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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CHAPNIK, JENNINGS, EPSTEIN JJ.

B E T W E E N:	)	
	)	
AHMAD SERHAN, deceased, By his Trustee without a will ZEIN AHMAD SERHAN and BEVERLEY GAGNON	)	*Paul J. Pape*, for the Respondents
	)	
Respondents (Plaintiffs)	)	
	)	
- and -	)	
	)	
JOHNSON & JOHNSON, LIFESCAN CANADA LTD. and LIFESCAN, INC.	)	*Michael E. Barrack* and *Caroline Zayid*, for the Appellants
	)	
Appellants (Defendants)	)	
	)	
	)	**HEARD:** January 31, 2006

EPSTEIN J.

[1] During the mid 1990's the defendants manufactured and distributed a device designed for use by diabetics to monitor their blood glucose levels. The device, known as the SureStep System, consisting of a meter and strip, is intended to provide a numerical indication of blood glucose levels. Notwithstanding that the defendants knew of its significant defects, they distributed it into Canada and the United States. Furthermore, the defendants failed to deal responsibly with complaints they received about the System and refrained from taking steps to remedy the defects until forced to do so.

[2] As a result of this conduct, a class action was commenced in Ontario claiming relief against the defendants on behalf of users of the device in all Canadian provinces except for British Columbia and Quebec.

[3] Cullity J. certified this action as a class proceeding under the *Class Proceedings Act 1992*, S.O. 1992, c. 6 ("*CPA*") on the basis that the claim disclosed a cause of action known as "waiver of tort". He concluded that none of the other asserted causes of action were suitable for certification. Of the common issues the plaintiffs proposed, four were accepted. All four are premised on the availability of the remedy of a constructive trust or the remedy of an accounting and disgorgement of profits.

[4] This appeal involves the propriety of certification of this proposed class action. The primary question is whether, within the context of the test to be applied under *Hunt v. Carey Canada Inc.*, [1990] 2. S.C.R. 959, the concept known as waiver of tort may be a cause of action and, if so, whether, in these circumstances, it entitles the plaintiffs to the remedy of either a constructive trust or an accounting and disgorgement of profits.

[5] While Cullity J. certified the proceeding on this basis, Ground J. was of the view that there was good reason to doubt that waiver of tort is a cause of action and granted leave to appeal the certification order.

I. History of the Proceeding and Facts

[6] The undisputed facts establish that the defendants were all involved in developing and distributing the Surestep System (the "System") in North America. Johnson & Johnson is a U.S. corporation that develops, manufactures and markets health care products and services. LifeScan, Inc., which developed and marketed the System, is also a U.S. corporation, and is a wholly-owned subsidiary of Johnson & Johnson. LifeScan Canada is a Canadian corporation and a wholly-owned subsidiary of LifeScan, Inc. LifeScan Canada distributed the System in Canada.

[7] In the early 1990's, LifeScan, Inc. developed the System. The product was launched in Canada in 1996. The defendants admitted that the meters were defective and therefore modified them in June 1997. Thereafter, LifeScan Canada distributed only corrected meters in Canada. The strips, designed to fit into the meters after the user puts a drop of blood on them, were also defective. This problem was addressed in 1998 when LifeScan, Inc. approved modified strips. LifeScan Canada marketed these strips in Canada starting in June 1998.

[8] On April 2, 1998, as a result of user complaints, U.S. federal agents raided and seized records from the defendants' California headquarters. What followed was a lengthy investigation conducted by the FDA, the FBI, the Department of Health and Human Services, the Department of Justice and other U.S. federal agencies. On December 15, 2000 the U.S. government and the defendants entered into a settlement agreement whereby the defendants pled guilty to a number of charges and agreed to pay substantial fines. In the plea agreement the

defendants admitted a number of facts, including that at the time they started distributing the product they knew of its defects, that they failed to remedy the defects when they received complaints, and that they submitted false reports to the FDA.

[9] The defendants settled the U.S. class action that was pursued as a result of this conduct.

[10] In the amended statement of claim delivered in this proposed class proceeding, the representative plaintiffs seek damages for negligence, negligent and fraudulent misrepresentation, breach of s. 52(1) of the *Competition Act* and conspiracy relating to the manufacture, sale and distribution of the System in Canada. The plaintiffs also claim that the defendants hold the revenue generated from the sale of the devices on a constructive trust for their benefit and for that of the other class members. There are also claims for an accounting, disgorgement of the revenues and for punitive damages.

[11] The causes of action upon which the plaintiffs relied were advanced against all the defendants on the basis that their businesses were organized as if they consisted of a single entity. Each of the defendants was stated to be the agent of the others and therefore vicariously responsible for the acts and omissions set out in the amended statement of claim.

[12] The members of the class are described in the claim as follows: "all persons in Ontario and elsewhere in Canada except British Columbia and Quebec, who used a SureStep Meter on or after February 1, 1996 and all persons who used a Strip on or after February 1, 1996."

II. The Certification Decision

[13] The motion for certification is based on s. 5(1) of the *CPA* which, provides as follows:

> **5(1)** The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[14] Evidence is not admissible on the question of whether there is a cause of action pleaded within the meaning of s. 5(1)(a) of the *CPA*.

[15] However, on the certification motion, both sides filed affidavit material pertaining to the other subsections of s. 5. As stated by the Supreme Court in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25, "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action".

[16] After setting out the background facts, none of which are contested, Cullity J. turned to the issue of damages. He noted that he had been presented with considerable expert evidence with respect to the likelihood that the problems that accompanied the use of the System would lead to serious consequences or long-term complications. After identifying the nature of this evidence, the learned motion judge found that there was "virtually no evidence that either of the representative plaintiffs, or any other member of the putative class, suffered any injurious effects to their health by using the meter or strips other than the pain involved in obtaining additional blood samples" (para. 12). There was also "no evidence ... that the representative plaintiffs or any member of the proposed class, suffered diabetic shock, or loss of income" (para. 13). Furthermore, the evidence disclosed that the representative plaintiffs obtained their Systems and strips for free.

[17] The learned motion judge noted that the evidence disclosed that 43,902 of the meters were sold or distributed in Canada, of which 21,321 were replaced by September 30, 2002. As well as the users of the defective meters, the proposed class would include individuals such as one of the representative plaintiffs who used defective strips with corrected meters (para. 17)

[18] Against this background, the motion judge first dealt with the most contentious issue, that being the disclosure of a cause of action.

[19] With respect to the claims that the defendants were negligent in selling the devices when they had prior knowledge of the defects, that they made negligent, or fraudulent, misrepresentations to the users of the equipment in Canada, that, in so doing, they breached section 52 of the *Competition Act*, Cullity J. determined that the constituent elements of the causes of action and necessary material facts were sufficiently disclosed in the pleading. However, he declined to certify on the ground that the applicability of each nominate tort, and the elements of causation and damage in respect of each of those torts, would have to be determined on an individual basis.

[20] The motion judge then turned to the claim of a constructive trust, a claim he described as being advanced as if it were a separate cause of action rather than a remedy. The defendants had argued that it was plain and obvious that this remedy would not be available even if the causes of action were proven – in other words that the material facts necessary to support the claim for constructive trust had not been pleaded. Cullity J. observed that the remedy was being advanced based on property acquired by a wrongful act. In his reasons, he set out the paragraphs in the amended statement of claim that he considered relevant to this issue (para. 29):

> 74. The plaintiffs and the other Class members trusted and relied upon the Defendants, because of their reputation in the marketing of medical devices and healthcare products, to provide a meter and Strips each fit to measure blood glucose levels and free from known defects. The Defendants profited from that trust by receiving increased revenue which is directly attributable to the conspiracy and false Representation.
>
> 75. The plaintiffs plead that good conscience requires the defendants to hold in trust for the plaintiffs and the other Class members all revenue they received in Ontario and elsewhere in Canada from the sale of SureStep meters, the Strips and the Associated Paraphernalia and to disgorge this revenue.

[21] The motion judge's examination of whether the plaintiffs may be entitled to a constructive trust centred on the four conditions established by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. These conditions are as follows:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendants must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiffs;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remained faithful to their duties; and
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case; e.g., the interests of intervening creditors must be protected.

[22] As far as the first condition was concerned, Cullity J. noted that fraud, one of the "traditional heads of equity jurisdiction", had been pleaded. He had no difficulty holding that "a party who has obtained property of another by fraudulent misrepresentations has breached an obligation of the type courts of equity have enforced" (para. 33).

[23] He further observed that while waiver of tort had not been pleaded, the above quoted paragraphs in the amended statement of claim alleged material facts that, if proven, could entitle the plaintiffs to a remedy on that basis. Cullity J. stated, at para. 34:

> Such facts would constitute a cause of action for which the remedies of a constructive trust or, alternatively, an accounting of revenues, are claimed. Claims based on waiver of tort seek "restitution" of benefits received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss.

[24] Cullity J. observed that waiver of tort, as a cause of action, arguably has the advantage for a plaintiff that proof of loss as an element of the tort, is not required. If such is the case, this may have special significance when identifying common issues for the purposes of the *CPA*.

[25] While Cullity J. was aware that his view was contrary to the reasoning in *Stoke-on-Trent Council v. W. & J. Wass Ltd.*, [1988] 3 All E.R. 394, he noted that the case had been criticized and that two recent decisions of the Ontario courts had accepted the proposition that benefits may be recoverable even when the plaintiff suffered no loss.

[26] The critical finding of the motion judge is at para. 38, where he states:

> It has been held more than once that a motions judge should be slow to strike novel causes of action or those in an area of the law that is unsettled, or undergoing significant change or development. In my opinion, the law relating to waiver of tort falls within each of these categories. In particular, although there are many cases in which remedies have been granted on the basis of the "doctrine" of waiver of tort, its scope, and the extent to which it reflects general principles, have not, as far as I am aware, received authoritative analysis in Canadian appellate courts.

[27] The motion judge then turned to the second condition that a constructive trust based on the defendants' wrongful conduct can arise only where a deemed or actual agency exists. He admitted that this condition raised a question of some difficulty, as, on the facts, there was no agency relationship between the parties. His response to this problem was to conclude that the references in *Soulos, supra*, to this particular fiduciary relationship reflected the facts of that case rather than an intention to limit the availability of the remedy to cases of fraud or other wrongful conduct by agents.

[28] With respect to the third condition, that the plaintiff show a legitimate reason for a proprietary remedy, the motion judge noted that "the plaintiffs seek the proprietary remedy of a constructive trust in a situation where it is not alleged that each class member had any pre-existing legal or equitable interest in the property that would be the subject matter of the trust" (para. 44). In response to these and other similar concerns, Cullity J. said, at para. 44, "In the present developing state of the law, I do not think either of these objections is necessarily fatal to the claim."

[29] The motion judge also was of the view that evidence was likely required to establish the third and fourth conditions.

[30] At para. 46 of his reasons, Cullity J. acknowledged that although the "introduction of waiver of tort principles – for which proprietary, as well as personal remedies may be available - into products liability cases may have serious and far reaching implications, I do not believe that the law is at present sufficiently clear to permit me to strike the claim for a constructive trust solely on the basis of the pleadings". Significantly, he went on to say, "if at trial, it is found that waiver of tort principles are applicable, but that a proprietary remedy is not appropriate, this would not exclude the possibility of the personal restitutionary remedy for an accounting and disgorgement that the plaintiffs have claimed in the alternative."

[31] Cullity J. also found that the amended statement of claim adequately disclosed the cause of action of conspiracy.

[32] In terms of the analysis under s. 5(1)(b) of the *CPA* and the existence of an identifiable class, the motion judge found that the proposed criteria for identifying the members of the putative class, namely, ownership of a meter or use of a strip, were sufficiently certain. The defendants take no issue with this.

[33] The motion judge then proceeded to examine the requirements of s. 5(1)(c) of the *CPA* and the thirteen common issues set out by the plaintiffs. In this part of the analysis he spent a considerable amount of time on the issue of reliance. He noted the decision of MacPherson J.A., writing for the court, in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.), to the effect that reliance is not established merely by showing that a plaintiff received a representation. Rather, the representation must have caused the plaintiff to act in a certain manner, and therefore the extent to which the defendants may be able to rebut any inference of reliance should not be determined on a certification motion. He also found that difficulties associated with causation applied to the claims of conspiracy and misrepresentation.

