Waiver of Tort: Disgorgement *Ex Nihilo*

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Waiver of tort is an archaic legal doctrine through which a plaintiff can choose to relinquish the right to compensation for damages and instead receive disgorgement of the defendant's wrongful gains. While the traditional understanding of waiver of tort saw it as dependent on proof of an underlying tortious action, the rise of consumer class actions in negligence led to courts finding that it could be an independent cause of action. This raised a number of ambiguities, including the question of what level of wrongdoing was necessary to ground that cause of action.

The author argues that both the traditional understanding of waiver of tort and the conception of waiver of tort as an independent cause of action are untenable. The traditional understanding, where waiver of tort is "parasitic" on another wrong, is merely a jargonistic way of electing the remedy of disgorgement, and the author argues that the continued use of the language of waiver of tort only confuses the issue. The author examines the two ways in which judges have described waiver of tort as an independent action: the "true independence" theory, where waiver of tort is its own legal wrong, and the "quasi-parasitic" theory where it is somewhat dependent on another wrong. The author argues that the first theory has been essentially eliminated by the jurisprudence and that the second theory is logically incoherent. He ultimately concludes that waiver of tort should be abandoned altogether and argues in support of a principled approach to the remedy of disgorgement.

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Introduction

Over the last decade, the antiquated doctrine of waiver of tort has re-emerged in Canadian law, raising concerns. Traditionally, waiver of tort involves situations where a plaintiff elects the remedy of disgorgement of a defendant's gains rather than compensation. Waiver of tort grew out of the writ of *indebitatus assumpsit*.[1] Under this action, "the plaintiff first alleges a debt and then a promise in consideration of the debt. The promise so laid is generally an implied one only."[2] When the wrong supported a tortious cause of action, it was often possible to characterize the facts as giving rise to an implied contract and thus a debt that the defendant owed the plaintiff. Therefore, pleading in *indebitatus assumpsit* rather than tort would result in payment of the defendant's ill-gotten gains to the plaintiff as if those gains were owed to the plaintiff as a debt. When proceeding in this manner, the plaintiff was said to "waive the tort" because tort damages would not be recovered.

The revival of this ancient doctrine has revealed uncertainty about its nature. Current manifestations of waiver of tort purport to provide a meaningful remedy for the plaintiff in situations where tort losses are too difficult to prove. Some cases indicate that waiver of tort is "parasitic" and

1. James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) at 121.

2. Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, 3rd ed (Washington, DC: William H Morrison, 1882) at 283, cited in AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1987) at 303.

thus only available to the plaintiff once a prior cause of action supporting disgorgement is made out. Other cases hold that waiver of tort may stand alone as an independent cause of action. Judges have characterized waiver of tort as an independent cause of action in two distinct ways: the "true independence" theory, whereby waiver of tort constitutes its own legal wrong, and the "quasi-parasitic" theory, whereby waiver of tort is considered both an independent cause of action *and* dependent on prior wrongdoing.

Peter Birks' taxonomical understanding of the law forms the backbone of this article as it clearly delineates between causes of action and remedies. The primary reason why waiver of tort is sometimes thought of as an independent cause of action is due to a misunderstanding of the difference between causes of action and remedies, and how they relate to various legal concepts. When the taxonomy is applied to waiver of tort, it becomes clear that waiver of tort cannot be a cause of action.

Birks' legal taxonomy divides the entire *corpus juris* into causative events and legal responses.[3] Causative events are facts that happen in the world which give rise to a legal response that consists of rights enforceable in court. In this scheme, a cause of action represents a causative event.[4] For example, the cause of action of negligence arises from a factual event in the world consisting of a matrix of components that, when present, indicate that a causative event has taken place. In the case of negligence, those components are standard of care, duty of care, lack of remoteness, causation and loss. When these elements are present together, the court recognizes a causative event that triggers a legal response in the form of a remedy.[5] Here, the response is compensation for loss caused by the

3. The discussion that follows is adapted from Peter Birks, *Unjust Enrichment* (Oxford: Oxford University Press, 2003) at 19–46 [Birks, *Unjust Enrichment*], with help from Mitchell McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" (2000) 8 RLR 516 at 517–24.

4. For Birks, causative events are not strictly speaking synonymous with causes of action. For example, contract formation is a causative event creating legal rights, but it is not a cause of action. Accordingly, Birks distinguishes between primary and secondary rights: "The primary rights and duties arising from contract are not to be confused with the secondary rights and duties arising from the wrong of breach of contract." Birks, *Unjust Enrichment*, *supra* note 3 at 20.

5. It is worth noting that Birks came to prefer references to "rights" rather than "remedies". See Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20:1 Oxford J Leg Stud 1 at 1–37.

negligence and, possibly, other forms of relief such as punitive damages. However, if a plaintiff can only prove a breach of duty of care, a remedy will be denied unless the other elements of negligence are also proven because, without each of them, there is no causative event at all to which the court could respond.

Other causes of action give rise to other responses that negligence does not. For example, unjust enrichment is a cause of action composed of three constituent elements: an enrichment to the defendant, a corresponding deprivation to the plaintiff and no juristic reason for the transfer. Once these three components are present, the court recognizes a causative event that triggers the remedy of restitution. As with negligence, if there is a required component of the cause of action missing in the factual matrix, there is no causative event and, as a direct result, no response of restitution.

This article is divided as follows. Part I examines the traditional application of waiver of tort as a doctrine that is parasitic on other legal wrongs. According to the parasitic theory, waiver of tort functions as a mechanism that may be used when a tortious cause of action supporting disgorgement is first made out. Part I concludes that courts have justifiably abandoned the parasitic theory, since it amounts to no more than an overcomplicated method of electing between remedies.

Unfortunately, the alternative adopted by the courts is also unsatisfactory. Part II traces the rise of waiver of tort as an independent cause of action. It explores the use of waiver of tort as a means of achieving a remedy in cases where none would otherwise be available because there is no provable tort on which it can rest. It also examines the logical inconsistencies inherent in the independence theory. Judges have fluctuated, even within the same decisions, as to whether waiver of tort, as its own cause of action, is truly or only partially independent. Part III argues that both theories are unsustainable. The true independence theory is philosophically problematic (and in any event has essentially been eliminated by recent cases), while the quasi-parasitic theory is logically incoherent. Moreover, courts' insistence on examining waiver of tort only with a full factual record has prevented the issue from receiving the consideration it deserves.

Waiver of tort has become a hollow and internally inconsistent doctrine, leaving judges and litigants confused about how and when a cause of action might support disgorgement. This article does not purport

to settle all theoretical questions as to the availability of disgorgement. However, it contributes to the ongoing search for a principled approach to disgorgement by showing that the doctrine of waiver of tort adds nothing and should be abandoned.

I. The Traditional Scope of Waiver of Tort

After the forms of action were abolished by the *Judicature Acts* between 1873 and 1875, waiver of tort survived in situations of implied contract and extinctive ratification.[6] If a set of facts supported both a tortious cause of action and an action in implied contract, then the plaintiff was required to choose which cause would be pursued at trial.[7] In context, waiver of tort was thought to be a bar that prevented the plaintiff from subsequently pursuing the action in tort if he had chosen to proceed in quasi-contract.[8] This could also occur through the agency doctrine of extinctive ratification, whereby a principal "extinguishes" the wrongful aspect of an agent's dealings with a third party by adopting the agent's transaction. In such a situation, the principal can either sue for breach of the agency or elect to ratify the agent's activity and collect the profits received by the agent. Waiver of tort has been invoked in such situations because the principal is subsequently barred from suing the agent in tort. Once the tort has been waived, the wrong is extinguished, creating a situation where there is no basis for a tort claim.[9]

Jackson v Penfold illustrates the application of waiver of tort under both implied contract theory and extinctive ratification within the context of a bailment.[10] In this case, Penfold received a mortgage on all his crops from the Agricultural Development Board. He then entered into a contract with Heinz, whereby Heinz would purchase Penfold's tomato crop in exchange for a credit. Penfold did not register the contract as required in order for the sale to be effective against creditors. One such creditor, Jackson, subsequently had summons issued against Penfold, rendering

6. Peter Maddaugh & John McCamus, *The Law of Restitution*, 2nd ed (Aurora, Ont: Canada Law Book, 2004) at 7 [Maddaugh & McCamus, 2nd ed].
7. Edelman, *supra* note 1 at 121.
8. *Ibid.*
9. *Ibid* at 122.
10. [1931] 1 DLR 808, 66 OLR 440 (CA) [*Penfold* cited to DLR].

