was made out in a *portion* of the population. Once the decision is made to consider the question on an aggregate basis, then argument can be introduced on the extent of the harm throughout the class. So in *Trillium*, for instance, if the defendant had produced evidence that *some* class members would not have negotiated and therefore suffered no loss, that need not send the matter for individual adjudication of each class members claim. The judge could still fairly assess aggregate liability if the harm could be equitably assessed proportionately through expert evidence, sampling or other devices (assuming also distribution concerns could be assessed in the aggregate). This would still satisfy the three-part test in *Ramdath*, and further the access to justice goals identified in that case. Justice Belobaba in *Ramdath* had introduced his damages judgment with the following paragraph:

[a]ggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.⁸⁵

The same points can, and should, be made with respect to liability. If class-wide causation can be fairly and reasonably determined without individual proof, then class action judges should do so routinely and without hesitation. And we appear to be cautiously starting down that road. This is how it should be: recognizing that class proceedings Acts did not, in themselves, modify the substantive law does not mean that they froze the substantive law at the time of their enactment. The law of causation can adjust to the procedural context of a class action, and should do so when it so obviously improves the efficacy of the tort system,

84. That these cases were decided recently is significant, as they appear to be, at least to some extent, at odds with Rothstein J's comments in *Microsoft SCC*, *supra* note 3 at para 131 to the effect that class-wide liability must be established *before* the aggregate damages provisions could be applied.

85. *Ramdath* 2014, *supra* note 80 at para 1.

improves access to justice, secures compensation and effects appropriate deterrence.

Finally, I cannot resist pointing out that aggregate assessment of liability *already* underpins the judicial resolution of mass wrongs in Canada. Most certified cases settle before trial, and the settlement terms are subject to judicial oversight and approval. These settlements routinely rely on estimates of the global liability of defendants to “groups of persons” without proof of individual loss.⁸⁶ If one is “substantively, procedurally, institutionally, or circumstantially fair”, as class action settlements must be,⁸⁷ then how can the other (the use of the same devices to determine a fair outcome at trial) not be?

Aggregate assessment of causation is a solution to the same problem that has led to reliance on waiver of tort. But because the aggregate award is actually premised on the true harm caused by the defendant’s wrong (rather than just by the extent to which it has profited from it), the assessment of liability and quantification of the damages on an aggregate basis is far preferable whether viewing the question from a perspective of adequate compensation or optimal deterrence. This was the central insight of Riordon J in *Blais and Létourneau*, and the logic underpinning *Ramdath* and *Trillium*.

V. Conclusion

I have endeavoured to demonstrate, throughout this article, that in most class actions with problems of indeterminate causation, tort law is a better avenue of address than equitable waiver of tort.

Courts are beginning to recognize the efficiency of adapting the

86. See for instance the decision approving the settlement in *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2014 BCSC 1936 (where Masuhara J approved a settlement which incorporated principles of aggregate causation and market share liability). I would argue that many, if not most, class actions that settle before trial are “rough and ready” estimates of class-wide liability that are premised on disconnecting the causal link between wrongdoer and the individual victim.

87. See John C Kleefeld, “Facets of Fairness: *Kidd v Canada Life Assurance Company* and the Approval of Class Action Settlements” (2015) 10:1&2 Canadian Class Action Review 33 at 64.

substantive rules of tort to further the objectives of compensation and deterrence, so that class action procedures can fulfill their promise as one of the principal avenues for access to justice in large-scale claims. The courts' willingness to entertain waiver of tort in collective litigation is a step on the way, and indicates that judges are alive to the problems of indeterminate causation in class claims.

But the recognition of waiver of tort would represent only a partial solution, one that might yield poor results and risk backfiring on the victims of tort, undercompensating them and, through under-deterrence, ensuring that more victims will be created in the future.

Conversely, a narrow, particularistic application of tort causation rules is little better. It is possible for courts to use presently recognized devices, such as "robust inferences of causation" or reversed onuses, to overcome individual attribution issues even in class claims. On one reading, this is what the Ontario courts were doing in *Ramdath* and *Trillium*, and it also could be viewed as operating in *Blais* and *Létourneau*. But these devices, which are artificial in individual claims, are even more plainly so in a class claim, where defendants are *inferred* or *presumed* to have caused a magnitude of harm that we know they did not cause. This could be heavy-handed, even absurd, in many toxic torts and many products liability cases: where a defendant's wrong has caused a measurable, but still incremental, increase in the incidence of a particular disease or injury, the "robust inference" or reversed onus might mean it would be on the hook for *all* such injuries.

The "better way" is to continue down the road blazed by the Quebec and Ontario courts, and embraced by legislatures in provincial tobacco legislation: viewing classable claims as cases of harm in populations, rather than in individuals. True aggregate estimation of the harm, with the plaintiff retaining the burden of proof, can be both more accurate and fair, and, where it is, it should be employed.