[34] In his consideration of the common issues, Cullity J. zeroed in on the contentious issue of connecting the wrong to the remedy. He reasoned that to the extent that proof of loss may not be required for the purpose of the restitutionary claims for a constructive trust or an accounting and disgorgement, based on the principles governing waiver of tort, the allegations of conspiracy by an unlawful act could provide a basis for such claims. The learned motion judge held that if the serious allegations concerning conspiracy are proven at trial and if, in law, no proof of loss is

required for restitutionary remedies available in cases of waiver of tort, the defendants may be found liable to disgorge all or part of the benefits they received from marketing the products – leading either to a proprietary remedy of constructive trust or a personal remedy for an accounting and disgorgement. Cullity J. concluded that "[w]hether the doctrine of waiver of tort applies – and, if so, which of the remedies would be available – are not questions to be determined on this procedural motion. I am concerned with the identification of common issues of fact and law – not with their resolution" (para. 65).

[35] Of the common issues the plaintiffs proposed, Cullity J. accepted only four, as follows (para. 73):

> (1) Are the defendants, or any of them, constructive trustees for all, or any, class members of all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and Associated Paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whom are such proceeds held?
>
> (2) Are the defendants, or any of them, liable to account to all, or any, of the class members on a restitutionary basis for all, or any part of, the proceeds of the sales of the SureStep Meter and Strips and any other income made by them in connection with the SureStep Meter, Strips and associated paraphernalia, including the lancets and controlled solutions? If so, in what amount and for whose benefit is such accounting to be made?
>
> (3) Should one or more of the defendants pay punitive damages? If so, in what amount and to whom?
>
> (4) Who should pay the cost of administering and distributing amounts to which class members are entitled and how, and when, should such cost the [sic] determined?

[36] The learned judge was satisfied under s. 5(1)(d) of the *CPA* that a class proceeding is appropriate for the determination of the common issues for the purpose of certification and far preferable to individual trials. It followed that each of the three objectives of the *CPA* – access to justice, judicial economy and behaviour modification - would be served by certifying the action on the basis of the limited common issues he approved (para. 68).

[37] Finally, the motion judge held that the named plaintiffs were suitable representative plaintiffs under s. 5(1)(e). It is important to note that in doing so, he observed that due to the nature of the restitutionary common issues, recovery would be measured by the benefits the defendants received rather than the damages the plaintiffs suffered.

III. The Test on Appeal

[38] The primary issues raised deal with a pure legal analysis of the concept known as "waiver of tort" and the entitlement to the remedy of a constructive trust or an accounting and disgorgement of profits. These are questions of law attracting a standard of review of correctness. This court is therefore free to substitute its own decision for that of the motion judge: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8 and *Pearson v. Inco Ltd. et al.* (2005), 78 O.R. (3d) 641 at para. 43 (C.A.).

[39] However, the test of correctness must be applied within the context of the nature of the motion before Cullity J. – a certification motion under the *CPA*.

[40] In argument, questions were raised about the test to be applied in determining whether an action can be certified when the issue is whether the claim discloses a cause of action. The discussion involved whether the test under rule 21.01(1)(b) of the *Rules of Civil Procedure* applied or whether the test was different given the determination of whether the pleading disclosed a cause of action was in the context of a class proceeding.

[41] The fact that the examination of whether the amended statement of claim discloses a cause of action that "might succeed" is taking place within the *CPA*, with its important policy objectives, does not give rise to a different test. While the Ontario Court of Appeal's decision in *Cloud v. The Attorney General of Canada* (2004), 73 O.R. (3d) 401 suggests a somewhat more liberal approach should be taken to certification of class actions, such an approach does not change substantive rights. As Winkler J. (as he then was) said in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130, "there is no jurisdiction conferred by the *Class Proceedings Act* to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants" (para. 50).

[42] The test for striking a pleading at this stage is well-known. A pleading should be struck under Rule 21 only where it is it is "plain and obvious" that the claim has no chance of success. As stated by Wilson J. in *Hunt v. Carey, supra,* at para. 33, "[n]either the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff's statement of claim be struck out." In reaching this conclusion, Wilson J. observed that with respect to the Ontario legislation, the Ontario Court of Appeal had made it clear that "[t]he fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action" (para. 27).

[43] Furthermore, it is well established that actions based on uncertain areas of the law should not be resolved at the pleading stage without the advantage of a factual foundation. This is

particularly the case when the court is deciding matters of policy: see *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 at paras. 14-15 (C.A.).

[44] The primary question is, therefore, whether the learned motion judge correctly found that the claim should not be struck; that is, whether it is not plain and obvious that the plaintiffs' claim will fail in relying on waiver of tort as a cause of action under which, in the circumstances here, the plaintiffs may be entitled to a constructive trust or an accounting and disgorgement of profits. Then, giving the class action motion judge the deference to which he is entitled based on his experience in this area, was he correct in determining that the other parts of s. 5 of the *CPA* are met?

IV. The Issues

1. Is waiver of tort an independent cause of action or only a choice of remedy after an actionable wrong has been established?

2. If waiver of tort is available as a restitutionary cause of action, is the remedy of a constructive trust available in these circumstances?

3. Alternatively, is the remedy of an accounting and disgorgement of profits available in these circumstances?

4. Are there other grounds that warrant overturning the decision to certify?

V. Analysis

1. Is waiver of tort an independent cause of action or only a choice of remedy after an actionable wrong has been established?

[45] The defendants submit that waiver of tort is not an independent cause of action. It is merely a choice of remedy in situations where a tort has been committed. It permits the plaintiff who has suffered little or no damages to recover instead the defendant's gains, but it is a parasitic concept in the sense that it is essential that a tort has been committed. It follows, say the defendants, that entitlement to a remedy based on the concept of waiver of tort cannot be determined as a common issue in a class proceeding unless all the elements of a tort have first been proven as common issues.

[46] Furthermore, they argue that waiver of tort does not apply to the torts the plaintiffs allege, in the sense that historically, waiver of tort has been applied in cases of misappropriation of goods or property.

[47] The plaintiffs, on the other hand, contend that waiver of tort is a distinct cause of action, not an alternative remedy for a claim in tort. Where a defendant has breached a duty of care

owed to a plaintiff and has thereby acquired monies, a claim lies for either a constructive trust or an accounting and disgorgement of these monies.

[48] Mr. Pape, for the plaintiffs, submits that waiver of tort lies where defendants engaged in "tortious conduct" and where it would be unjust for them to retain the fruits of their behaviour - even where the plaintiff has not suffered any form of deprivation. What the plaintiff must demonstrate is that he has been the subject of conduct by which the defendant has breached a duty of care owed to him and that this conduct has enriched the defendant. In such circumstances the defendant should be compelled to disgorge the ill-gotten gains.

[49] The importance of the issue of whether or not waiver of tort is an independent cause of action is that the court below concluded that this action may be grounded in the wrongful conduct of the defendants in the form of conspiracy, without any need to make out all the elements of a conspiracy, most notably proof of loss. It is only the tortious conduct, that is, the act of conspiring, that need be shown to entitle the plaintiffs to a remedy. This remedy could take the form of either the proprietary remedy of a constructive trust, or a personal remedy for an accounting and disgorgement.

[50] I start with an explanation of the concept of waiver of tort. Its 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.

[51] P.D. Maddaugh and J.D. McCamus introduce their chapter on the subject as follows:

> The doctrine known as "waiver of tort" is perhaps one of the lesser appreciated areas within the scope of the law of restitution. From the outset, it seems to have engendered an undue amount of confusion and needless complexity. The almost mystical quality that surrounds the doctrine is attested to by the following famous couplet penned by a pleader of old [J.L. Adolphus, "the Circuiteers – An Eclogue" (1885), 1 L.Q. Rev. 232, at p. 233]:
>
> Thoughts much too deep for tears subdue the Court
> When I *assumpsit* bring, and god-like waive a tort.

> One source of this confusion stems from the doctrine's very name. As one writer has pointed out, not entirely facetiously, it has "nothing whatever to do with waiver and really very little to with tort". [citations omitted][1]

[52] They note that, along with the advantage the doctrine brings where the tortfeasor's personal gain exceeds the quantum of damages the plaintiff might recover in an action for tort, by pursuing an action in restitution rather than in tort, the plaintiff can also avoid the necessity of having to prove the actual loss in tort.[2]

[53] The authors refer to the "much-debated question"[3] of whether it is necessary to establish all of the constituent elements of an actionable tort as a prerequisite to invoking the doctrine. Their view is that waiver of tort constitutes an independent cause of action. The basis of this view appears to be that they find it difficult to justify denying relief simply because the wrong involves tortious conduct that has caused no pecuniary damage. Indeed, with specific reference to Cullity J.'s reasoning in the case at bar, the learned authors express the opinion that "in Canada... given the Supreme Court's acceptance of the tri-partite principle espoused in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, there appears to be no reason why this approach ought not to be employed to recognize waiver of tort as an independent restitutionary remedy."[4]

[54] This opinion is supported in other academic writings, including those of Jack Beatson and Daniel Friedmann.[5] In essence, they argue that the doctrine is an example of the general principle that an action in restitution lies to compel the defendant to disgorge an unjust enrichment gained through any type of wrongdoing.

[55] Beatson provides extensive analysis of the debate over whether waiver of tort is parasitic of an underlying tort or an independent claim in itself.[6] He finds positive support for the latter side of the argument through examination of the historical development of the waiver mechanism, as well as case law. Beatson concludes "the restitutionary claim given by way of 'waiver of tort' is not parasitic and does not depend on the existence of a tort".[7]

[56] Friedmann adds his support to Beatson, rejecting the parasitic theory, which "envisages a process under which developments in the law of torts (or equitable wrongs) must always precede those in the law of restitution."[8] The independence theory "assumes that developments within the law of restitution may lead to recognition of new interests as worthy of protection, even if

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[1] P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf (Aurora, On.: Canada Law Book, 2005) [hereinafter "*The Law of Restitution*"] at p. 24-1.
[2] *Ibid.* at p. 24-4.
[3] *Ibid.* at p. 24-17.
[4] *Ibid.* at p. 24-20.
[5] J. Beatson, "The Nature of Waiver of Tort" in J. Beatson, ed., *The Use and Abuse of Unjust Enrichment* (Oxford, Clarendon Press, 1991) and. D. Friedmann, "Restitution for Wrongs: The Basis of Liability" in W. Cornish, ed., *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998).
[6] J. Beatson, "The Nature of Waiver of Tort", *ibid.*
[7] *Ibid.* at 242.
[8] D. Friedmann, "Restitution for Wrongs: The Basis of Liability", *supra* note 5 at 134.

they are not protected against damage caused by their infringement or if the protection afforded by another branch of the law does not extend to the particular invasion which occurred."[9]

[57] To illustrate his viewpoint, Friedmann draws upon a hypothetical example involving conspiracy. In his example, A pays C to assault B, but C never carries out the assault and so B suffers no loss:

> The crime of conspiracy might have been committed, but the possibility of basing the claim on the tort of conspiracy is problematic since "an overt act causing damage is an essential element of liability in tort". Again, it is submitted that the fact that no tort has been committed is not decisive. The question whether B is entitled to claim the payment by A to C has to be decided independently within the law of restitution. It is not an easy one, since C's gain did not derive from an appropriation of that which belongs to B. Nevertheless, it seems to me that a right of recovery might be recognised. Even if C's conduct did not constitute a tort, it can certainly be regarded as wrongful for the purpose of restitution. C should not be allowed to profit from this wrong and the risk to B may suffice in order to permit him to recover.[10] [citations omitted]

[58] Others who have studied the issue have come to the opposite conclusion. Goff & Jones, for example, maintain that it is a "*sine qua non*" of the plaintiff's entitlement to sue in tort or in restitution that he "establish that a tort has been committed".[11]

[59] This debate is reflected in the jurisprudence.

[60] As noted by Beatson, several cases have supported the independence theory: see, for example, *National Trust Co. v. Gleason*, 77 NY 400 (N.Y.C.A. 1879); *Federal Sugar Refining Co. v. U.S. Sugar Equalisation Board*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan v. Malaysian Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *The Universe Sentinel*, [1983] A.C. 366 (H.L.).

[61] In advancing the contrary view, Cumming J. in *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590 (Sup. Ct.), a case in which a dissatisfied purchaser of computer equipment was trying to sue Toshiba directly, as opposed to the retailer from which he purchased the equipment, said "the so-called 'waiver of tort doctrine' is inapplicable unless the defendant had committed a tort which gives rise to a cause of action to the plaintiff" (para. 14).