Heinz a garnishee. The Board then also took action and notified Heinz that the tomatoes belonged to the Board under the terms of the mortgage. At trial, the Court held that the proceeds of the sale properly belonged to Penfold and could be garnished by Heinz for Jackson. This decision was overturned on appeal and the Board was found to be the owner of the tomatoes. The appellate court offered the following analysis that could be understood in two ways:

> Penfold, being bailee for the Board of these tomatoes, sold them. That he sold them wrongfully is wholly immaterial—the bailor, on discovering that its bailee had disposed of its property, had the option of insisting on a tort having been committed and suing in trespass and trover; or it might waive the tort and claim the sale-price. Its demand of the price from the Heinz Company shews conclusively that it waived the tort and affirmed the sale.[11]

This could be understood as a typical application of waiver of tort in the implied contract theory, where Heinz is deemed to owe the Board a debt rather than suing for a proprietary tort. Alternatively, viewed as a bailment with Penfold as bailee, the fact that the Board sued for the price rather than for breach of bailment signified the Board's adoption of the bailee's sale. Under this analysis, waiver of tort extinguished the wrong through the ratification of the sale. It is unclear which approach forms the *ratio decidendi* of the case.

Ultimately, the implied contract theory of restitution was rejected in favour of unjust enrichment.[12] As James Edelman argues, waiver of tort, having lost its conceptual anchor, likely should have died along with the implied contract theory.[13] The lack of conceptual anchor has influenced the doctrine's evolution. Most contemporary manifestations of waiver

11. *Ibid* at 810.

12. Although unjust enrichment first appeared in *Delgman v Guaranty Trust Co of Canada and Constantineau*, it did not really take root in Canada until *Pettkus v Becker*. *Delgman v Guaranty Trust Co of Canada and Constantineau*, [1954] SCR 725, [1954] 3 DLR 785; *Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257. See Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014) at 77–78 [McInnes, *Canadian Law of Unjust Enrichment*].

13. Edelman, *supra* note 1 at 122. Stephen Hedley even argues that the doctrine had no relevance after the forms of action were abolished in the *Judicature Acts*. See Stephen Hedley, "The Myth of Waiver of Tort" (1984) 100:4 Law Q Rev 653 at 658. On the other hand, Maddaugh and McCamus argue that the death of implied contract theory should

of tort rely on the House of Lord's decision in *United Australia Ltd v Barclays Bank Ltd*[14] as authority for the parasitic theory of waiver of tort.[15] The House of Lords understood waiver of tort as a mere election between remedies that does not bar the pursuit of multiple causes of action pleaded in the alternative:

> Where "waiving the tort" was possible, it was nothing more than a choice between possible remedies derived from a time when it was not permitted to combine them or to pursue them in the alternative . . .. At some stage of the proceedings the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment.[16]

Unfortunately, their Lordships did not clarify whether waiver of tort (in its parasitic version) is merely a procedural election between the remedies of compensation or disgorgement after proving the elements of a tort, or whether waiver of tort simply allows a restitutionary claim in unjust enrichment to be pleaded in the alternative.[17]

This lack of clarity has persisted. Since *United Australia*, courts have interpreted waiver of tort as either an alternative pleading in unjust enrichment for restitution or as an election of disgorgement over compensatory damages for torts that support both remedies (e.g., conversion or trespass). There have been many attempts based on this latter understanding to apply waiver of tort to causes of action not normally associated with the doctrine, typically in order to expand the availability of disgorgement. Most of these attempts are applications of the parasitic theory of waiver of tort, where the availability of disgorgement depends upon the plaintiff's ability to first prove a tort

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serve to free the doctrine from its unprincipled shackles. See Peter D Maddaugh & John D McCamus, *The Law of Restitution: Loose-Leaf Edition*, vol 2 (Toronto: Thomson Reuters, 2012) (loose-leaf updated 2014, release 13) ch 24 at 14 [Maddaugh & McCamus, loose-leaf].

14. (1940), [1941] AC 1 (HL (Eng)) [*United Australia*].

15. See e.g. *Homebuilder Inc v Man-Sonic Industries Inc* (1987), 22 CPC (2d) 39, 5 ACWS (3d) 381 (Ont Sup Ct J); *Zidaric v Toshiba of Canada Ltd* (2000), 5 CCLT (3d) 61 at para 14, 101 ACWS (3d) 722 (Ont Sup Ct J) [*Zidaric*]; *Amertek Inc v Canadian Commercial Corp* (2003), 229 DLR (4th) 419 at paras 369-70, 124 ACWS (3d) (Ont Sup Ct J) [*Amertek* Sup Ct J].

16. *United Australia*, *supra* note 14 at 13, 19.

17. Edelman, *supra* note 1 at 123-24.

cause of action. A brief survey of the application of the parasitic theory provides a useful contrast to the way more recent cases treat waiver of tort as an independent cause of action. The following cases illustrate that while the parasitic theory of waiver of tort supports some tortious claims, courts have struggled to apply it to others. They further illustrate that the parasitic theory of waiver of tort is ultimately no more than an overly complicated method of electing the remedy of disgorgement.

Within the class of civil wrongs, Birks distinguishes between torts (proprietary and personal), equitable wrongs (causes of action traditionally recognized by the courts of equity), breaches of statutory duties and breaches of contract.[18] Most proprietary torts have generally, and non-controversially, supported disgorgement through waiver of tort.[19] Equitable wrongs also support disgorgement, although likely not through waiver of tort.[20] On the other side of the spectrum, courts have generally not allowed waiver of tort for breach of contract.[21] The availability of

18. Birks, *Unjust Enrichment*, *supra* note 3 at 21.

19. See e.g. Lionel Smith, "The Province of the Law of Restitution" (1992) 71:4 Can Bar Rev 672 at 689–90; Maddaugh & McCamus, 2nd ed, *supra* note 6 at 735–42; *Penfold*, *supra* note 10; *Arrow Transfer Co v Royal Bank of Canada*, [1972] SCR 845 at 877, 27 DLR (3d) 81; *Number 10 Management Ltd v Royal Bank of Canada* (1976), 69 DLR (3d) 99 at 109, 1976 CarswellMan 113 (WL Can) (CA); *Club 7 Ltd v EPK Holdings Ltd* (1993), 115 Nfld & PEIR 271 at para 209, [1993] 360 APR 271 (NLSC (TD)) [*Club 7*].

20. See e.g. *Cadbury Schweppes Inc v FBI Foods Ltd* (1994), 1 BCLR (3d) 258, [1995] 4 WWR 104 (SC) [cited to BCLR]. In this case, the plaintiff successfully sued the defendant for breach of confidence for the unauthorized use of a recipe for the clam-tomato cocktail drink, Clamato. The plaintiff could not prove loss and thus received only "headstart damages". The plaintiffs then applied to disgorge the defendant's profits using waiver of tort. This was rejected for two reasons. First, "the waiver of tort concept has no place in breach of confidence actions generally" because "[r]emedial flexibility is built into the breach of confidence cause of action," presumably, because it is a wrong from the courts of equity. *Ibid* at paras 7–8. Second, the plaintiff must have requested disgorgement at trial so that a proper decision could be made based on evidence. *Ibid* at para 11. The Court of Appeal and the Supreme Court of Canada did not disturb the trial judge's treatment of waiver of tort's applicability to equitable wrongs. See *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142, 167 DLR (4th) 577. Nevertheless, the academic literature generally favours using waiver of tort to describe disgorgement for equitable wrongs. See e.g. J Beatson, *The Use and Abuse of Unjust Enrichment: Essay of the Law of Restitution* (Oxford: Clarendon Press, 1991) ch 8 at 242–43.

21. See e.g. *Pet Supplies (USA) Inc v Pivotal Partners Inc*, 2008 BCSC 1667 at para 55, 91 BLCR (4th) 328 [*Pet Supplies*]; *Re*Collections Inc v Toronto-Dominion Bank*, 2010 ONSC 6560 at paras 146–47, 5 CPC (7th) 214.

waiver of tort in other areas of civil wrongs remains less certain, including personal torts and statutory breaches.

Plaintiffs claiming waiver of tort for personal wrongs, such as conspiracy and deceit, have met mixed success. For example, in *Ontario Realty Corp v P Gabriele & Sons Ltd*, the plaintiff entered into six contracts with the defendant for environmental cleanup work.[22] Over time, the plaintiff paid out several invoices submitted by the defendant, even though the contracts had not been performed. The plaintiff pleaded waiver of tort on the basis of conspiracy. The trial judge held that waiver of tort was available for conspiracy and breach of fiduciary duty, and found that the plaintiff had succeeded in making out the elements of conspiracy.[23] The Court of Appeal overturned the finding of conspiracy and breach of fiduciary duty with respect to two of the transactions, but did not discuss disgorgement within the context of waiver of tort.[24]

Although waiver of tort is likely available for deceit,[25] it is uncertain if it is available for negligent misrepresentation, which is a frequent companion to waiver of tort claims.[26] In *Strata Plan LMS 3851 v Homer Street Development Limited Partnership*, negligent misrepresentation was rejected as a foundation for waiver of tort.[27] The plaintiff applied to amend its statement of claim to add waiver of tort to disgorge gains realized by the defendant's negligent misrepresentation of projected occupancy rates for downtown Vancouver hotels. Justice Truscott found no precedent for

22. 173 ACWS (3d) 1251, 2009 CanLII 1807 at para 218 (Ont Sup Ct J).