[62] In asserting that the essence of the doctrine of waiver of tort was the existence of a tort, Cumming J. relied upon the well-known decision of the House of Lords in *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1. In that case a cheque had been drawn in favour of the plaintiff, United Australia. The company secretary dishonestly endorsed it to a company in

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[9] *Ibid.* at 149.
[10] *Ibid.* at 153.
[11] Goff & Jones, *The Law of Restitution*, 6th ed. (London: Street & Maxwell, 2002) at para. 36-001.

which he was a director. The defendant bank collected the money and deposited it into the company's account. The plaintiff sued the company for restitutionary relief but the action was discontinued when the company went bankrupt. United Australia then brought an action in conversion against the bank. The issue became whether the plaintiff had irrevocably lost its right to sue in tort, having earlier elected to proceed with the restitution action against the company. In rejecting the notion that waiver of tort rested on an implied consensual transaction, the House of Lords asked the rhetorical question "if it were understood that no tort had been committed, how could an action in *assumpsit* lie?"

[63] While the case at bar was under reserve, Mr. Barrack, counsel for the defendants, brought to our attention the decision of the British Columbia Supreme Court in *Reid v. Ford Motor Co.*, [2006] B.C.J. No. 993, released on May 3, 2006. That class action, in which the representative plaintiff claimed damages for repairing an allegedly defective ignition switch, was framed in negligence. The plaintiff had moved to amend the statement of claim and certification order to include a claim for waiver of tort.

[64] Gerow J. dismissed the motion, holding that "the claim for waiver of tort cannot be sustained on the facts pled in the statement of claim" (para. 34).

[65] In light of my views concerning the relevance of this decision to the analysis of the issues raised in the case at bar, no submissions were requested of counsel with respect to the *Reid* decision.

[66] There are several factors that make *Reid* distinguishable, not the least of which is that the claim is framed in negligence, unlike the case at bar where fraud and conspiracy forms the foundation of the claim. Gerow J. recognised the significance of the fact that the matter before her was founded in negligence. At para. 29 she said, "Restitutionary 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 enrichment to the level of a primary purpose." At para. 15, Gerow J. specifically identified fraud as one of the intentional torts where the doctrine of waiver of tort has been utilized.

[67] Gerow J. did express concern about the consequences of allowing, in products liability cases, a cause of action that eliminates the need to prove loss. I share this concern, but am of the view that it should be considered and resolved on the basis of a full record.

[68] *Reid*, while distinguishable, does, however, contribute to the ongoing debate regarding the legal issues raised in this appeal. The debate taking place among legal writers and arguably in the jurisprudence demonstrates that there is room for difference of opinion as to the precise status of the doctrine and specifically whether it is an independent cause of action. I therefore agree with Cullity J.'s observation that the law with respect to this issue has not been authoritatively settled. Clearly, it cannot be said that an action based on waiver of tort is sure to fail. Furthermore, the resolution of the questions the defendants raise about the consequences of

identifying waiver of tort as an independent cause of action in circumstances such as exist here, involves matters of policy that should not be determined at the pleadings stage.

[69] Cullity J. was therefore correct in concluding that the issue of whether waiver of tort is an independent cause of action should be resolved in the context of a factual background of a more fully developed record.

[70] What remains to be considered is whether or not, if such a cause of action does exist, either of the potential remedies Cullity J. certified could be available to the plaintiffs in the circumstances of this case.

[71] Cullity J. observed that the concept of a cause of action refers to the material facts that must be pleaded to entitle the plaintiff to a remedy against the defendant. It is possible to have cases where although a breach of duty has been pleaded, and in that sense discloses a cause of action, the remedy requested would be unavailable. The plaintiffs' entitlement to either a constructive trust or an accounting and disgorgement (the common issues certified) based on waiver of tort is, in my view, the most challenging aspect of this appeal.

[72] The defendants submit that even if waiver of tort may be an independent cause of action, the plaintiffs are not entitled to either of these remedies. The basis of this argument is that the plaintiffs are not able to establish an entitlement to the property in question, being the defendants' revenues from the sale of the System. They argue that the law does not support the proposition that a defendant who has committed a wrong will be required to account for a profit that is not based on the use of the property of the wronged plaintiff. Furthermore, unjust enrichment is required. There is no unjust enrichment on these facts given that the plaintiffs have not suffered any deprivation.

[73] The defendants further contend that the requirements set out by the Supreme Court of Canada for a constructive trust are not satisfied in this case. Mr. Barrack, counsel for the defendants, says that it is implicit in the reasons of the motion judge that he was not satisfied that the four criteria set out by McLachlin J. (as she then was) in *Soulos, supra*, could be met. These criteria must be met in order to satisfy a finding of constructive trust based on wrongful conduct, as opposed to a constructive trust based on unjust enrichment.

[74] The plaintiffs submit that Cullity J. did not certify this action on the basis of constructive trust as a separate cause of action. Rather, he found that it was a remedy available to the class in the event that it proves its claim in waiver of tort. They say that under the doctrine of waiver of tort, the plaintiff must demonstrate that he has been the subject of conduct by which the defendant has breached a duty of care owed to him; this conduct has enriched the defendant, and the defendant thereby holds the profits derived from the wrongful conduct, and the circumstances are such that he should not retain them. Only the benefit the defendant received is germane to the analysis.

[75] Additionally, the plaintiffs argue that waiver of tort is a distinct cause of action for the remedy of an accounting and disgorgement of profits, a remedy that arguably engages neither the conditions set out in *Pettkus, supra,* nor those in *Soulos.*

[76] Accordingly, I will proceed to examine whether Cullity J. was correct in certifying the case based on waiver of tort such that the plaintiffs should be allowed to advance a claim for these remedies, first by dealing with the plaintiffs' position that waiver of tort, as an independent cause of action, may give rise to the remedy of a constructive trust and then turning to the plaintiffs' potential entitlement to an accounting and disgorgement.

2. *If waiver of tort is available as a restitutionary cause of action, is the remedy of a constructive trust available in these circumstances?*

[77] In Canada, the legal response to the person who has obtained a benefit unjustly, has been to develop remedies through the law of restitution. The modern law of restitution provides various monetary and proprietary remedies for both unearned windfalls and for wrongful acquisitions of property and profits. What animates the law of restitution and what appeared to compel the motion judge toward certification is the principle against unjust enrichment.

[78] The decision of the Supreme Court of Canada in *Pettkus, supra,* is considered to have extended the law of restitution in Canada by identifying that the constructive trust could be a remedy for unjust enrichment. Since this decision, the constructive trust has been recognized as the most useful tool to prevent unjust enrichment as it holds several advantages for someone asserting a restitutionary claim. Historically, the entitlement to a constructive trust has focused on the existence of a fiduciary relationship. Subsequent cases, however, have further developed the concept. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, a constructive trust was imposed to take away the gain made through a breach of confidence even though the majority held there was no fiduciary relationship between the parties. Other extensions followed in cases such as *Rawluk v. Rawluk* [1990] 1 S.C.R. 70 and *Peter v. Beblow,* [1993] 1 S.C.R. 980, both of which involved imposing constructive trusts in the family law setting.

[79] In *The Law of Restitution, supra,* Maddaugh and McCamus describe this preoccupation with the fiduciary relationship as "inordinate".[12] In exploring constructive trusts that arise out of fraud, the authors make the point that "[c]hancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development".[13] They go on to make a point that "[n]o pre-existing fiduciary relationship need be established for this category of constructive trust".[14]

[80] The decision of the Supreme Court of Canada in *Soulos, supra,* the case upon which Cullity J. thought the plaintiffs could potentially rely for the remedy of a constructive trust, is

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[12] *Supra* note 1 at p. 5-7.
[13] *Ibid.* at p. 5-15.
[14] *Ibid.*

seen as the most recent extension of the constructive trust. In that case, the court distinguished a separate type of constructive trust – one based on the concept of "good conscience". The defendant real estate agent had purchased property for himself that he had been negotiating to buy for his client, the plaintiff. When the plaintiff discovered the breach of fiduciary duty, he claimed a constructive trust over the property. However, land values had declined. As a consequence, the plaintiff was unable to show any loss on his part or any gain by the defendant. Even so, for his own idiosyncratic reasons, the plaintiff wanted the property and sought a constructive trust.

[81] In the opening words of her judgment, McLachlin J. (as she then was) said "this case stands for the proposition that a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff" (para. 1). Under the broad umbrella of the concept of good conscience, constructive trusts are recognized both to remedy unjust enrichment and corresponding deprivation, as well as to address wrongful acts like fraud.

[82] McLachlin J. observed, at para. 14, that the appeal presented "two different views of the function and ambit of the constructive trust". One view sees the constructive trust arising only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. *On the other view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust that underlie many of our industries and institutions.*

[83] It was McLachlin J.'s view that "the second, broader approach to constructive trust should prevail" and that the law of constructive trust embraces both "the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence" (paras. 15 and 25). In particular, McLachlin J. noted that good conscience has attracted the support of many jurists as "the unifying concept underlying constructive trust" and cited, at para. 27, the following comment by A. J. McClean:

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. Macferlan* . . . in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.[15]

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[15] A. J. McLean, "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- *Pettkus v. Becker*" (1982) 16 U.B.C. L. Rev. 155.

[84] McLachlin J. then elaborated upon this second type of constructive trust, saying that it may be imposed where good conscience so requires. Significantly, at para. 33 she stated:

> The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[85] At para. 45 of *Soulos,* McLachlin J. identified four conditions that "*generally*" should be satisfied for a constructive trust based on wrongful conduct, the conditions (set out in para. 22 herein) that Cullity J. explored in order to determine if the plaintiffs may be entitled to a constructive trust based on waiver of tort (my emphasis).

[86] As will be discussed below, the first three conditions appear to attempt to limit the scope of the remedy by requiring the existence of a sufficient connection between a plaintiff and a defendant. A close examination of the relationship between the parties is central to the inquiries under these conditions. The fourth condition then demands that we ask whether, in light of this relationship, there is any other reason why the remedy should not be extended in these circumstances.

(i) **The first condition** – The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands.

[87] The defendants argue that Cullity J. erred in holding that courts of equity would respond when a party obtains property of another by fraudulent misrepresentation. They say that the plaintiffs have not alleged that their property was obtained by fraud. They add that elsewhere the motion judge held that reliance was an essential element of an allegation of fraudulent and negligent misrepresentation. He then rejected the suggestion that reliance could be inferred or determined as a common issue. Finally, they argue that there is no other fiduciary relationship between the plaintiffs and defendants that could justify the imposition of a trust.

[88] The question is whether Cullity J. was correct in coming to the conclusion that a claim for constructive trust was not sure to fail based on the plaintiffs' inability to demonstrate, on the pleadings, that the defendants were under an equitable obligation to them, giving rise to the assets over which a trust was being claimed.

[89] More specifically, the question is whether Canadian courts may be prepared to identify an enforceable equitable obligation between those who manufacture and distribute health care

products such as the System, where defects in the products potentially carry life threatening consequences, and the ultimate users – individuals who are in a vulnerable position in relying on the products. Such an equitable obligation would have to arise in relation to activities such as knowingly distributing faulty health care products for profit.[16]

[90] An equitable obligation arises out of an equitable relationship (*Soulos* at para. 42). Significantly, I.C.F. Spry identifies the "established considerations" of the courts of equity as including fraud, misrepresentation, illegality or unfairness.[17]

[91] Furthermore, the reference in *Soulos* to a "prior equitable obligation" has caused some confusion. D. M. Waters queries whether the constructive trust "can be deployed as a remedy to take away gains from other kinds of wrongs."[18] He observes as follows:

> Courts may also wish to prevent profit from crime, and they may well impose constructive trusts to this end....The test in *Soulos* states, in its first element, that the defendant must have been under an 'equitable' obligation. But in the twenty-first century the relevance of this is not clear. If the trust is the appropriate remedy, then it is so whether the wrong from which it arises is sourced in equity or common law."[19]

[92] Other authors have analyzed *Soulos* and questioned why common law duties cannot support a constructive trust. Lionel Smith states as follows: "Preferable on this point is the view expressed by Sopinka J., in dissent: 'I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedies.'"[20] Similarly, Robert Chambers queries "why constructive trusts should be restricted to cases where the duty breached is equitable."[21] Waters sums up these concerns by expressing the hope "that the reference to 'equitable obligations' in *Soulos* will not be taken literally, as confining the constructive trust to situations which have some historical link to the equitable jurisdiction."[22]

[93] In the face of the preparedness of the Supreme Court of Canada to recognize different circumstances under which "equitable" obligations will be identified and the debate among legal writers about the requirement itself, it cannot be said that the plaintiffs' claim for a constructive trust is sure to fail on the basis of their inability to satisfy the first condition in *Soulos*. Furthermore, the answer to that question is a policy decision that ought not to be resolved on a procedural motion.

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[16] Such conduct could fall under the definition of equitable fraud as defined in *Guerin v. R.*, [1984] 6 W.W.R. 481 at 505-506 (S.C.C.), citing *Kitchen v. Royal Air Force Assn.*, [1958] 3 All E.R. 241 (C.A.).
[17] I.C.F. Spry, *The Principles of Equitable Remedies*, 6th ed. (Agincourt, On.: Carswell, 2001) at pp. 5-6.
[18] D.M.W. Waters, ed., *Waters' Law of Trusts in Canada*, (3rd ed.) (Toronto: Thomson, 2005) at 505.
[19] *Ibid.*
[20] Lionel D. Smith, "Constructive Trusts – Unjust Enrichment – Breach of Fiduciary Obligation: *Soulos v. Korkontzilas*" (1997) 76 Can. Bar Rev. 539 at 545.
[21] Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alta. L. Rev. 173 at 182.
[22] *Supra* note 18 at 473.

(ii) **The second condition** – The assets in the hands of the defendants must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiffs.

[94] The defendants point out that the learned motion judge acknowledged, at para. 40 of his reasons, that there was no agency relationship, and he did not see any ground on which one could be deemed to exist. Nevertheless, Cullity J. went on to conclude that despite the clear language of *Soulos,* no agency relationship was required for the second condition to be fulfilled.

[95] This condition poses difficulty unless McLachlin J.'s reasoning in *Soulos* is viewed as being based on a general relationship recognized in equity, rather than an agency relationship specifically. On the facts in *Soulos* the relationship was that of agent and principle. But the cases examined (or relied upon) involved other types of equitable relationships such as those involving trustee and beneficiary.

[96] I agree with Mr. Barrack that it is unlikely that, in most circumstances, the relationship between a manufacturer and consumer would be identified as an equitable relationship. However, based on the "unsettled" nature of the law of constructive trusts and the fact that we are here dealing with manufacturers and distributors of health care products, it cannot be said that an attempt to have an equitable obligation recognized in this particular type of products liability case could not possibly succeed.

[97] Again the debate taking place among legal writers and the preparedness of the Supreme Court of Canada to extend the scope of the availability of the constructive trust must be considered in assessing whether there may be some merit to the motion judge's opinion that in relation to this condition, it was unlikely that the reference to agency activities was intended to limit the availability of the remedy to cases of fraud or other wrongful conduct "by agents".

[98] Further, given the relevant policy considerations, such a determination should be made against the background of the facts.

(iii) **The third condition** – The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remained faithful to their duties.

[99] The defendants rely on the fact that the plaintiffs paid no money for the System to anyone, let alone the defendants. There is no factual connection between the wrongs the defendants are alleged to have committed and the funds they received. Citing Goff and Jones, they say that a proprietary claim to recover the proceeds of a tortious act will "fail *unless* the proceeds represent the traceable proceeds of the tortious exploitation of a plaintiff's undisputed title to, or possession of, property."[23]

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[23] *Supra* note 11 at para. 36-018 (emphasis in original).

[100] This third condition requires a plaintiff to demonstrate a legitimate reason for seeking a proprietary remedy. The reason must be related to the need to ensure that parties like the defendants remain faithful to duties set out in the first two conditions.

[101] The first part of this condition suggests that if you are going to seek a proprietary remedy rather than damages, you better justify it.

[102] At para. 44 of his reasons, Cullity J. noted that the plaintiffs had not alleged a pre-existing interest in the property over which a trust is being asserted and that it is not identifiable specifically as a separate, or mixed fund.

[103] I agree with the motion judge that in the present developing state of the law, particularly with respect to the constructive trust's remedial nature as recognized in *Lac Minerals, supra,* neither of these objections is necessarily fatal to the claim. In *Lac Minerals,* at p. 676, La Forest J. stated as follows:

> Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property.

(iv) **The fourth condition** - There must be no factors which would render imposition of a constructive trust unjust in all circumstances of the case; e.g., the interests of intervening creditors must be protected.

[104] The defendants contend that the absence of any payment by the plaintiffs to the defendants, the absence of any reliance by the plaintiffs on any statements the defendants made, the substantive law of products liability, and the fact that the U.S. corporation has paid a substantial penalty, are all factors that render the imposition of a constructive trust unjust.

[105] *Soulos* expands the use of constructive trusts to certain situations where "good conscience" dictates and where it would not be unfair in the circumstances.

[106] I agree with Cullity J. that any determination of what constitutes lack of fairness – and the determination of the third condition, as well - can only be properly determined on the facts.

[107] To summarize, there is considerable merit to the defendants' arguments about the problems the plaintiffs have in meeting the four requirements set out in *Soulos* for the remedy of a constructive trust based on wrongful conduct. The same can be said about the concerns the defendants have identified about the implications of extending this type of remedy in this type of situation. However, these arguments and concerns are not only open to debate but also engage

important policy issues. It follows that they should be examined fully and resolved on the basis of a complete factual record, not in the course of a procedural motion.

[108] Alternatively, if it is plain and obvious that the claim for a constructive trust is sure to fail, then it may be that the plaintiffs can persuade the court to grant the remedy of an accounting and disgorgement based on waiver of tort. This takes me to the plaintiffs' main argument flowing from their submission that waiver of tort may be an independent cause of action.

3. Is the remedy of an accounting and disgorgement of profits available in these circumstances?

[109] John McCamus defines disgorgement relief as essentially involving an award to the plaintiff of the benefits secured by the defendant through wrongful conduct.[24] McCamus says, "the scope or ambit of the doctrine in terms of the list of torts for which disgorgement claims are possible remains a matter of some uncertainty."[25] For the reasons that follow, I agree.

[110] There is considerable uncertainty surrounding the meaning of disgorgement and its application, starting with whether or not the remedy is restitutionary in nature. For McCamus, as this remedy involves the disgorgement of enrichments unjustly acquired, it falls squarely within the realm of the law of restitution. Mitchell McInnes, however, argues that disgorgement is not properly labeled as a restitutionary remedy.

[111] Drawing upon the work of earlier scholars, McCamus specifies two distinct types of benefits that the law of restitution seeks to have removed from the defendant and placed in the hands of the plaintiff: (1) benefits received by the defendant directly by the plaintiff (enrichment by subtraction), and (2) benefits acquired by the defendant through wrongful conduct (enrichment by wrong).[26] It is the latter category of benefits that may be subject to disgorgement. In *The Law of Restitution, supra,* the learned authors refer to relief in the "disgorgement" measure as being "increasingly" used to describe "a form of relief that requires the defendant to hand over to the plaintiff the benefits acquired through wrongful conduct, whether or not the benefit has been acquired from the plaintiff in the subtraction sense".[27] For McCamus, the remedy of disgorgement responds to a type of unjust enrichment; the finding of an underlying tortious conduct "provides the explanation for the wrongfulness of the defendant's conduct and... the reason why the enrichment is unjust".[28] Other writers have subscribed to this view.[29]

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[24] John McCamus, "Restitution as an Alternative to Damages in Contract and Tort" (Law Society of Upper Canada Special Lectures, 2005) at p. 5-1.
[25] *Ibid.* at p. 5-21.
[26] *Ibid.* at pp. 5-16 – 5-17.
[27] *Supra* note 1 at p. 3-22.
[28] *Supra* note 26 at p. 5-21.
[29] See, for example, A.M. Dugdale & M.A. Jones, eds., *Clerk & Lindsell on Torts*, 19th ed. (Toronto: Carswell, 2006) at para. 1-07, fn. 32.

[112] Some academic writing supports the view that disgorgement is not restitutionary. This is based on the argument that whereas disgorgement requires the defendant to "give *up*" a benefit wrongfully obtained, it does not necessarily engage the law of restitution, which requires a defendant to "give *back*" something that the plaintiff once had. Viewed from this perspective, disgorgement may be broader in scope than restitution. Alternatively, it may be viewed as an entirely different type of remedy, since restitution is not traditionally based on the commission of any wrong, whereas disgorgement is a remedy that is triggered when a defendant has committed a wrong.

[113] This argument is articulated by Mitchell McInnes in a number of his articles.[30] McInnes classifies measures of relief not according to purposes but according to effects. On this basis, disgorgement relief, which is quantified exclusively by reference to the defendant's gain and without regard to the plaintiff's loss, has a goal of depriving the defendant of an enrichment that he acquired.

[114] According to McInnes, disgorgement "proceeds without regard to a corresponding deprivation, with the result that the plaintiff cannot connect herself to the impugned benefit in the same way" as in the case where relief is sought for a benefit transferred directly from the plaintiff to the defendant.[31]

[115] On this basis, a finding of the requisite relationship between parties under the principles in *Soulos* is arguably not required for disgorgement relief to be available. As stated by McInnes: "The courts do not follow the same principles in redressing instances of enrichment by wrongs. Because the defendant's gain need not have been subtracted from the plaintiff, the extent of her loss (if any) does not constitute a limit to the amount of relief granted. She is entitled to disgorgement of the wrongful gain in any event."[32]

[116] Cullity J., in his reasons, identified an accounting and disgorgement as a personal restitutionary remedy. Whether or not disgorgement is, in fact, part of the law of restitution, is unclear. In *Transit Trailer Leasing Ltd. v. Robinson,* [2004] O.J. No. 1821 (Sup. Ct.), Cusinato J. stated that in electing to waive the tort of conversion, "the law of restitution provides in the granting of restitutionary relief that the defendant may be disgorged of any acquired benefit as a result of his wrongful act" (at para. 84). This represents an example of the application of the disgorgement remedy where no resort is made to the analysis in *Soulos* in order to determine whether or not the plaintiff had been unjustly enriched. Such an example casts a shadow of doubt over whether or not disgorgement is properly characterized as restitutionary, that is, a remedy intended to correct unjust enrichment.

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[30] Mitchell McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1997-1998) 25 Man. L.J. 513; Mitchell McInnes, "The Measure of Restitution" (2002) 52 Univ. of Toronto L.J. 163; Mitchell McInnes, "Enrichments and Reasons for Restitution: Protecting Freedom of Choice" (2003) 48 McGill L.J. 419; Mitchell McInnes, "Making Sense of Juristic Reasons: Unjust Enrichment after *Garland v. Consumers' Gas*" (2004) 42 Alta. L. Rev. 399.

[31] "*The Measure of Restitution*", *ibid.* at 185.

[32] "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada", *supra* note 30 at para. 18.

[117] In *The Law of Restitution, supra,* the learned authors seem to acknowledge that disgorgement may not be an appropriate remedy where a subtraction wrong has been committed. They observe that a case such as *Pettkus* is arguably "not a pure disgorgement case because the plaintiff incurred at least some outlay in the form of services provided" and that "the relationship of the notion of corresponding deprivation to the pure disgorgement cases remains unclear".[33] In other words, disgorgement is properly applied not for the purpose of preventing unjust enrichment, but simply to prevent a wrongdoer from benefiting from wrongful conduct.

[118] McCamus, in examining circumstances where disgorgement may or may not be available, identifies the American case of *Federal Sugar Refining Co., supra,* where disgorgement was held to be available in cases involving the tort of interference with contractual relations. In this case the plaintiff agreed to sell sugar to a Norwegian agency at a certain price. An export permit was required. The official in charge of issuing permits refused to issue a certificate to the plaintiff. He then incorporated the defendant and entered into a similar contract to sell sugar to the Norwegian agency at an increased price. The plaintiff sought to recover the profit the defendant made on the transaction. The court was of the view that it was irrelevant that the plaintiff had made a losing contract or one it was unable to perform. The action was not for damages for breach of contract but for the profit the defendant made as a result of its wrongful acts.

[119] In *Federal Sugar,* it was not necessary for the plaintiff seeking disgorgement to establish that but for the defendant's breach of duty, the plaintiff would have earned a similar level of profits. As the trial judge noted at p. 582, "the point is not whether a definite something was taken away from plaintiff and added to the treasury of defendant. The point is whether defendant unjustly enriched itself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched."

[120] The recoverability of benefits acquired through tortious conduct that are in excess of any actual loss was also recognized in *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.,* [1952] 1 All E.R. 796, where recovery was based on the ground that a wrongdoer ought not to be permitted to profit from his own wrongdoing. At p. 800, Lord Denning noted 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". The benefit obtained in *Strand Electric* saved expense; it was subject to disgorgement even though the plaintiff was unable to demonstrate any harm or loss.

[121] The proposition that disgorgement liability flowing from waiver of tort is benefit based, imposed to remove the benefit the wrong-doer secured and eliminate incentives otherwise present for engaging in such acts, forms the foundation of Mr. Pape's argument that waiver of tort giving rise to disgorgement is a sustainable cause of action in the circumstances here and that the principles in *Soulos* are inapplicable. The plaintiffs submit that the defendants, having

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[33] *The Law of Restitution, supra* note 1 at p. 3-23.

wrongfully obtained revenues through the distribution of products they knew to be faulty, ought to be compelled to disgorge them.