23. The plaintiff had pleaded waiver of tort as an independent cause of action. *Ibid* at para 205. Justice Newbould found that the plaintiff could rely on the doctrine, but did not consider it in light of the debate concerning its status as an independent cause of action. *Ibid* at para 216. Therefore, this case is best understood as an application of the parasitic theory.

24. *Ontario Realty Corp v P Gabriele & Sons Ltd*, 2010 ONCA 642 at para 25, 267 OAC 372.

25. In the lengthy and complicated *Amertek*, deceit was found to support waiver of tort. See *Amertek* Sup Ct J, *supra* note 15 at para 372. Although the finding of deceit was overturned on appeal, the appellate decision did not indicate that disgorgement through waiver of tort would not have been available had there been deceit. *Amertek Inc v Canadian Commercial Corp* (2005), 76 OR (3d) 241, 256 DLR (4th) 287 (CA) [*Amertek* CA].

26. See e.g. *Pet Supplies*, *supra* note 21; *McKenna v Gammon Gold Inc*, 2010 ONSC 1591, 88 CPC (6th) 27 [*McKenna*]; *Arora v Whirlpool Canada LP*, 2012 ONSC 4642, 24 CPC (7th) 68 [*Arora* SC], aff'd 2013 ONCA 657, 44 CPC (7th) 223 [*Arora* CA], leave to appeal to SCC refused, 35661 (13 March 2014).

27. 2011 BCSC 569 at para 109, 23 BCLR (5th) 359 [*Strata Plan*].

waiver of tort on the basis of negligent misrepresentation. He declined to expand the law in this manner because the tort was an "anti-harm" wrong rather than an "anti-enrichment" wrong.[28] Waiver of tort has also been used to plead unjust enrichment in the alternative to a tortious cause of action.[29] In such cases, the remedy should be true restitution[30] rather than disgorgement, but judges have awarded disgorgement as the remedy for the tripartite action of unjust enrichment (as opposed to unjust enrichment for wrongdoing) when it is pleaded in conjunction with waiver of tort. This phenomenon is due in part to the Canadian tendency to use "unjust enrichment" to describe both true unjust enrichment and disgorgement for wrongdoing, in the same way that "restitution" is used to describe both true restitution and disgorgement.[31] These cases follow a predictable pattern: (1) a tort is pleaded with unjust enrichment in the alternative; (2) the plaintiff is required to prove the three elements of unjust enrichment; and (3) if the plaintiff can make these out, disgorgement will be awarded under the doctrine of waiver of tort because judges had unjust enrichment by wrongdoing in mind all along.[32] Consequently, this mistaken application of waiver of tort to unjust enrichment should also be classified as an example of the parasitic theory of the doctrine.

Use of waiver of tort has also been attempted in cases of statutory breach. For example, in *Koubi v Mazda Canada Inc*, the British Columbia Court of Appeal decertified a class action lawsuit where the defendant had manufactured and sold cars with defective door locks.[33] The case had initially been certified on the basis of waiver of tort for breaches of the

28. *Ibid* at paras 107–09. The distinction between anti-harm and anti-enrichment was first adapted to waiver of tort in *Reid v Ford Motor Co*, drawing on *Networth Industries Ltd v "Cape Flattery" (The)* in an attempt to explain why some torts support disgorgement and some do not. *Reid v Ford Motor Co*, 2006 BCSC 712, 149 ACWS (3d) 804 [*Reid*]; *Networth Industries Ltd v "Cape Flattery" (The)* (1 December 1997), Vancouver C953623 (BCSC).

29. Edelman notes this as a potential use of waiver of tort where the remedy would be true restitution. See Edelman, *supra* note 1 at 123–24. Most Canadian treatments of the doctrine, however, think in terms of disgorgement for wrongdoing when waiver of tort is pleaded for unjust enrichment.

30. That is, the greatest amount in common between the plaintiff's loss and the defendant's gain.

31. Smith, *supra* note 19 at 694–99.

32. See e.g. *Reid*, *supra* note 28 at para 28; *McKenna*, *supra* note 26; *Club 7*, *supra* note 19.

33. 2012 BCCA 310, 352 DLR (4th) 245 [*Koubi* CA]. This case can also be considered using the quasi-parasitic theory, as discussed below.

Sale of Goods Act[34] and the *Business Practices and Consumer Protection Act*.[35] The Court recognized that there is no tort of statutory breach,[36] but held that disgorgement may be awarded through waiver of tort if the statute does not exclude it.[37] This class action was decertified because the Court found that each statute's remedial scheme excluded disgorgement through waiver of tort.[38] However, it held that waiver of tort may yet apply where a statutory remedial scheme is broad and inclusive, as there is no general statement that eliminates waiver of tort for breaches of statutory duties.[39] If this is possible, the disgorgement remedy elected by waiver of tort would be parasitic on the legal wrong constituted by breach of the statute.

The above cases all illustrate instances where courts have adopted the parasitic theory of waiver of tort. Under this theory, the doctrine creates an avenue to the remedy of disgorgement available to plaintiffs not only on the foundation of an existing tort, but potentially also a statutory wrong. Some torts, specifically proprietary torts and some personal torts, non-controversially support disgorgement though waiver of tort. Ultimately, it is difficult to conceive of waiver of tort under the parasitic theory as anything more than a "legalese" way to inform the court that the plaintiff is electing disgorgement in situations where it is already available. Consequently, the continued use of waiver of tort under the traditional parasitic theory is difficult to justify, as it is essentially a hollow doctrine.

II. Waiver of Tort as an Independent Cause of Action

The difficulties of applying waiver of tort, particularly in negligence cases, has led to the idea that waiver of tort might be an independent cause of action. This area of law remains unsettled. To further complicate matters, there are at least two understandings of waiver of tort as an

34. RSBC 1996, c 410.

35. SBC 2004, c 2.

36. *Koubi* CA, *supra* note 33 at para 49; *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 143 DLR (3d) 9.

37. *Koubi* CA, *supra* note 33 at paras 51–52. The fact that there is no tort of breach of statutory duty probably should have eliminated this possibility absolutely.

38. *Ibid* at para 65.

39. See Maddaugh & McCamus, loose-leaf, *supra* note 13, ch 24 at 20–21.

independent cause of action that emerge from the cases: (1) what is here termed as the true independence theory, where waiver of tort represents a causative event; and (2) the quasi-parasitic theory of waiver of tort. The quasi-parasitic theory is difficult to conceptualize and classify due to its insistence that waiver of tort is both an independent cause of action and dependent on prior wrongdoing. Although the distinction between the true independence account and the quasi-parasitic theory does not appear in the academic literature or jurisprudence, it is both real and necessary to understand how waiver of tort's application as an independent cause of action has been conceived, and why it is not a helpful way to address the proper availability of disgorgement.

A. Source of the Debate: Waiver of Tort for Negligence

Prior to the recent influx of class action lawsuits based on waiver of tort and negligence, negligence was consistently rejected as a tort supporting disgorgement under the parasitic theory. In *Davidson v Manitoba Hydro*, the Government of Manitoba had issued a licence to Manitoba Hydro to regulate the water levels on Lake Winnipeg along which the plaintiff's property was located.[40] Davidson alleged negligence against Manitoba Hydro[41] and applied to amend his statement of claim to add the Government of Manitoba as a defendant, alleging that it was negligent in issuing the licence to Manitoba Hydro.[42] The plaintiff wanted to disgorge the government's gains on the basis of waiver of tort and "unjust enrichment" for wrongdoing.[43] Although the analysis is somewhat confused,[44] Wright J rejected the application because, even if the government had been negligent, there was no wrongdoing in negligence itself sufficient to ground disgorgement. *Davidson* thus

40. (1999), 140 Man R (2d) 229, 89 ACWS (3d) 240 (QB) [*Davidson* cited to Man R].

41. *Ibid* at para 17.

42. *Ibid* at para 5. The claim as it stood against Manitoba Hydro was for trespass, nuisance and that the erosion to the plaintiff's property constituted an expropriation. *Ibid* at para 3.

43. *Ibid* at para 20.

44. For example, Wright J incorrectly suggests that waiving the tort involves removing allegations of fault and requires "unconscionable conduct" before finding unjust enrichment. For statements regarding removing allegations of fault, see *United Australia*, *supra* note 14. For statements regarding "unconscionable conduct", see *Davidson*, *supra* note 40 at paras 20–21.

implies that negligence does not support waiver of tort because negligence lacks the moral wrongness, or "unconscionable conduct", necessary to disgorge the defendant's gains.[45] Moral wrongness is required because waiver of tort is grounded in the policy that "a wrongdoer ought not be permitted to profit from wrongdoing".[46] Justice Wright indirectly applied this principle by recognizing that if there is no wrongdoing, then there should be no disgorgement through waiver of tort. *Davidson* implies that negligence is something less than wrongdoing.