[122] This examination of disgorgement raises significant policy concerns with respect to the nature and scope of a remedy that possesses no link to a plaintiff's loss. As noted by McInnes, "in the absence of such a loss, society arguably should not incur the cost of shifting a windfall from one party to another without good reason".[34] Maddaugh and McCamus similarly note that "although it may be appropriate to recapture profits as a disincentive to wrongdoing, it may not be appropriate to grant a priority over other creditors in the event of an insolvency".[35]

[123] Clearly, there has been a sustained debate about whether it is appropriate to award proprietary disgorgement for wrongdoing that has not involved the appropriation of property previously held by the plaintiff. This class action suit gives the courts of this province an opportunity to examine the purpose behind the remedy of disgorgement in the context of the *CPA*, legislation specifically intended to correct the behaviour of wrongdoers.

[124] Not only these policy concerns, but also the essential nature of the remedy of disgorgement, require clarification in our jurisprudence. In fact, in stating the common issue of whether or not the defendants might be liable to account to the class members on a restitutionary basis, Cullity J. implicitly anticipated these concerns by posing the additional question of "if so, in what amount and for whose benefit is such an accounting to be made?" (at para. 73) Questions of the circumstances under which manufacturers and distributors of health care products might have to disgorge their profits and to whom or to what entities the assets in issue may be directed need to be developed on the basis of a full factual record. At this preliminary stage Cullity J. was correct in concluding that a claim based on waiver of tort giving rise to the remedy of disgorgement and an accounting was not certain to fail.

4. Are there other grounds that warrant overturning the decision to certify?

[125] The defendants submit that the motion judge erred in other aspects of the decision.

[126] They raise the issue of the identification of punitive damages as a common issue. Mr. Barrack essentially argues that the issue of punitive damages is premature and for this reason should not have been certified as a common issue. He says that punitive damages may only be awarded where they serve a rational purpose and represent a proportionate response to the defendants' behaviour and the harm caused. They therefore can only be determined after a court has decided whether a tort has been committed and whether the objectives of punishment and deterrence have been accomplished. The defendants contend that the effect of the decision is to avoid the requirements for awarding punitive damages since it would determine the issue without reference to the underlying liability and damages.

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[34] *"The Measure of Restitution", supra* note 30 at 185.

[35] *The Law of Restitution, supra* note 1 at 5-32.

[127] The claim for punitive damages is based on allegations that include the defendants' conduct in the development and marketing of the System, the delayed recall, and disregard of and indifference toward the plaintiffs' rights and safety – conduct that the plaintiffs assert was economically motivated.

[128] In *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) Carthy J.A. established that judges such as Cullity J. are entitled to deference reflective of the expertise they develop in this sophisticated area of practice. He said that "the Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle" (at p. 677).

[129] Common issues relating to punitive damages have been accepted in a number of cases including *Rumley v. British Columbia,* [2001] 3 S.C.R. 184, *Cloud, supra, Carom v. Bre-X Minerals Ltd., supra,* and *Chance v. Crane Canada* (1996), 26 B.C.L.R. (3d) 339 (S.C), aff'd (1997), 44 B.C.L.R. (3d) 264 (C.A.). One author speaks approvingly of these cases, noting that an award of punitive damages to the class as a whole furthers the objective of behaviour modification without giving a punitive damages windfall to a single plaintiff.[36] He states further that in *Rumley, supra,* the Supreme Court of Canada has "explicitly stated that punitive damages are appropriately addressed as a common issue in a class proceeding."[37] At para. 34, McLachlin C.J., writing for the court, stated as follows:

> Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence -- that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace*, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

[130] In my view, the possible grounds of liability in this case are not specific to any one victim but rather to the class of victims as a group. Based on these observations, in addition to the deference owed to the motion judge in determining the common issues, I see no reason to interfere with this aspect of the motion judge's decision.

[131] Based on the provisions in s. 24(1) of the *CPA*, the defendants also challenge the motion judge's acceptance of the class members' entitlement to an aggregate award as a common issue. Cullity J. stated, at para. 66 of his reasons, that he had incorporated the possibility of an aggregate award into common issues (1) and (2).

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[36] Michael A. Eizenga et al., *Class Actions Law and Practice,* looseleaf (Markham, On.: LexisNexis Canada, 2005) at para. 3.37.
[37] *Ibid.* at para. 3.38.2.

[132] The defendants submit that aggregate damages cannot be determined as a common issue since the other common issues do not properly permit a determination of liability.

[133] The plaintiffs argue that the remedies of constructive trust, accounting and disgorgement of the revenues can be determined at a trial of the common issues without the involvement of any individual class member and after liability has been determined under the doctrine of waiver of tort.

[134] The plaintiffs proposed the common issue as follows, as cited at para. 55 of Cullity J.'s reasons: "If the conspiracy is established, should the court assess aggregate damages at large? If so, why, in what amount and for whom?" In his analysis of this issue, Cullity J. stated as follows, at para. 66:

> [This issue] could be reformulated so that it refers not to damages but, rather, to the amount for which the defendants may be liable to make restitution. Section 24(1) of the *CPA* that permits aggregate awards refers to an assessment of 'monetary relief' and is not, in its terms, restricted to damages as compensation for losses suffered by the class.

[135] The authority to make an aggregate assessment at trial is subject to three preconditions in section 24(1):

> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly 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.

[136] Section 24(1) of the *CPA* is applicable only once liability has been determined and provides a method to assess the quantum of damages on a global basis.

[137] The authorities establish that a question relating to an aggregate assessment should not be included if, at the certification stage, the court can determine that one or more of the three prerequisites could not be satisfied even if the other common issues were decided in favour of the plaintiff. Essentially, an aggregate award will likely be inappropriate if any of the remaining common issues would require proof by each class member. Winkler J. (as he then was) considered when an aggregate assessment of damages is appropriate in *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913 (Gen. Div.). He stated that it was a "novel point" and

had never been ordered as a common issue under the *CPA* at that time. Although Winkler J. refused to identify aggregate damages as a common issue in the circumstances of that case, the facts are distinguishable. The motion before Winkler J. was for certification of an action as a class action following a fire in a subway tunnel. The action advanced claims for personal injury, property damage and claims under the *Family Law Act*. Winkler J. stated as follows, at paras. 18-20:

> These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".
>
> In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiffs time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.
>
> .... Even if by class definition the members of the proposed class have all suffered exposure to smoke, the extent of such exposure and any damage flowing from it will vary on an individual basis.

[138] Given my conclusions concerning the common issues relating to waiver of tort as a cause of action and the potential remedies, the same concerns that faced Winkler J. are not present here. Since proof of loss is arguably not required, there will be no need for any "idiosyncratic" assessment of damages in each case. Rather, in the event that liability is found, and in the event that either the remedy of constructive trust or disgorgement is found to be available to the plaintiffs, no such finding of individual damage will be required. As stated by Cullity J., the plaintiffs' case is "to a large extent based on assumptions that liability could be established at a trial of common issues and that an aggregate assessment of damages would be made" (para. 67). I agree with Cullity J. that such assumptions are valid regarding common issues (1) and (2).

[139] In any event, this is not an issue that should be barred from being considered as a common issue at this stage in the proceedings, given that the requirements of s. 24(1) are likely to be met. In *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974 (Sup. Ct.), Cullity J. stated as follows in accepting the issue of an aggregate award as a common issue, at para. 25: "It is, I believe, sufficient at this stage if there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are

otherwise successful at a trial for common issues." I agree. The appropriateness of aggregate damages is for the trial judge to assess after the trial. At this stage in the proceedings, there is a reasonable likelihood that the statutory preconditions will be satisfied.

[140] Finally, the defendants contend that there is a limitation period problem. The proposed class includes individuals in Ontario and elsewhere in Canada except British Columbia and Quebec. Given when this proceeding was initiated and in light of the limitation periods in various provinces, the defendants may have a statutory defence in relation to some class members. Accordingly, if the class is certified, the court will have to decide whether the claims of persons outside Ontario are subject to limitation periods that have already expired.

[141] It is certainly possible that a shorter limitation period might apply to class members in jurisdictions outside of Ontario.

[142] In *Pausche v. British Columbia Hydro & Power Authority*, [2000] 11 W.W.R. 385 (B.C.S.C.), aff'd [2002] B.C.J. No. 196 (C.A.), the British Columbia Supreme Court determined that the assessment of limitations is individual to the proposed class representative. The court determined, and the Court of Appeal confirmed, that it is better to reserve determination of that issue until the individual issues are considered at trial.

[143] One author states that although the expiry of a limitation period can result in dismissal of a proposed class claim, this is not the tendency of the courts: "The court may be reluctant to delve too deeply into this issue prior to or at the certification stage if there is any doubt, preferring to leave the matter for trial."[38]

[144] Eizenga, too, notes that the fact that class members may each have different limitation periods has not, on its own, been a bar to certification: see, for example, *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88 (S.C.), where the court found that including non-resident class members would not complicate the trial on the common issues, and subsequent proceedings could determine the applicable limitations in other jurisdictions. Eizenga proposes that "as a practical matter", challenges relating to limitations defences should be adjourned to a stage of the proceedings following the certification motion.[39]

[145] In my view, it is premature at this stage to attempt to decide the limitation issue solely on the basis of the amended statement of claim. The proper course is to defer any final determination of this question until the nature of the tort, if any, has been examined based on the factual record.

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[38] Ward Branch, *Class Actions in Canada*, looseleaf (Aurora, On.: Canada Law Book, 2005) at para. 4.140.
[39] Eizenga, *supra* note 36 at para. 6.11.1.

VI. Conclusions

[146] In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 at 61 (H.L), Lord Wright said "any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." Over half a century later, in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, McLachlin J. (as she then was) said, at para. 42, "The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice." The suggestion is that like negligence, the categories of restitution may never be closed.

[147] And then came *Soulos* and Carthy J.A.'s pronouncement in the Court of Appeal (1995), 25 O.R. (3d) 257 at 261, that "it is the moral quality of the defendant's conduct that forms the fundamental reason for the court's intervention" and that equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises". These words were substantially adopted by the majority of the Supreme Court at paras. 14-15 of McLachlin J.'s judgment, which held that the constructive trust may apply even without an established loss to condemn wrongful conduct and maintain the integrity of equitable relationships.

[148] While *Soulos* has been recognized as a significant advancement in Canadian law, it has also fueled an important debate. There is division in the law of restitution between subtractive unjust enrichment and disgorgement of the profits of wrongdoing. Within the field of disgorgement, there is another division, surrounding issues pertaining to personal and proprietary disgorgement.[40]

[149] There appears to be agreement that the constructive trust is a discretionary remedy available for deterrence purposes in the commercial arena. In this case, the court may find that the defendants' misconduct in knowingly distributing health care devices into the Canadian market with the risk potential of the nature that exists in this case sufficiently offends the conscience of the court to support a finding of disgorgement or constructive trust.

[150] There can be no doubt that these defendants were enriched. Is it not unjust for them to retain their gains from their misrepresentations as to the efficacy of a health care device relied upon by thousands of diabetics in Canada?

[151] However, connecting these plaintiffs with these gains in a legally coherent fashion is the problem that lies at the root of the challenge to the certification of this class proceeding.[41] The remedy the plaintiffs seek may leave them better off than if the events had never occurred.

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[40] For an interesting discussion see Sharpe J.A.'s analysis in "*Commercial Law Damages: Market Efficiency or Regulation of Behaviour?*" Law Society of Upper Canada Special Lectures 2005 (Toronto: Irwin Law, 2005).

[41] At least in *Soulos*, the plaintiff had an idiosyncratic interest in the property in issue.

The possibility of a windfall gain bothers some. The possibility of leaving the defendants with their ill-gotten gains, bothers many.[42]

[152] The potential problem with a free-standing waiver of tort centers on the difficulties in creating sound rules that can be developed to define circumstances where it would and where it would not apply. However, in my view, the biggest challenge is identifying a legally acceptable way of justifying why plaintiffs such as the representative plaintiffs in this action, out of a class of all other potential plaintiffs, should be entitled to the amounts claimed.

[153] The policy debate that has been identified in these reasons demonstrates the need to think through carefully why a plaintiff is given a remedy, what it should be based on and the limits on what the courts can do to respond to misconduct such as that pleaded here. The determination of the difficult questions that arise out of these plaintiffs' having claimed these remedies depends at least in part on how far the reasoning in *Soulos* might be taken. It may also depend on how the scope of the remedy of disgorgement is defined and limited.

[154] The response may lie in the concept of gain-based compensation, a notion that requires a different form of justification since the plaintiff cannot connect himself to the property being claimed by pointing to his or her loss. This engages the controversial notion of corrective justice, something that challenges the parameters of tort law.

[155] Like Cullity J., I understand the nature and significance of the concerns the defendants raise with respect to an action of this type having been brought on this basis. The issues that will arise at the trial of the common issues will unquestionably be difficult. The plaintiffs will have to make complex submissions about their entitlement to an interest in the defendants' revenues. They may well have to make novel arguments concerning corrective justice. It may be that applying either remedy, a constructive trust or disgorgement, to this type of situation would take "corrective justice" too far and at trial the plaintiffs may find themselves without a remedy.

[156] However, that a pleading reveals an arguable or difficult point of law cannot justify striking it out. In fact, as stated by McLachlin J. in *Hunt, supra,* at para. 52, "where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. *Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society."* (my emphasis)

[157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation.

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[42] There are other concerns; the indeterminacy of damages recognized as a problem in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* [1995] 1 S.C.R. 85, and the concern that the consequences of taking this forward without proper controls may introduce strict liability for a defective product.

This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

[158] I understand that in the area of product liability where governing principles, involving statute, contract and negligence law, are already complex, it is particularly important to have legally supportable boundaries of liability and recovery. It is the need to examine, identify and define these boundaries in the face of the ongoing debate that supports the decision to allow the matter to proceed.

[159] In all of these circumstances, I agree with Cullity J. that it cannot be said, in this case, that it is plain and obvious that this claim will fail. The plaintiffs may well face an uphill battle, but they should not be deprived of the opportunity to prove their case at trial. On the assumption that a legal obligation may exist, this class proceeding is suited for certification based on the common issues identified by Cullity J.

[160] For these reasons, the appeal is dismissed. If the parties are unable to resolve the issue of costs, they may make written submissions, through the Divisional Court Office, within 20 days.

Epstein J.

EPSTEIN J.

I agree

JENNINGS J.

Released:

CHAPNIK J. (dissenting):

[161] I have read the comprehensive and well-reasoned judgment of the majority, and although I agree with much of what was stated, I respectfully disagree with the conclusions reached.

[162] In his reasons, Cullity J. opined that a motion judge should be slow to strike novel causes of action or those in an area of the law that is unsettled or undergoing significant change or development. He noted, at page 9, that the scope of the doctrine of "waiver of tort" and the extent to which it reflects general principles have not received authoritative analysis in Canadian appellate courts. Moreover, in the United Kingdom, Goff & Jones suggest that it is doubtful whether English law is "sufficiently mature" to adopt a general principle that recognizes an independent restitutionary claim "simply on the wrongful acquisition of a benefit".[43]

[163] With the growth of new products and their proliferation in the marketplace, the remedy of waiver of tort as a cause of action continues to rear its head. Inevitably, such relief is on the horizon in Canada. However, with the greatest of respect, I do not think the facts of this particular case justify its certification as a class proceeding wherein the novel cause of action "waiver of tort" is tested.

[164] In my view, although waiver of tort may constitute a novel cause of action and although it may not require proof of loss or damage, the plaintiffs' claim based on waiver of tort as a cause of action cannot be sustained on the facts pleaded. In brief, this case does not fall within the types of cases where waiver of tort has been applied, and it is plain and obvious that there is no principled basis on which to apply it in this case.

[165] Further, it is plain and obvious that such an action would fail. Accordingly, Cullity J. erred in holding the statement of claim disclosed waiver of tort as a cause of action which could permit the remedies of constructive trust or an accounting and disgorgement of profits; and in certifying the action as a class proceeding.

BACKGROUND

The Facts

[166] The factual matrix has for the most part been fully and adequately set out in the decisions of Cullity J. on the motion for certification, and Epstein J. for the majority on this appeal.

[167] As far as I am able, without losing the context of the case, I will not repeat what my learned colleagues have said. My recitation of the facts, however, may include several details which in my view, are required on the record to fully understand the background of this case and what informed the conclusions reached by Cullity J.

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[43] R. Goff and G. Jones, *The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 2002) at pages 776-77.

[168] In a nutshell, the case involved a motion for certification of a class action against the defendants who had allegedly committed a number of torts in the course of the manufacture, sale and distribution of a product known as the SureStep System (the "System") to be used by diabetics to monitor their blood glucose levels.

[169] Though Cullity J. certified the action as a class proceeding based on the doctrine of "waiver of tort", he declined to certify the class action for the nominate torts of negligence, negligent and fraudulent misrepresentation, breach of s. 52(1) of the *Competition Act* and conspiracy. In his assessment, the applicability of each nominate tort and the elements of causation and damages in respect of those torts would have to be determined on an individual basis. He concluded, at paras. 56 and 69, that liability arising from these causes of action could not be determined as a common issue, and that a class action would not be the preferable procedure for resolving such claims.

[170] While noting that expert affidavit evidence differed considerably with respect to the likelihood that any of the problems associated with the use of the defective System would lead to short-term consequences or long-term complications, the learned judge stated, at para. 12:

> There is, however, virtually *no evidence* that either of the representative plaintiffs, *or any other members of the putative class, suffered any injurious effects to their health* by using the meter or the Strips other than the pain involved in obtaining additional blood samples. (emphasis added)

[171] As for the claim for damages based on the nominate torts, he concluded, at para. 13 that "there was *no evidence* on this motion that the representative plaintiffs, *or any member of the proposed class, suffered diabetic shock, or loss of income*" (emphasis added).

[172] Cullity J. was led to these conclusions on the evidence placed before him which I will briefly summarize under four headings: the System and its Defects, the Corrective Action Taken, Alleged Injuries, and Damages and Loss of Income.

The System and its Defects

[173] The System consists of a blood-monitoring device, which allows individuals with diabetes to measure their own blood glucose levels. In order to obtain a reading, the individual pricks his or her finger using a lancet and applies a drop of blood on a test trip. The strip is then inserted into a glucose meter, and information concerning the user's blood glucose level is displayed on a LCD screen.

[174] The normal glucose blood level range is between 4 and 7 mmol/L; and the System was designed to provide a numerical indication of blood glucose levels at ranges between 0 and 27.8 mmol/L. Above that, a "HI" reading would be expected.

[175] It is not disputed that the original software contained an error that resulted in the meters sometimes giving an ER1 reading rather than a HI reading (the "ER1 problem") when the user had a blood glucose level above 27.8 mmol/L, which is said to be rare. So long as the user's blood glucose level was below 27.8 mmol/L, the ER1 problem would not occur.

[176] A second issue with the original system related to the insertion of the strip, that is, it was found that when a user failed to insert a strip completely into the blood glucose meter, the meter could potentially give a lower than accurate blood glucose reading (the "Low Flier problem").

[177] The System came with an owners' booklet which included other causes of an erroneous ER1 reading, such as blood being applied to the wrong side of the test strip, not enough blood on the test trip, or the test strip being inserted more than two minutes after applying the blood.

Corrective Action Taken

[178] It is not disputed that the defendants or some of them knew about the problems pertaining to the meters and the strips long before they were corrected. As noted by Epstein J., the corrective action followed on the heels of an investigation commenced by various authorities in the United States.

[179] The System was launched in Canada in February 1996. The software in the meter was modified to correct the ER1 problem in July 1997 and as of October 7, 1997, LifeScan Canada only sold corrected meters in the Canadian marketplace. A voluntary recall of affected meters in June 1998 produced 21,321 replacement meters as at September 30, 2002 shipped by LifeScan Canada.

[180] By mid-1998, LifeScan Canada began to distribute new strips for sale in the Canadian marketplace not subject to the Low Flier problem.

Alleged Injuries

[181] The representative plaintiff, Mr. Ahmad Serhan, now deceased, was diagnosed with diabetes in the early 1990's and obtained the System in October 1997; he returned his affected meter to LifeScan pursuant to its voluntary recall program on July 2, 1998. The evidence disclosed that on a few occasions, he received an ER1 reading, but the actual type of reading is unclear. The only harm claimed to have been suffered by him is that he was, on a number of occasions, required to repuncture his finger with a lancet.

[182] Ms. Beverly Gagnon, the other representative plaintiff, was given a *corrected* meter in July 1998, at a time when the newly designed strips were already on the Canadian market. She did not report false Low Flier readings, and used the corrected strips for the majority of the two years that she owned the meter.

Damages and Loss of Income

[183] Neither of the proposed representative plaintiffs paid for their own meters or strips. Mr. Serhan's meter was given to him at no cost by the hospital, and he obtained test strips under the Ontario Drug Benefit Plan (with a payment of $2.00 per prescription).

[184] Ms. Gagnon obtained the meter for free through a diabetes clinic at her local hospital, and the cost of the test strips was fully covered under the Ontario Drug Benefit Program, also with a $2.00 payment per prescription.

[185] The evidence disclosed that the Drug Benefit Program, other provincial government plans and certain private insurance plans covered the cost of the strips; the retail price of the products varied over the relevant time period; and 35,105 coupons of different denominations were redeemed to reduce the net price paid by the consumer.

Summary

[186] I have detailed the above not to in any way undermine the seriousness of what occurred, (particularly in light of the admissions made by the defendants in the U.S. case), but only to provide the context underlying the conclusions reached by Cullity J., namely that there was no evidence the representative plaintiffs, or any other members of the putative class suffered injury by using the System other than the pain involved in taking additional blood samples; and there was no evidence that any such member suffered diabetic shock or loss of income.

STANDARD OF REVIEW

[187] I agree with Epstein J. that the primary issues raised embrace a question of law; that is, whether the concept known as "waiver of tort" may be a cause of action, and the plaintiffs' potential entitlement to the remedies of a constructive trust or an accounting and the disgorgement of profits. Thus, the standard of review is one of correctness: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8 and *Pearson v. Inco Ltd. et al.* (2005), 78 O.R. (3d) 641at para. 43 (C.A.).

[188] At the same time, Cullity J. is an experienced class proceedings judge. His decision to certify the action as a class proceeding is entitled to considerable deference.

ANALYSIS

1. Section 5(1)(a) of the *CPA:* Do the pleadings disclose a cause of action?

Overview

[189] I think it is fair to say that the primary focus of Cullity J.'s reasons centre on the prerequisite for certification set out in s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"); that is, that the pleadings disclose a cause of action. The common issues were

re-fashioned to reflect the judge's decision that the pleadings disclosed the cause of action "waiver of tort". Cullity J. found that it was not plain and obvious that a class proceeding based on waiver of tort in these circumstances would fail.

[190] Cullity J. concluded that whether the doctrine of waiver of tort applies and if so, whether the restitutionary remedies of a constructive trust or an accounting and disgorgement of profits are available in these circumstances, are not questions to be determined on the procedural motion. Epstein J. for the majority agrees that such questions require determination on "a full record".

[191] With respect to my learned colleagues, I disagree. Given that s. 5(1)(a) of the *CPA* requires that a cause of action be disclosed by the pleadings as a prerequisite to certification, it is essential to examine the factual matrix closely in any given situation to determine whether this condition is met. In the circumstances of this particular case, it is my view that this condition has not been met.

[192] In my respectful view, there is no need in this case to determine whether or not any loss or damage needs to be established in a claim based on waiver of tort. This is because, in any event, when this case is viewed as a whole, it is plain and obvious that the plaintiffs can have no entitlement to either of the restitutionary remedies claimed. I will illustrate this by first examining the doctrine of waiver of tort, then turning to restitutionary remedies generally and the specific remedies of unjust enrichment, constructive trust, and disgorgement. When these concepts are considered cumulatively on the facts of this case, it becomes plain and obvious that the plaintiffs' case is sure to fail.

The Doctrine of Waiver of Tort

[193] Clearly, the doctrine of waiver of tort is a recognizable feature in Canadian law. Though at times the doctrine is characterized as a tort or cause of action, it is more commonly described as a restitutionary remedy that permits a plaintiff to recover damages representing the monies the wrongdoer has gained, rather than the calculable loss to the plaintiff.

[194] As others have said more eloquently, the doctrine is based on the proposition that a wrongdoer should not be permitted to keep the gains acquired through its wrongful conduct, but must account for such ill-gotten gains to the person impacted by the tort, even if that person has lost nothing or suffered no damage.[44]

[195] As observed in detail by Epstein J., given the present unsettled nature of the jurisprudence in this area, there appears to be no reason why waiver of tort could not be recognized as an independent restitutionary cause of action in Canadian jurisprudence. At the same time, though potentially obviating the need for the plaintiff to prove damages, the principle requires the court to consider whether an equitable or restitutionary claim is available. As noted by Cullity J. at para. 24 of his reasons, for the purposes of s. 5(1)(a) of the *CPA*, "[m]aterial facts

[44] See G.H.L. Fridman, *Restitution*, 2nd ed. (Scarborough: Thomson Carswell, 1992) at 355-367.

must have been pleaded that, if proven, could entitle the plaintiff to the particular remedy claimed".