Zidaric v Toshiba of Canada Ltd also rejects waiver of tort for negligence.[47] The plaintiff had purchased a Toshiba laptop and claimed that the floppy disk controller was defective. He sued for negligence and, among other things, an account of profits through waiver of tort.[48] Toshiba's motion for a summary dismissal for want of reasonable cause of action was granted because the loss alleged was pure economic loss, for which there is generally no recovery in Canadian negligence law.[49] In this case, the plaintiff's failure to establish all the elements of negligence proved fatal to his waiver of tort claim:

> [T]he so-called "waiver of tort doctrine" is inapplicable unless the defendant has committed a tort which gives rise to a cause of action to the plaintiff. I find there is no reasonable cause of action in tort disclosed by the pleading. Further, the waiver of tort doctrine is inapplicable unless the defendant is unjustly enriched. Where the claim is in negligence, as here, the defendant does not *acquire* a benefit.[50]

Thus waiver of tort for negligence was rejected for two reasons. First, affirming the parasitic theory, the Court held that waiver of tort is unavailable unless a complete cause of action is first proven, thereby revealing that a causative event has taken place. Second, even if negligence could have been established, negligent activities are characterized by losses suffered by plaintiffs rather than gains to defendants. Proof of

45. *Supra* note 40 at paras 20–21.

46. Maddaugh & McCamus, loose-leaf, *supra* note 13, ch 24 at 2, n 4.

47. *Supra* note 15.

48. *Ibid* at paras 1–2, 4, 14.

49. See *ibid* at paras 7–9, 11; *Arora* CA, *supra* note 26 at para 52. In rare and limited circumstances, there may be recovery for pure economic loss. See *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd*, [1992] 1 SCR 1021, 91 DLR (4th) 289.

50. *Zidaric*, *supra* note 15 at para 14 [emphasis in original].

negligence does nothing to establish a defendant's gain, thereby rendering the remedy of disgorgement unavailable for negligence.

B. Rise of the Independent Cause of Action Theory

Until recently, the fact that negligence did not support disgorgement under the parasitic theory of waiver of tort was not considered problematic. For example, in the first edition of Maddaugh and McCamus' *The Law of Restitution*, they argued that negligence should not support waiver of tort:

> Some torts, *by their very nature*, would appear to be *incapable* of being waived. For example, it is difficult to envisage situations where the doctrine might apply in cases of . . . negligence . . .. The reason for this is simply because the defendant will not usually be unjustly enriched as a result of such wrongdoing.[51]

Perspectives changed as it became evident that class action lawsuits were consistently struggling to pass the certification stage due to the difficulty of proving loss on a class-wide basis.[52] As H. Michael Rosenberg noted, "[t]he poor performance of consumer class actions is disappointing [as they function] as an important procedural device to enhance access to justice and promote behaviour modification."[53]

As chance would have it, a debate had simultaneously emerged in academic literature concerning the proper scope of waiver of tort. Jack Beatson argued that waiver of tort should be understood as an independent cause of action when the sale or use of property is at stake.[54] Building

51. Peter D Maddaugh & John D McCamus, *The Law of Restitution*, 1st ed (Aurora, Ont: Canada Law Book, 1990) at 514 [emphasis added].

52. H Michael Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010) 6:1 Can Class Action Rev 37 at 37; Charles Murray, "An Old Snail in a New Bottle?: Waiver of Tort as an Independent Cause of Action" (2010) 6:1 Can Class Action Rev 5 at 5.

53. Rosenberg, *supra* note 52 at 37.

54. Beatson, *supra* note 20 at 232–33. Beatson draws attention to the fact that when there is a sale or use of property, in addition to the torts of conversion or trespass available to the plaintiff, there is also a "subtraction from exclusive *dominium* [of the plaintiff]". *Ibid* at 233. He argues that allowing disgorgement of the defendant's profit makes sense on the basis of that consideration alone; there need not first be a wrong proven in conversion or trespass. This is primarily a conceptual point since, in practice, there would *never* be a set of facts that would give rise to such a claim that would not also give rise to conversion or trespass. Therefore, it makes no practical difference to the plaintiff whether waiver of

from Beatson's position, Maddaugh and McCamus modified their earlier position with respect to waiver of tort and negligence, arguing that rather than "incapable" of supporting waiver of tort, negligence now only appears "to be [an] unlikely [candidate] for waiver".[55] They then qualified this stance further, writing that "there is no reason why the doctrine should be so limited and, in theory at least, it should extend to any case where tortious conduct has produced a profit".[56] The positions taken by Beatson, and Maddaugh and McCamus bolstered judges in their pursuit of waiver of tort as an independent cause of action, primarily in the context of class action lawsuits where demonstrating loss in negligence proved difficult.[57] Only after the developments in class action lawsuits (discussed below) were Maddaugh and McCamus further emboldened to declare that, in waiver of tort cases, "the restitutionary claim is not 'parasitic' to the breach of some antecedent legal duty, but rather stands as an independent cause of action".[58]

The cases that follow reflect the expectation that, in time, the disparate uses of waiver of tort could eventually be gathered under one principle, in the same way that *Donoghue v Stevenson* gathered various pre-existing strands of case law to articulate the content of the duty of care in negligence.[59] In reality, however, the foundation of the theory

tort is available either independent from or parasitic to proprietary torts. Furthermore, Beatson states that "if anything" the wrong (i.e., conversion or trespass) "is parasitic and dependent on the property right". *Ibid.* Therefore it is unhelpful and counterproductive to describe the "restitutionary relief" (i.e., disgorgement) that he has in mind as "waiver of tort" since the policy behind waiver of tort is that wrongdoers should not profit from their wrongdoing. See also Maddaugh & McCamus, loose-leaf, *supra* note 13, ch 24 at 2, n 4. Furthermore, Beatson is clear that outside the context of proprietary interests, waiver of tort can only properly be thought of as parasitic because in every other context they lack a principle like the "subtraction from exclusive *dominium*". Beatson, *supra* note 20 at 233. Subsequent academics and judges have either completely misunderstood Beatson on this point or are dismissive of it. See e.g. Maddaugh & McCamus, loose-leaf, *supra* note 13, ch 24 at 2, n 4; Murray, *supra* note 52 at 10; *Serhan (Trustee of) v Johnson & Johnson* (2006), 85 OR (3d) 665 at paras 54–55, 269 DLR (4th) 279 (Sup Ct (Div Ct)) [*Serhan* Div Ct].

55. Maddaugh & McCamus, 2nd ed, *supra* note 6 at 735.

56. *Ibid.*

57. See *Strata Plan*, *supra* note 27 at para 80. Although this new account of waiver of tort has arisen in the context of class actions, there is nothing in principle that limits its application to ordinary lawsuits.

58. Maddaugh & McCamus, loose-leaf, *supra* note 13, ch 24 at 2, n 4.

59. [1932] UKHL 100.

of waiver of tort as an independent cause of action did not arise from a survey of cases, as negligence did in *Donoghue*, but rather from isolated and speculative instances in the academic literature. The jurisprudence consists of brief, contradictory analyses that are never fully or logically developed. In particular, the cases are often unclear as to whether courts permitting waiver of tort see it as truly independent or quasi-parasitic.

(i) The Trailblazer: *Serhan (Estate Trustee) v Johnson & Johnson*

Serhan (Estate Trustee) v Johnson & Johnson, decided by Cullity J, was the first case to approach the difficulties surrounding proof of loss in class actions through waiver of tort.[60] The class action began after Johnson & Johnson was fined in the United States for manufacturing and selling defective meters and one-time-use strips designed to measure blood glucose levels in diabetics. Occasionally, the meters displayed an error message when they should have reported high blood glucose levels, requiring the user to try again with a new strip. Also, if the strips were not inserted far enough into the meter, it could report an inaccurate glucose level. The plaintiffs applied to certify their class action lawsuit on a number of bases: "negligence, conspiracy, fraudulent or negligent misrepresentation, and breach of section 52 of the *Competition Act*".[61] In this case, as is typical in defective product liability class actions, the plaintiffs could not prove significant loss or damage, thus precluding recovery of compensatory tort damages.[62] Although the plaintiffs did not plead it,[63] Cullity J found that a claim in waiver of tort as an independent cause of action was not certain to fail at trial and certified the class on that basis.

Justice Cullity expressed his understanding of waiver of tort as a cause of action in the sense that a cause of action "has most commonly been understood to refer to the material facts that must be proven—and pleaded—to entitle the plaintiff to a remedy against the defendant . . .. Material facts must have been pleaded that, if proven, could entitle the plaintiff

60. (2004), 72 OR (3d) 296, 49 CPC (5th) 283 (Sup Ct J) [*Serhan* Sup Ct J cited to OR].

61. *Ibid* at para 12.

62. *Ibid* at paras 13, 61–63. For this reason, it has been suggested that the primary policy motivating the push to have waiver of tort recognized as an independent cause of action concerns the creation of risk rather than the imposition of injury. See Murray, *supra* note 52 at 15.