[196] In my view, the plaintiffs can have no entitlement to the restitutionary relief claimed.

Restitutionary Relief

[197] As noted by McLachlin J. (as she then was) in *Peel v. Canada*, [1992] 3 S.C.R. 762 at 803, "restitution, more narrowly than tort or contract, focuses on re-establishing equality as between two parties, as a response to a disruption of equilibrium through a subtraction or taking."

[198] Both Cullity J. in his reasons, and Epstein J. for the majority, describe the differences between the traditional restitutionary remedy of constructive trust, and the remedy of an accounting and disgorgement of profits. To summarize, under traditional restitutionary principles, the plaintiff had to sustain a deprivation corresponding to the defendant's gain. The remedy of disgorgement, however, may not require any loss or deprivation on the part of the plaintiff.

[199] Clearly, in respect of both remedial claims, the mere assertion of an injustice is not sufficient to avoid scrutiny of the restitutionary elements of a claim for damages. This was noted by McLachlin J. in *Peel, supra*, at 802-03:

> The courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. *The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy.* Such flexibility is found in the three-part test for recovery enunciated by this Court in cases such as [*Pettkus v. Becker*, [1980] 2 S.C.R. 834]. *Thus recovery cannot be predicated on the bare assertion that fairness so requires. A general congruence with accepted principle must be demonstrated as well.* (emphasis added)

[200] In my respectful view, it is plain and obvious that both remedies are certain to fail in the particular circumstances of this case. This conclusion is based the combined absence of the elements of unjust enrichment, any trust-like relationship, or any sort of calculable loss or ongoing deprivation suffered by the representative plaintiffs or members of the putative class in relation to the defendants' profits. I will consider each of these aspects that are lacking in this particular case.

Unjust Enrichment

[201] The tri-partite test for unjust enrichment was explained in *Pettkus v. Becker, supra* at para. 38, as follows:

> ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

[202] The principle of unjust enrichment is said to underlie all restitutionary claims.[45] In several cases, no restitutionary relief has been allowed in the absence of a claim for unjust enrichment: see, for example, *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.); and *Zidaric v. Toshiba of Canada Ltd.*, [2000] O.J. No. 4590 (Sup. Ct.).

[203] Further, the Supreme Court of Canada has placed the onus of proving the three elements of unjust enrichment on the claimant: see *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575 at 590.

[204] In the instant case, although they initially pleaded constructive trust based on both unjust enrichment and wrongful conduct, plaintiffs' counsel apparently disclaimed reliance on a trust based on unjust enrichment. Cullity J. noted, however, that the two categories of constructive trust are not mutually exclusive. He stated, at para. 28:

> The distinction, therefore, is not between cases in which there has, and has not been unjust enrichment, but rather between those in which proof of unjust enrichment is not essential to the claim and those in which the three-pronged test of enrichment, a corresponding deprivation and the absence of a juristic reason, must be satisfied. In cases of constructive trusts arising from wrongful conduct, the extent to which the defendant was unjustly enriched may be relevant to, and even determine, the extent to which the trust attaches.

[205] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, McLachlin J. (as she then was) similarly recognized that "[o]ften wrongful acquisition of property will be associated with unjust enrichment, and vice-versa" (at para. 36). Insofar as a finding of unjust enrichment may determine the extent of the restitutionary remedy available, it appears that Cullity J. recognized that a restitutionary remedy based on unjust enrichment alone would not be available in these circumstances, given the obvious lack of any deprivation suffered by the plaintiffs. That assessment is consistent with the conclusion reached by McLachlin J. in *Peel, supra* at 803, that recovery cannot be predicated on the bare assertion that fairness so requires. A general congruence with accepted principle must be demonstrated as well.

[206] In this case, the representative plaintiffs obtained their equipment essentially for free from such institutions as hospitals, clinics and pharmacies rather than directly from the defendants. Moreover, they suffered no deprivation corresponding to the defendants' alleged enrichment.

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[45] *Ibid.* at 358.

[207] In *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218 (C.A.), where the plaintiffs sought recovery of the purchase price paid to the defendants in connection with an allegedly defective product, the Court of Appeal upheld the trial judge's decision to strike out the portions of the claim requesting reimbursement for the full purchase price. In rejecting the argument that the request could be sought on the basis of unjust enrichment, the Court commented on the lack of any direct relationship between the parties, at para. 20: "The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery."

[208] Similarly, in a more recent decision that was drawn to our attention by counsel after their submissions, *Reid v. Ford Motor Company et al.*, [2006] B.C.J. No. 993 (B.C.S.C.), in a class action for damages for repairing a defective ignition switch, the plaintiff sought to amend the pleadings and certification order to include a claim for waiver of tort involving restitutionary relief of the type claimed here. The plaintiff in that case had rooted her claim in negligence on the exception to recovery for pure economic loss for dangerous defects, as articulated by the Supreme Court in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

[209] In determining that the proposed amendments disclosed no reasonable cause of action, the court noted that the purchase price would have been paid, not to the defendant Ford, but to repair shops or parts dealers where the class members had purchased the part. Thus, any benefit to Ford was "indirect and only incidentally conferred on them" (at para. 33).

[210] The court went on to state at para. 33, that "cases where unjust enrichment has been made out generally deal with benefits conferred directly and specifically on the defendant, such as goods or services purchased directly from the defendant or money paid to the defendant".

[211] The complete, undeniable lack of unjust enrichment in this case is a factor that militates against finding entitlement to a restitutionary remedy.

Constructive Trust Based on Wrongful Conduct

[212] As noted above, a finding of constructive trust may be based on unjust enrichment or wrongful conduct. It is the latter category of constructive trust that the plaintiffs rely upon. The Supreme Court of Canada in *Soulos, supra* held that a constructive trust may apply to people in positions of trust in order to hold them to "high standards of trust and probity that commercial and other social institutions require if they are to function effectively" (at para. 33). McLachlin J. (as she then was) went on to list, at para. 45, four conditions that must "generally" be satisfied as prerequisites for a constructive trust based on wrongful conduct. These conditions have been canvassed in detail by Epstein J. for the majority.

[213] In discussing the four criteria set out in *Soulos* in the context of this case, Cullity J. stated at para. 34 that:

> Waiver of tort, by that name, has not been pleaded but, *as well as the general – and by themselves probably inadequate – references to good conscience*, paragraphs 74 – 76 of the statement of claim do, I believe, allege material facts that if proven, could entitle the plaintiffs to a remedy on the basis of the doctrine. (emphasis added)

[214] In my respectful view, not only are the references to good conscience "inadequate" by themselves, but it is plain and obvious that at least two of the four conditions listed in *Soulos* cannot be satisfied on the facts of this case. Furthermore, it is implicit in Cullity J.'s reasons that he was not satisfied that all of the four criteria could be met in these circumstances.

[215] Problems exist with respect to the first condition in *Soulos*, which states that the defendant must have been under an "equitable obligation" in relation to the activities giving rise to the assets in his hands. Cullity J. stated, at para. 33:

> I do not see any difficulty in holding that a party who *has obtained property of another by fraudulent misrepresentations* has breached an obligation of the type courts of equity have enforced. (emphasis added)

[216] My concern here is two-fold. First, using the language of Cullity J. himself, the defendant in this case does not fall into the category of "a person who has *obtained property of another* by fraudulent misrepresentations". Secondly, given that Cullity J. already found that the nominate tort of fraudulent misrepresentation was an individual issue, and unsuitable as a cause of action in the circumstances of this class proceeding, it is difficult to see how it might ground a claim in waiver of tort in the class proceeding. In the case of fraud, not only damage but also reliance must be proven for liability to be found. On this reading, the common issues, as identified by Cullity J., preclude any finding of an equitable obligation.

[217] Furthermore, at para. 40, Cullity J. himself specifically noted the difficulty in applying the second condition in *Soulos* to the facts of this case. That condition requires the assets in the hands of the defendants to have resulted from "deemed or actual agency activities of the defendant" in breach of his equitable obligation to the plaintiffs.

[218] Cullity J. found that "there was no agency relationship" and he did not see "any ground on which one could be deemed to exist". Nevertheless, based on McLachlin J.'s statement in *Soulos* that the remedy might extend beyond agency situations, to breaches of "a trust-like duty", he concluded at para. 42 that it is unlikely that the references to agency activities in *Soulos* were intended to limit the availability of the remedy to cases of wrongful conduct by agents.

[219] I recognize that the categories of fiduciary relationships are evolving in our jurisprudence. In my view, however, a review of the case law, including the facts in *Soulos*, indicates that the Supreme Court did not intend for fiduciary concepts to be stretched to such an

extent, so as to permit a finding of a "trust-like" duty on the facts of this case, where there is no direct relationship between the parties akin to an agency relationship.

[220] In expanding the law to enforce what courts deem to be "good commercial conduct," courts have occasionally imposed moral purpose and behaviour modification goals on litigants. At the same time, keenly aware of the dangers of indeterminate liability, they have sought to limit the scope of restitutionary remedies available. This occurred in a different context involving an alleged breach of contract in the case of *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.). In that case, publication of information gathered by the defendant during the time he was a secret service agent was found to have infringed the very interest the contract was designed to protect, and such conduct engaged an equitable restitutionary remedy. The House of Lords in *Blake* explicitly stated, however, that contract damages measured by the defendant's gain are "exceptional" and available only where the plaintiff has some legitimate interest in preventing the defendant's profit-making activity. To make this very clear, the court specifically referred to the words of Lord Woolf in the Court of Appeal's decision, [1998] Ch. 439 at 457:

> We do not think that the basis on which damages are awarded should depend on the defendant's moral culpability alone. *The fact that his breach of contract is deliberate and cynical is not by itself a good ground for departing from the normal basis on which damages are awarded.* [emphasis added]

[221] This same principle may be applied to like situations in the field of tort law. The facts in the instant case certainly do not bring it within such an "exceptional circumstance". In my view, the proprietary restitutionary remedy based on constructive trust cannot be extended to this situation.

[222] With great respect to my colleagues, the aim of the four-part test in *Soulos* must have been to place limitations on the situations in which a claim for constructive trust based merely on the wrongful conduct of a defendant might be advanced. In this case, due to the cumulative impact of the absence of unjust enrichment, the absence of a traditional trust-like relationship, the absence of any readily definable equitable obligation, and the absence of any damages suffered by the plaintiffs, I conclude that it is plain and obvious that such a claim will fail.

Accounting and Disgorgement of Profits

[223] Sharpe J.A. has likened the disgorgement remedy to that of a punitive damage award: "The growing acceptance of punitive damages is not unrelated to the development of disgorgement, or an accounting of profits, as a remedy."[46]

[224] Maddaugh and McCamus take this a step further and argue that,

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[46] Sharpe J.A., "*Commercial Law Damages: Market Efficiency or Regulation of Behaviour?*" Law Society of Upper Canada Special Lectures (Toronto, Irwin Law, 2005) at 24.

> ... recognition of the relevance of deterrence in fashioning remedies for breach of contract strengthen the argument for explicit recognition of the disgorgement remedy in exceptional cases ... [47]

[225] These rather creative and novel pronouncements have not been lost on the courts. In the context of class actions, *Abdool v. Anaheim Management Ltd.*, (1995) 21 O.R. (3d) 453 stands as one decision in a series that embrace restitutionary relief arising from a defect in a product or building structure. These cases culminated in the seminal decision of the Supreme Court of Canada in *Winnipeg Condominium, supra*. In that case, the court restored the claim of a condominium corporation against the builder and sub-contractor who had installed exterior stone cladding in an apartment building, some of which had collapsed. Once the cladding was recognized as defective, steps could be taken to isolate the area below the cladding until the danger was removed. The defendant corporation had purchased the property subsequent to the installation of the cladding.

[226] Despite the lack of privity between the parties, the plaintiffs' claim was restored as the structural defect was "not merely shoddy" but dangerous. La Forest J. stated, at para. 12:

> In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort.

[227] The Supreme Court held that compensation ought to be extended to the cost of "fixing the defect." In effect, the amount of damages a plaintiff is entitled to in the "dangerous defect" exception to the prohibition against pure economic loss claims is confined to the reasonable cost of repairing the defect and mitigating the danger.

[228] In the instant case, we are not dealing with a claim by plaintiffs who incurred expense in mitigating or repairing a dangerous defect. The facts suggest that even the broad post-*Winnipeg* parameters of tort law are being challenged here. In my view, there is no principled basis upon which the remedy of disgorgement might be available to the plaintiffs in their claim based on waiver of tort. Therefore, it is plain and obvious that a claim for such remedy will fail.