63. *Serhan* Sup Ct J, *supra* note 60 at para 34.

to the particular remedy claimed."[64] Justice Cullity's understanding of "cause of action" is consistent with Peter Birks' taxonomy, in which a cause of action represents a causative event which, if proven, gives rise to a corresponding legal response. In this case, waiver of tort as a cause of action in Birks' taxonomy would be a civil wrong—a legal wrong in itself. Conceptually, it cannot depend on proof of another legal wrong in order to trigger a legal response.[65] Therefore, waiver of tort, understood in this manner, would consist of elements that, when present together, indicate that a causative event has taken place warranting judicial intervention. This conception of waiver of tort as an independent cause of action is referred to in this article as the true independence theory.

However, after laying this foundation, Cullity J reverts (apparently unwittingly) to a more "parasitic" way of conceptualizing waiver of tort. He writes 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, based on the principles governing waiver of tort, *the allegations of conspiracy by an unlawful act could provide a basis for such claims*".[66] This articulation of waiver of tort as an independent cause of action is distinct from the true independence theory and faces two difficulties. First, there is no precedent for the contention that proof of loss is not required when waiver of tort is pleaded. Second, Cullity J's reasoning seems to lapse into a parasitic understanding of waiver of tort, in that it relies on the existence of an alleged wrongdoing disclosed in other unproven causes of action. Never before had incomplete causes of action been sufficient to ground a legal remedy. If waiver of tort as an independent cause of action depends on the proof of some elements of *another* cause of action (rather than the *complete* cause of action), then it is best understood as a *quasi*-parasitic theory. It is not a true independent theory because it is not a wrong in itself as a truly independent cause of action; it depends on partial proof of other causes of action. Nor is it a true parasitic theory because it does not actually depend on any fully proven, and thus legally recognizable,

64. *Ibid* at paras 23–24.

65. If there is another legal wrong present, it would only exist in the alternative to waiver of tort.

66. *Serhan* Sup Ct J, *supra* note 60 at para 63 [emphasis added]. Here, the appeal to conspiracy as an *unlawful* act is deeply problematic because the elements of conspiracy could not be proven in this case. The law does not see something as unlawful unless and until a cause of action is proven.

cause of action. This theory of waiver of tort is better understood as "quasi-parasitic" rather than "quasi-independent" because the importance of its dependence on a partial cause of action is greater than the extent to which it could be said that waiver of tort is a legal wrong in itself.

Either way waiver of tort is conceived, it is clear that proof of loss is not required under Cullity J's understanding of the doctrine.[67] Unfortunately, he failed to provide persuasive authority for this position, referring only to scholarly criticism by Maddaugh and McCamus of the English case *Stoke-on-Trent City Council v W & J Wass Ltd*[68] and two trial judgments, neither of which support his position. The first of these is *Amertek Inc v Canadian Commercial Corp*, a case concerning unprofitable contracts to produce and deliver military trucks to the US Army.[69] It is peculiar that Cullity J cites this case because in *Amertek*, O'Driscoll J considered waiver of tort as parasitic upon the tort of deceit: "*[I]f the Plaintiffs succeed in proving the tort of deceit*, they are entitled to waive the tort and recover in a restitutionary claim the value of the benefits

67. *Ibid* at para 35.

68. [1988] 3 All ER 394 (CA). Disgorgement was denied because the plaintiff could only prove nominal damages. Arguably, if this case had been an action in unjust enrichment, Maddaugh and McCamus would have been correct to suggest that "the plaintiff ought to have recovered the amount of the lost fees". Maddaugh & McCamus, 2nd ed, *supra* note 6 at 742, n 94. However, and this is the criticism that Cullity J is interested in, Maddaugh and McCamus further suggest that, in this case, "the defendant should be required to disgorge the profits that it made as a result of its intentional wrongdoing". *Ibid.* Respectfully, Cullity J, and Maddaugh and McCamus overlook an important difference between the Canadian and British understandings of restitution for unjust enrichment. In England, restitution for unjust enrichment may include disgorgement. See e.g. Peter Birks, *Unjust Enrichment*, *supra* note 3 at 79. However, Canada authoritatively limits restitution for unjust enrichment to the amount in common between the plaintiff's loss and the defendant's gain: "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain [the defendant] made at the [plaintiff's] expense." See *Air Canada v British Columbia*, [1989] 1 SCR 1161 at 1202–03, 59 DLR (4th) 161. See also McInnes, *Canadian Law of Unjust Enrichment*, *supra* note 12 ("since the cause of action for unjust enrichment entails true strict liability, it cannot support a right to disgorgement" at 1269).

69. *Amertek* Sup Ct J, *supra* note 15. Unfortunately, Cullity J provided no pinpoint references to *Amertek* (an eighty-seven page judgment) that would allow his reader to identify what he had in mind by citing this case.

obtained by the Government Defendants through their wrongful acts".[70] Generally, the proposition that waiver of tort does not require loss is only true to the extent that the underlying tort does not require loss. In *Amertek*, O'Driscoll J recognized that the tort of deceit required proof of loss and ultimately found proof that loss occurred.[71] Therefore, *Amertek* does not support the proposition that waiver of tort does not require proof of loss.

The second case Cullity J refers to is *Transit Trailer Leasing Ltd v Robinson*.[72] The plaintiff successfully sued for conversion of a missing rented trailer that was discovered in the possession of Robinson's scrap metal business. This case cites a passage from Lord Denning's decision in *Strand Electric & Engineering Co Brisford Entertainment Ltd*, which was an action for the proprietary tort of detinue:

> If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them even though the owner has, in fact, suffered no loss. If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable remuneration as the price of his permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire.[73]

In both *Transit Trailer Leasing* and *Strand Electric*, the proprietary torts pleaded did not result in injury to the plaintiff and they stand as good authority for the proposition that some proprietary torts support disgorgement. However, Cullity J does not hold that proof of loss is not required for disgorgement in these cases because the causes of action for which waiver of tort was claimed—conversion and detinue—do not require proof of loss. *Transit Trailer Leasing* supports the same conception of waiver of tort as *Amertek*. Whether waiver of tort deals with proof of loss only depends on whether the underlying tort requires proof of loss. That is to say, waiver of tort does not require proof of anything other than proof of all elements of the underlying tort. As such, both *Amertek*

70. *Ibid* at para 372 [emphasis added].

71. *Ibid* at paras 374, 385. Justice O'Driscoll's finding of fact that loss had occurred was reversed on appeal. See *Amertek* CA, *supra* note 25.

72. (2004), 30 CCLT (3d) 227, 130 ACWS (3d) 874 (Ont Sup Ct J) [*Transit Trailer Leasing* cited to CCLT].

73. *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*, [1952] 2 QB 246 (CA), cited in *Transit Trailer Leasing*, *supra* note 72 at para 88. Note that Beatson's analysis of proprietary interests would apply here in that there is still a loss of the plaintiff's *dominium*. Beatson, *supra* note 20 at 233.

and *Transit Trailer Leasing* conceive of waiver of tort as parasitic on other torts—deceit, where loss is required, and conversion, where no loss is required. The results of *Amertek* and *Transit Trailer Leasing* reveal that the continued use of waiver of tort under the traditional parasitic theory is difficult to justify. They demonstrate that it is very difficult to conceive of waiver of tort under the parasitic theory as anything more than a "legalese" way to inform the court that the plaintiff elects disgorgement in situations where that remedy is already available.

Prior to *Serhan*, no authority had ever considered waiver of tort as a causative event. Therefore, there had never been occasion to discuss whether waiver of tort as an independent cause of action requires proof of loss, either as one of the elements in the true independence theory or in the incomplete causes of action depended on in the quasi-parasitic theory.

As noted above, Cullity J raised, and fluctuated between, two distinct conceptions of waiver of tort as an independent cause of action: the true independence and quasi-parasitic theories. This fluctuation is also evident in Epstein J's judgment affirming the class certification in *Serhan*.[74] Justice Epstein, sitting in the Divisional Court, succinctly articulated and affirmed Cullity J's conception of waiver of tort under the quasi-parasitic theory:

> 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.[75]

In this passage, Epstein J described waiver of tort under the quasi-parasitic account. Later, in the same judgment, however, she seems to have invoked the true independence theory by listing a set of required elements for waiver of tort:

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74. *Serhan* Div Ct, *supra* note 54 at para 49. The certification of *Serhan* was upheld on appeal on the basis that the issue of whether or not waiver of tort is an independent cause of action should be decided on a complete factual record at trial. See *ibid* at paras 156–60. Accordingly, Cullity J's reasoning was generally affirmed on wholesale. Leave to appeal to the Supreme Court of Canada was denied. *Serhan Estate v Johnson & Johnson*, [2007] 1 SCR x.

75. *Serhan* Div Ct, *supra* note 54 at para 49.