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[47] P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf (Aurora, On.: Canada Law Book, 2005) at p. 25-21.

Conclusion on s. 5(1)(a) of the *CPA*

[229] The majority decision and the reasons of Cullity J. import the plain and obvious test set out in *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321 at 332-6 (S.C.C.) into motions for class proceedings certification.

[230] A pleading will be struck out under Rule 21.01(1)(b) of the *Rules of Civil Procedure* only if it is plain and obvious that the statement of claim, or part of it, discloses no reasonable cause of action. Even so, a court should not summarily dispose of matters of law that are novel or that have not been fully settled in the jurisprudence. Notwithstanding this, the court in *Anderson v. St. Jude Medical Inc.*, [2002] O.J. No. 260 (Sup. Ct.) struck a claim alleging that the defendants were strictly liable for damages caused by implantation of defective heart valves in the plaintiffs. After reviewing the case law in Canada, Dambrot J. concluded that since strict liability is not recognized as part of tort law in Ontario, it was plain and obvious that such a cause of action would fail and should be struck from the record. In doing so, he stated at para. 38:

> There is good reason to leave to the legislators the decision on whether to impose strict liability on manufacturers, and whether that should be done in all industries. In essence, strict liability makes the manufacturer an insurer of its products and shifts the burden from *the individual who was injured* to a broader sector of society. (emphasis added)

[231] A perusal of the case law discloses that waiver of tort as a cause of action has been traditionally applied in cases involving property torts such as conversion, trespass, misappropriation of goods and fraud based on monies had and received. See, for example, *Halifax Building Security v. Thomas*, [1996] Ch. 217 (C.A.); *Stoke-on-Trent City Council v. W. & J. Wass Ltd.*, [1998] 3 All E.R. 394 (C.A.); and *Club 7 Ltd. v. E.P.K. Holdings Ltd.* (1993), 115 Nfld. & P.E.I.R. 271 (Nfld. S. C.).

[232] It is my view that in the instant case, given the cumulative impact of the absence of an agency, trust or fiduciary relationship, and the failure to prove any loss or damage or injury to the plaintiffs that corresponds to the defendants' profits, the pleadings clearly do not disclose a viable cause of action in waiver of tort which would support either of the restitutionary remedies discussed above.

[233] It is plain and obvious, therefore, that in the circumstances of this case, the claim would fail. Accordingly, Cullity J. erred when he certified this proceeding as a class action based on the cause of action "waiver of tort."

2. Are there other grounds for refusing the certification of this class proceeding?

[234] While I would allow the appeal based solely upon my analysis of subsection 5(1)(a) of the *CPA*, I will briefly address some concerns with the other requirements of s. 5.

[235] I do not take issue with Cullity J.'s findings with respect to subsections 5(1)(b) and (e) of the *CPA*.

[236] Subsection 5(1)(c), which requires the existence of common issues, is intertwined with my analysis of subsection 5(1)(a), as discussed above. The common issues that Cullity J. identified stand or fall on the availability of waiver of tort and the restitutionary remedies claimed, upon which I have respectfully stated that Cullity J. erred.

[237] I note that Cullity J., as an experienced class proceedings judge, is entitled to deference in his determination of the preferable procedure under subsection 5(1)(d) of the *CPA*.

[238] With great respect, however, I disagree with Cullity J.'s conclusion that pursuant to subsection 5(1)(d) of the *CPA*, a class proceeding would be the preferable procedure for the resolution of the common issues identified.

[239] The propriety of moving a particular case forward to a full-blown class proceeding must be assessed within the context of the legislative goals of class actions in general, those being the enhancement of access to justice, the improved efficiency of the judicial process and the sanctioning of inappropriate behaviour.

[240] In *Pearson, supra,* the Ontario Court of Appeal recently reversed the decision of a class proceedings judge who had denied certification based on Inco's environmental spills. It did so, based on the fact that since the initial motion for certification, the claim and common issues had been reduced, such that the claim for damages was now limited to the devaluation of individuals' real property arising from contamination of the soil. The core issue then was the alleged damage to land values throughout Port Colborne caused by the past pollution. Remediation was limited to qualifying individual properties with significant contamination.

[241] In *Pearson,* the Court of Appeal acknowledged that as the claim was originally framed, a class proceeding would not have held the advantage of judicial economy, since "the individual claims of injury to health and related claims would dwarf the resolution of the common issues" (at para. 70). Although individual assessments of property values would still be required under the amended claim, the common issue of the decline in property value constituted "a substantial element of each class member's claim" (at para. 70).

[242] In contrast, in this case based on the doctrine of waiver of tort, although the putative class includes members who used the blood monitoring system between certain dates, the claim lacks any structured issue to be addressed, the resolution of which would determine the key issues common to all class members.

[243] The usual issues would address matters of proof which are not ascertainable in this case. How would the court ascertain, for example, who obtained an error rather than a HI reading and on what occasions, or whether this was due to the defective meter, the Low Flier problem or some other manner of default? Regardless of whether or not proof of damage is

required for a cause of action in waiver of tort, this is not a case in which judicial efficiency would be improved by proceeding under the *CPA*.

[244] It may well be that some individuals have a claim for damages due to the use of the defective blood monitoring system. However, a class action would not, in my view, be the most efficient vehicle for claiming redress. In terms of access to justice, unlike the situation in *Cloud v. Attorney General*, (2004), 73 O.R. (3d) 401 (C.A.) there is no evidence that it would be "extraordinarily" difficult for class members to proceed with individual law suits, and there is no indication that the class proceeding would mitigate any difficulties faced by individual litigants (at paras. 87-88).

[245] What certification of this case does, in essence, is bring strict liability to Canadian law in the area of products liability. The only goal accomplished would be the punishment of unlawful and inappropriate behaviour by the defendants. I agree with the court in *Pearson*, *supra* at para. 88, that the goal of behaviour modification includes an element of deterrence. As noted by McLachlin C.J.C. in *Western Canadian Shopping Centres*, [2001] 2 S.C.R. 534 at para. 29:

> ... class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff, the expense of bringing suit would far exceed the likely recovery.

[246] In *Western Canada*, at para. 26, the court commented that "[e]nvironmental pollution may have consequences for citizens all over the country", and that in such a case, it is essential to ensure that potential wrongdoers do not ignore their obligations to the public.

[247] While I agree that the goal of deterrence might, in another case, favour a class proceeding, on the facts of this case, given the recalls and corrective action taken by the defendants, the wrongdoers can no longer be said to be ignoring their obligations to the public. The behaviour modification goal has reduced in significance, and may well be moot. The defendants have corrected the defects.

[248] Moreover, fines levied on the defendants in the United States, (where there are strict liability laws for such cases), totaled about US$60 million. This amount included about US$30 million in settlement of a lawsuit commenced by whistleblower employees of LifeScan Canada Inc. These penalties serve the goals of both specific and general deterrence.

[249] The pleadings in this case reflect the trend in U.S. products liability cases recently seen in the plethora of litigation against cigarette manufacturers. In his decision at para. 34, Cullity J. referred to a 1920 trial decision of the U.S. District Court in *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575 (S.D.N.Y., 1920) in which the court suggested that a defendant who had enriched itself by committing a wrong against the plaintiff must disgorge such enrichment, notwithstanding the plaintiff's inability to quantify the loss. A

perusal of the recent U.S. jurisprudence, however, indicates that the fundamental precepts of tort law are observed and enforced in U.S. litigation, even in the face of a proliferation of products liability lawsuits.

[250] Indeed, our own courts have recognized the serious consequences of allowing class actions to proceed past certification where the three purposes of class proceedings are not met by that choice of procedure. In *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 at para. 42 (Sup. Ct.), Cumming J., in his discussion of "strike suits" in U. S. litigation, cited the following analysis by Steven Sharpe and James Reid:

> In the United States, the availability of class action procedures combined with a contingency fee structure for plaintiffs' lawyers has led to the creation of an entrepreneurial sector of the legal profession known as the 'strike bar'. U.S. strike bar lawyers are motivated by sizable contingency fees and relative freedom to direct litigation according to their own interests. *Even defendants who have done nothing wrong face Hobson's choice: to pay for a very expensive battle in the courts and eventually risk a potentially exorbitant jury damage award, or settle. Most defendants eventually swallow their indignation and make the prudent economic choice and, as a result, settlement has become the typical outcome of class action securities litigation in the United States.*[48] (emphasis added)

[251] Where behaviour modification will not result, and where neither access to justice nor judicial efficiency goals are pressing or relevant, in my view, it is not desirable as a matter of policy to make such a choice for defendants the norm in products liability litigation in Canada.

CONCLUSION

[252] It is a well-settled principle of law that the *CPA* does not change the substantive law, but is, rather, a procedural statute. Neither its objects nor its provisions should be given effect in a manner that affects the substantive rights of the parties: see *Ontario New Home Warranty Program v. Chevron Co.* (1999), 46 O.R. (3d) 130 at para. 50 (Sup. Ct.).

[253] At the same time, I agree with the majority and with Cullity J. that the time may be ripe to recognize and bring emerging and novel concepts into our law of torts. Waiver of tort as a cause of action fits the bill. Nevertheless, as this basically introduces strict liability for a defective product into our law, the judiciary must be vigilant in setting its parameters.

[254] In a different set of circumstances, it may well be prudent to allow such a cause of action to proceed as a class proceeding. As I said at the outset of these reasons, however, this is not the case in which the concept should be tested.

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[48] S. Sharpe and J. Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 Can. Bus. L. J. 348 at 353-4.

[255] In my view, if this proceeding is certified as a class action, any wrongful conduct by a defendant would constitute grounds for a restitutionary remedy, and the potential amount thereof would bear no relationship to loss or damage, which would raise the risk of indeterminate damages.

[256] Although Sharpe J.A. in his paper observed an increasing judicial reluctance to be bound by traditional contract rules when awarding damages in a commercial setting, limits are clearly set:

> The moral quality of the wrong perhaps has a stronger influence in the determination of tort damages, especially for intentional torts such as malicious prosecution, false arrest and wrongful dismissal. However, even in the law of torts, one sees a similar emphasis on compensation for the injured party's loss *and an effort to avoid undue burdens that would flow from excessive damage awards in the case of negligence damages.*[49] (emphasis added)

[257] And later, he added as follows:

> In the commercial area, the rules limiting compensation in tort cases for purely economic loss explicitly aim to avoid burdening defendants with *unpredictable and unforeseeable losses.*[50] (emphasis added)

[258] Though procedural reforms may have unleashed class actions "as potent judicial weapons"[51] to regulate conduct in the commercial sphere, in my view, the principles inherent therein should be subject to close judicial scrutiny at an early stage. The new trend need not import holus-bolus the principle of strict liability into products liability cases, exemplified by the plethora of claims against various industries in the United States. Clearly, the mere assertion of injustice cannot be sufficient to avoid scrutiny of the restitutionary elements of a claim for damages. In the instant case, the plaintiffs' claim based on waiver of tort as a cause of action cannot be sustained on the facts pleaded. It is plain and obvious that such an action would fail.

[259] Accordingly, Cullity J. erred when he held that the statement of claim disclosed waiver of tort as a cause of action that could permit the remedies of a constructive trust or an accounting and disgorgement of profits pursuant to s. 5(1)(a) of the *CPA*; and in certifying the action as a class proceeding.

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[49] Sharpe J.A., *supra* note 3 at 7.
[50] *Ibid.* at 8.
[51] *Ibid.* at 28.

[260] I would allow the appeal, reverse the decision of Cullity J. and dismiss the plaintiffs' motion for certification, but, in the circumstances, without costs.

CHAPNIK J.

Released: JUN 16 2005

COURT FILE NO.: 392/04
DATE: 20060615

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CHAPNIK, JENNINGS, EPSTEIN JJ.

B E T W E E N:

AHMAD SERHAN, deceased By His Trustee without a will ZEIN AHMAD SERHAN and BEVERLEY GAGNON

Respondents
(Plaintiffs)

- and -

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

Appellants
(Defendants)

REASONS FOR JUDGMENT

Released: JUN 15 2006

ADHMAD SERHAN, et al. and JOHNSON & JOHNSON, et al.
Respondents Appellants

Court File No. 392/04

June 15, 2006
For written reasons released this day, the appeal is dismissed (Epstein J. and Jennings J. concurring; dissent: Chapnik J.) If unable to agree on costs, the panel will entertain written submissions on the issue of costs if filed through the Divisional Court office, within 20 days of the release of these reasons.

Chapnik J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding commenced at WINDSOR

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