[U]nder the doctrine of waiver of tort, the plaintiff must demonstrate that he has been the subject of conduct by which [1] the defendant has breached a duty of care owed to him; [2] this conduct has enriched the defendant, [3] and the defendant thereby holds the profits derived from the wrongful conduct, and [4] the circumstances are such that he should not retain them.[76]

After finding that these elements had been established, Epstein J considered whether a constructive trust or account of profits could serve as proper legal responses for this cause of action.[77] Proceeding in this manner makes sense under the true independence theory of waiver of tort because, once the cause of action is proven, the court must still decide on a method that would allow it to arrive at the remedy of disgorgement. However, the elements of the true independence theory conflict with the requirements of the quasi-parasitic theory affirmed earlier by Epstein J.[78] Ultimately, *Serhan* settled in 2011 without judicial resolution of this conflict.

The judicial tendency to fluctuate between these two theories is not restricted to the *Serhan* decisions. As will be discussed below, the Ontario Court of Appeal's decision in *Aronowicz v Emtwo Properties Inc*[79] arguably eliminated the possibility of a true independence theory of waiver of tort. Nevertheless, problems remain for the surviving quasi-parasitic theory, including how to understand the wrongdoing required for disgorgement by waiver of tort in light of its dependence on incomplete causes of action.

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76. *Ibid* at para 54.

77. *Ibid* at paras 77–145.

78. In comparison to the elements listed for the true independence theory in *Serhan*, the quasi-parasitic approach would have worked within the elements of the tort of conspiracy.

> (1) Whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or, (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd, [1983] 1 SCR 452 at 471–72, 145 DLR (3d) 385. These elements bear little resemblance to those of the true independence theory.

79. 2010 ONCA 96, 98 OR (3d) 641 [*Aronowicz*].

(ii) *Reid v Ford Motor Co*

The *Serhan* decisions opened the floodgates for waiver of tort as an independent cause of action in class action lawsuits. However, initially, at least in British Columbia, judges seemed reluctant to certify new claims on the basis of this doctrine. For instance, in *Reid v Ford Motor Co*, a class action that had initially been certified on the basis of a claim in negligence, the plaintiffs moved to amend their statement of claim to add waiver of tort.[80] Although *Serhan* was not cited and the plaintiffs did not specifically plead waiver of tort as an independent cause of action,[81] Gerow J recognized that their proposed amendment would relieve the plaintiffs of the requirement to prove loss in their negligence claim. Accordingly, Gerow J denied the plaintiff's application on the basis of a quasi-parasitic conception of waiver of tort:

> As the amount the Class Members would recover would bear no relationship to any losses or damages they incurred, the proposed amendment would raise the risk of indeterminacy of damages the Supreme Court avoided by limiting the amount of liability to the reasonable cost of repair.[82]

This statement reflects the concern in *Zidaric* that the remedy of disgorgement through waiver of tort makes no sense of the requirement to prove loss in negligence. Further, Gerow J rejects the idea that proof of loss is not required when waiver of tort is pleaded because, as a matter of policy, it would create an undesirable situation of indeterminate liability where a defendant could be liable without knowing it or being able to take steps to prevent it. Unfortunately, Gerow J concluded that waiver of tort could only be available on the basis of unjust enrichment when its three elements could be made out (alas, they could not).[83] In subsequent jurisprudence, *Reid* has either been rejected (due to its incorrect use of unjust enrichment) or dubiously distinguished on the basis that *Reid*

80. *Supra* note 28.
81. *Ibid* at para 19.
82. *Ibid* at paras 23–24.
83. *Ibid* at para 28.

refers only to negligence and not to other causes of action that require loss.[84]

(iii) *Heward v Eli Lily & Co*

Citing Epstein J's decision in *Serhan* as an authority, the plaintiffs in *Heward v Eli Lilly & Co* sought certification of their class action lawsuit on the basis of negligence and waiver of tort as an independent cause of action.[85] As chance would have it, Cullity J also presided over this application. This time he identified two main issues with waiver of tort that, in his estimation, remained unresolved in Canadian jurisprudence: first, whether all elements of a pleaded cause of action must be proven in order for waiver of tort to apply (i.e., is the quasi-parasitic theory of waiver of tort correct?) and second, which torts or "tortious circumstances" will make waiver of tort available (i.e., what is the scope of the parasitic and quasi-parasitic theories?).[86] With respect to the first issue, Cullity J generally followed the reasoning in the *Serhan* decisions.[87] In this context, however, he argued the following:

> In considering the adequacy of the pleading of waiver of tort, I am no longer satisfied that it is helpful—or even meaningful—to ask simply whether the concept is, or is not, a cause of action. A question framed in this manner may obscure the essential nature of the inquiry . . . —namely whether the material facts that would, or could, entitle the plaintiffs to a disgorgement remedy have been pleaded. I believe it is likely to be even more confusing to ask whether waiver of tort is a cause of action or only a remedy . . .. Different remedies—such as an equitable accounting or a constructive trust—may be available. To ask whether it is a cause of action also tends to confuse the issue with the more narrow question whether the availability of the remedy is dependent or "parasitic" on proof of all of the constituent elements of an actionable tort including, specifically, damages. This is the first of the issues I have referred to as not finally settled in the authorities. However,

84. See e.g. *Serhan* Div Ct, *supra* note 54 at para 66, which distinguishes *Reid* on the basis that the underlying fault is negligence whereas *Serhan* concerns conspiracy. See also *Heward v Eli Lilly & Co* (2007), 39 CPC (6th) 153 at paras 37–38, 154 ACWS (3d) 1020 (Ont Sup Ct J) [*Heward*]; *Pro-Sys Consultants Ltd v Microsoft Corp*, 2006 BCSC 1047 at para 85, 57 BCLR (4th) 323 [*Pro-Sys* SC], both of which reject *Reid*'s treatment of waiver of tort on the basis of Gerow J's use of unjust enrichment.

85. *Supra* note 84 at para 24.

86. *Ibid* at para 28.

87. *Serhan* Sup Ct J, *supra* note 60; *Serhan* Div Ct, *supra* note 54.

proof that an actionable tort was committed would not, in itself, satisfy the requirements of pleading waiver of tort.[88]

It is undoubtedly correct to say that the discussion of waiver of tort as an independent cause of action has distracted from the search for a principled application of the disgorgement remedy. However, it is deeply problematic to suggest that it remains unsettled whether damages can be awarded in the absence of proof of a cause of action's constituent elements. Not only is such a position completely unsupported by precedent, but more fundamentally, it also ignores the fact that the *only* reason why *Serhan* was certified at the Superior Court was because waiver of tort was understood as a potential independent cause of action—a "causative event" giving rise to a right and where there is a right, there is a corresponding remedy. If waiver of tort was not a cause of action, there would have been no basis on which to certify the case. Justice Cullity's suggestion that damages can be awarded in the absence of proof of the constituent elements of a cause of action conflicts with the nature and significance of the difference between causative events and legal responses. The quasi-parasitic theory of waiver of tort suggests that legal remedies may be available for unproven torts. In contrast, before the quasi-parasitic theory of waiver of tort, *all* legal remedies were only enabled by full proof of a cause of action. Absent such proof, there may have been a *moral* wrong, but never a *legal* wrong. A primary problem with the quasi-parasitic theory is that it takes for granted that there can be a remedy without a causative event and, in the process, takes the legal system beyond its proper boundaries to permit mere moral wrongdoing as sufficient basis for legal remedies.

In *Heward*, Cullity J continued to fluctuate between the quasi-parasitic theory on the basis of partial proof of negligence and the true independence theory. He mentioned similar elements for waiver of tort as those introduced by Epstein J in *Serhan*:

> On the basis of the facts pleaded in this case, it would be open to a trial judge to find (a) that the defendants breached a duty of care by deliberately concealing, or withholding information about harmful side-effects of Zyprexa for the purpose of gaining the approval

88. *Heward*, *supra* note 84 at para 31.

of Health Canada, (b) that they intended to, and did, profit thereby and (c) that, but for the breach of duty, such profits would not have been obtained.[89]

Ultimately, in *Heward* the class was certified on the basis of waiver of tort.[90] However, this case can be understood not only under the independence theory of waiver of tort, but also as an application of the parasitic theory, since Cullity J found that the plaintiff's statement of claim disclosed a cause of action in negligence.[91] Justice Cullity found that new causes of action should only be resolved on a full factual record at trial rather than on a preliminary motion.[92] Thus it remains unclear whether certification was granted on the basis of the true independence theory, quasi-parasitic theory or parasitic theory.

(iv) Subsequent Cases

When Epstein J affirmed the certification of *Serhan*, she hoped that discussion of waiver of tort as an independent cause of action would clarify the availability of disgorgement as a remedy.[93] However, that necessary discussion was inhibited by the terms of the discussion itself. In contrast, it is possible to develop a principled approach to determining what remedies are available for a given cause of action without overexpanding the range of situations in which the courts will intervene. This is what the Supreme Court attempted to accomplish with their criteria for a constructive trust in *Soulos v Korkontzilas*: Once a cause of action is proven (e.g., breach of trust or fiduciary duty), there are criteria that guide the imposition of the

89. *Ibid* at para 47. *Cf* the elements of negligence: (1) standard of care; (2) duty of care; (3) remoteness; (4) causation; (5) damage/loss.

90. Leave to appeal Cullity J's decision with respect to waiver of tort was refused in *Heward v Eli Lilly & Co* (2007), 51 CCLT (3d) 167 at para 14, 45 CPC (6th) 309 (Ont Sup Ct J).

91. *Heward*, *supra* note 84 at paras 17–18. Note, however, that Cullity J does not seriously entertain this possibility. The *Serhan* decisions, therefore, are distinguishable from *Heward* in this respect because the *Heward* plaintiffs could make out negligence whereas the plaintiffs in *Serhan* could only partially make out conspiracy.

92. The tendency to decide waiver of tort on a full factual record, although a matter of precedent, is odd since appeals of these class action certifications are consistently reviewed on the standard of correctness. This seems to imply that as a matter of law, the factual record should play a lesser role in resolving these issues. Further, ironically, it ignores the fact that *Donoghue v Stevenson* itself was resolved on a preliminary motion.

93. *Serhan* Div Ct, *supra* note 54 at para 124.

remedy of the constructive trust (a constructive trust is a legal response, not a causative event).[94] Simply creating a new cause of action out of waiver of tort does not contribute to a *Soulos*-like project because it will remain unclear how to connect the new cause of action to any given legal response in a principled way. Perhaps this is why in *Serhan*, Epstein J still felt the need to discuss at length whether remedies such as constructive trust or account of profits would be available for waiver of tort as an independent cause of action.

Cases subsequent to *Serhan, Reid* and *Heward* generally certified class actions including waiver of tort as an independent cause of action with little to no new analysis.[95] Even when waiver of tort has been pleaded specifically in the parasitic theory to attain the disgorgement remedy, judges have continued to discuss the doctrine in light of the uncertainty of waiver of tort's status as an independent cause of action.[96] Over the years, the uncertainty became cumbersome and a drag on lawsuits' progress. As a result, it became common to bifurcate proceedings for waiver of tort from other issues so that the parties could simplify proceedings, with the hope of resolving their dispute on other grounds.[97] Waiver of tort has even been rejected solely on the basis that its uncertainty would add needless complexity, cost and delay to an action that would otherwise proceed

94. [1997] 2 SCR 217, 32 OR (3d) 716.

95. See e.g. *Lambert v Guidant Corp* (2009), 72 CPC (6th) 120, 177 ACWS (3d) 48 (Ont Sup Ct J); *Robinson v Medtronic* (2009), 80 CPC (6th) 87, 181 ACWS (3d) 427 (Ont Sup Ct J) [*Robinson* cited to CPC]; *Goodridge v Pfizer Canada Inc*, 2010 ONSC 1095, 101 OR (3d) 202; *Anderson v Bell Mobility Inc*, 2011 NWTSC 40, 25 CPC (7th) 416; *Cannon v Funds for Canada Foundation*, 2010 ONSC 4517, 192 ACWS (3d) 50; *Schick v Boehringer Ingelheim (Canada) Ltd*, 2011 ONSC 1942, 18 CPC (7th) 128; *Kang v Sun Life Assurance Co*, 2011 ONSC 6335, 4 CCLI (5th) 86; *Fournier Leasing Company Ltd v Mercedes-Benz Canada Inc*, 2012 ONSC 2752, 216 ACWS (3d) 32; *Koubi* CA, *supra* note 33 at para 30.

96. See e.g. *Peter v Medtronic* (2007), 50 CPC (6th) 133 at para 51, 162 ACWS (3d) 541 (Ont Sup Ct J); *Koubi v Mazda Canada Inc*, 2010 BCSC 650 at para 70, 189 ACWS (3d) 32; *Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252 at para 307, 212 ACWS (3d) 635.

97. See e.g. *Peter v Medtronic* (2009), 83 CPC (6th) 379 at para 22, 181 ACWS (3d) 455 (Ont Sup Ct J); *Robinson*, *supra* note 95 at para 195; *Andersen v St Jude Medical Inc*, 2010 ONSC 77 at para 12, 87 CPC (6th) 45. Compare *Pollack v Advanced Medical Optics*, 2011 ONSC 1966 at para 56, 21 CPC (7th) 291 (bifurcation was denied because it would inappropriately delay and impede access to justice).

smoothly.[98] The cases surveyed below illustrate the state of waiver of tort in Canada after *Serhan*, *Reid* and *Heward*.

Reid, discussed above, was a British Columbia case that resisted waiver of tort as an independent cause of action. This resistance was short lived. In *Pro-Sys Consultants Ltd v Microsoft Corp*, *Reid* was distinguished on the basis of its treatment of unjust enrichment.[99] Furthermore, waiver of tort was not eliminated as an independent cause of action.[100] This is similar to the British Columbia Court of Appeal's approach in *Pro-Sys Consultants v Infineon Tech*, where *Serhan* (Div Ct) and *Heward* were mentioned favourably.[101]

However, in *Pet Supplies (USA) v Pivotal Partners Inc*, waiver of tort as an independent cause of action was disallowed.[102] In this case, the plaintiff sought to rely on the doctrine, not because it was incapable of proving loss, but because it did not want to produce documents that would do so. Waiver of tort was rejected because the refusal to disclose these documents would hinder the Court's assessment of the appropriateness of a disgorgement remedy.[103] When *Pet Supplies* stands alongside the *Serhan* decisions and *Heward*, either on the quasi-parasitic or the true independence theories, it could produce an intolerable situation where proof of loss is required only when there is non-disclosed evidence of loss, but not when there is no evidence of loss at all. If proof of loss is not required for waiver of tort, then, as a matter of principle, it should be irrelevant whether or not the plaintiff has the ability to prove loss. Once the plaintiff meets the purported demands of waiver of tort, the claim should be allowed. In the debate over the status of waiver of tort, *Pet Supplies* can only be justified if it affirms the traditional parasitic theory and rejects the independence

98. *Simmonds v Armtec Infrastructure Inc*, 2012 ONSC 5228 at para 22, 22 ACWS (3d) 9.

99. *Pro-Sys* SC, *supra* note 84. Although this case eventually ended up before the Supreme Court of Canada, the Court, as discussed below, did little to address legal issues in waiver of tort. See *Pro-Sys Consultants v Microsoft*, 2013 SCC 57 at paras 93–97, [2013] 3 SCR 477 [*Pro-Sys* SCC].

100. *Pro-Sys* SC, *supra* note 84 at paras 81, 86.

101. *Pro-Sys Consultants v Infineon Tech*, 2009 BCCA 503, 98 BCLR (4th) 272.

102. *Supra* note 21.

103. *Ibid* at para 54.

theories. While there are indications that it leans in this direction,[104] this case expressly remains neutral in the debate.[105]

Dennis v Ontario Lottery and Gaming Corp illustrates the kind of novel situations where waiver of tort as an independent cause of action can lead.[106] The plantiff, a problem gambler, added his name to a self-exclusion list operated by the Ontario Lottery and Gaming Corporation (OLGC) in order to prevent the people listed from gaining entry into gambling facilities. However, this list was often unenforced and Dennis, along with many other problem gamblers, was permitted to enter. He proceeded to lose money and further his "progressive behavioural disorder and . . . illness".[107] This decision was an appeal of Cullity J's refusal to certify a class action lawsuit against the OLGC for, among other things, negligence and waiver of tort according to the quasi-parasitic theory. Justice Cullity's decision was upheld on the basis that the case was not suitable for a class action. It is significant that the doctrine of waiver of tort was not the reason why this action failed to certify. In fact, Wilson J argued in a dissenting opinion that waiver of tort should have rendered this case suitable for class certification because it purportedly does not require proof of loss.[108] The result would have been that the plaintiffs disgorged the profits of gambling facilities, thereby achieving their hopes of "hitting the jackpot".

III. The Ascension of the Incoherent Quasi-Parasitic Theory

Since *Serhan* and *Heward*, most cases have proceeded according to the quasi-parasitic theory. Judges generally did not refer to any unique set of elements required to support the independent cause of action of waiver of tort and focused more on the notion of wrongdoing. The primary reason for this development is that waiver of tort is supposed to prevent defendants from reaping a windfall from wrongdoing. Generally, it seemed to be lost on judges that the true independence theory

104. *Ibid* at paras 34, 36–37, 52, 55.
105. *Ibid* at para 35.
106. 2011 ONSC 7024, 344 DLR (4th) 65.
107. *Ibid* at para 9.
108. *Ibid* at paras 320, 329.

would have rendered waiver of tort a wrong in itself. In contrast, the quasi-parasitic theory attempts to focus directly on the moral wrongdoing in incomplete causes of action. Another reason for the trend toward the quasi-parasitic theory may be the inchoate recognition that waiver of tort as a truly independent cause of action does nothing to resolve the question of when the disgorgement remedy should be available.[109] In any event, the Ontario Court of Appeal authoritatively affirmed the quasi-parasitic theory in *Aronowicz* to the extent that *if* waiver of tort is an independent cause of action, then it will be understood according to the quasi-parasitic theory.[110] This essentially eliminated the true independence theory of waiver of tort without ultimately settling the issue. In the cases that followed, courts continue to apply the quasi-parasitic theory despite its logical incoherence.

In *Aronowicz*, brothers Harry and Abraham Aronowicz each owned 50% of the shares in Emtwo, which held title to five properties.[111] Harry borrowed money from a third party in exchange for two of these properties so that he could trigger a shotgun buyout clause in their unanimous shareholder agreement. After Harry purchased Abraham's shares, Abraham discovered that Harry had agreed to sell two of the properties and sued for deceit and waiver of tort. Ultimately, the Court of Appeal affirmed the grant of the defendant's application for summary dismissal.[112] In his analysis of the waiver of tort claim, Blair JA wrote:

> While waiver of tort appears to be developing new legs in the class action field . . . it is of no assistance to the appellants here. Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing. The motion judge found none here. No breach of contract. No breach of fiduciary duty, or duty of good faith or confidentiality. No oppression. No misrepresentation. No deceit. No conspiracy. As counsel . . . put it in their factum, "its eleventh hour insertion into the statement of claim does not provide the appellants' claim with a new lifeline given that the record discloses no wrongful conduct on the part of the respondents in respect of any of the causes of action pleaded".[113]

109. As mentioned, even on the assumption of true independence, it is still necessary to determine what the appropriate remedy would be. Recognition of a new cause of action does not contribute to such a project. See *Serhan* Div Ct, *supra* note 54 at paras 77–145.

110. *Supra* note 79 at para 82.

111. *Supra* note 79.

112. *Ibid* at para 73.

113. *Ibid* at para 82.

This statement is both confusing and significant. It is confusing because it purportedly remains neutral in the waiver of tort debate while concluding that there was no wrongdoing because the pleaded causes of action could not be proven. Such reasoning seems to reject waiver of a tort as an independent cause of action on both the true independence and quasi-parasitic theories, in favour of the parasitic account. Despite his express denial that he is deciding the issue, Blair JA seems to say that required wrongdoing resides in other causes of action that the plaintiff must first prove.

On the other hand, this statement is significant because, even if he is not deciding the issue, he does set the parameters of the doctrine of waiver of tort: For disgorgement via waiver of tort to be available, there must be wrongdoing. It is crucial to recognize that Blair JA separates the idea of wrongdoing from waiver of tort in his statement that waiver of tort requires wrongdoing. As a matter of logic, this statement cannot be reconciled with the position that waiver of tort *is* wrongdoing. Therefore, *Aronowicz* should be understood as "closing the door" on the possibility of the true independence theory and thereby sharpening the debate over waiver of tort. Waiver of tort aside, *Aronowicz* stands for the proposition that, at minimum, disgorgement requires wrongdoing. This proposition should survive even once the language of waiver of tort withers away.

With the true independence theory eliminated, at least in Ontario, it is not surprising that the cases following *Aronowicz* have struggled to conceptualize what constitutes wrongdoing for the purposes of disgorgement by waiver of tort within the quasi-parasitic theory. Specifically, it is unclear if mere moral wronging is adequate or if legally recognized wrongdoing is required. If the former is sufficient, then the new waiver of tort doctrine overthrows centuries of tradition that requires proof of causative events *before* the court acknowledges a justiciable wrong. However, if legal wrongdoing is required, then the doctrine lapses into the hollow parasitic theory, rendering it incoherent to discuss waiver of tort as an independent cause of action at all. Unfortunately, courts did not recognize the problems associated with identifying what is meant by wrongdoing until *Andersen v St Jude Medical Inc*, discussed below.[114] To

114. 2012 ONSC 3660, 219 ACWS (3d) 725 [*Andersen*].

this day, they continue to struggle to prevent the doctrine from collapsing back into the parasitic theory.[115]

A. The Full Factual Record Requirement

The tendency of courts to require a full factual record before deciding issues of waiver of tort is problematic in that it prevents courts from fully analyzing the implications of the doctrine. This created a period of stagnant uncertainty that extended past *Aronowicz*. However, judicial attitudes towards this requirement are perhaps beginning to change. For example, in *Parker v Pfizer Canada Inc*,[116] Perell J argued that a full factual record should not be necessary in order to decide whether or not waiver of tort is an independent cause of action:

> It has become conventional to certify waiver of tort as a common issue . . .. However, in my opinion, it is time to revisit the convention, which is based, in part, on the ongoing uncertainty about the waiver of tort doctrine that began eight years ago with *Serhan v. Johnson & Johnson* . . .. However, in my opinion, it is not necessary to wait for a trial judgment. The answers to questions about the scope of waiver of tort are purely matters of legal policy that do not require an evidentiary record and, indeed, the questions would be better answered by posing hypothetical questions not confined to a particular evidentiary record. Hypothetical questions that would be relevant are whether, when and to what extent a restitutionary award should circumvent established principles of tort, contract, and property law that limit the extent of a wrongdoer's liability. In the case at bar, because certifying waiver of tort has become fashionable, neither party argued the point, so I will say nothing more about how waiver of tort policy questions should be answered and I simply say that in the immediate case or in other cases, the certification of waiver of tort questions should be revisited.[117]

Later the same year, *Andersen* became the first class action to go to trial that was certified on the basis of waiver of tort as an independent cause of action.[118]

115. *Koubi* CA, *supra* note 33; *Arora* SC, *supra* note 26.
116. 2012 ONSC 3681, 217 ACWS (3d) 22.
117. *Ibid* at paras 109–12.
118. *Supra* note 114.

B. Andersen v St Jude Medical Inc *and Subsequent Cases*

In *Andersen*, the defendant manufactured prosthetic hearts that increased patients' risk of a medical complication called paravalvular leak. The class of plaintiffs sued for negligence and waiver of tort. Justice Lax dismissed the plaintiffs' case on the basis that no duty of care had been breached. Any potential wrongdoing grounding waiver of tort was thought to reside in this duty and, therefore, this finding defeated waiver of tort as well. As a result, *Andersen* failed to finally settle the law of waiver of tort. Nevertheless, Lax J offered some commentary in *obiter dicta* in the hope that it would "be helpful in moving this vexing question closer to resolution".[119] Noting that courts have consistently required a full factual record to decide the issue, she offered this perspective:

> The extensive factual record that was developed during a 138 day trial did not illuminate for me the important issues of policy that were meant to arise from the trial record . . .. My experience from this trial suggests that deciding the waiver of tort issue does not necessarily require a trial and that it may be possible to resolve the debate in some other way.[120]

Surprisingly, after eight years of debate, she was also the first judge to clearly recognize the earthmoving implications of the quasi-parasitic theory:

> The requirement that a plaintiff demonstrate damages has long been considered a fundamental tenet of tort law.[121] . . . [If loss is necessary for conduct to be considered wrongful, then] recognizing waiver of tort as an independent cause of action would result in punishing defendants for conduct that has never before been deemed wrongful . . . the discussion surrounding the waiver of tort debate touches on questions as fundamental as what exactly it is that directs the law to deem certain conduct wrongful.[122]

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119. *Ibid* at para 577.

120. *Ibid* at paras 585, 587.

121. It is uncontroversial that proof of damages is a fundamental tenet of negligence law, not tort law as a whole. Justice Lax's comments here should be read as a reference to negligence law since, in this case, negligence was the only tort pleaded.

122. *Andersen*, *supra* note 114 at para 593. Earlier we saw two reasons why waiver of tort was not available for negligence on the parasitic theory: Negligence does not cause gains for the defendant and negligence is not truly a wrong. Justice Lax's comment suggests that if negligence is a wrong, its wrongfulness may be in the causing of loss to the plaintiff. If that is the case, then negligence could not support disgorgement under the quasi-parasitic theory either.

Justice Lax further suggested that the ability of courts to resolve this issue will turn on whether courts ought to make such a fundamental change to the legal system or if it should only occur through legislation.[123]

Waiver of tort finally came before the Supreme Court of Canada for the first time in *Pro-Sys Consultants v Microsoft*.[124] Unfortunately, the court overlooked the recent developments in *Pfizer* and *Andersen* and authoritatively affirmed the approach taken by Epstein J in *Serhan*, holding that the pleadings stage is not the appropriate time to determine whether waiver of tort is an independent cause of action:

> Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.[125]

With this approach, the Supreme Court may have stifled the progress that had been made in *Andersen*. As a result, it is possible that Lax J's insight may ultimately be overlooked, making it once again necessary to wait for a trial to bring certainty to the law.

Two waiver of tort cases decided after *Andersen* are worth considering. Both have taken what is meant by "wrongdoing" within the context of the quasi-parasitic theory more seriously and both held that waiver of tort does not disclose a reasonable cause of action. In the process, they may have also collapsed waiver of tort back to its parasitic roots in spite of the judicial persistence of referring to waiver of tort as a potential independent cause of action.

The first of these cases is *Koubi* from the British Columbia Court of Appeal.[126] Even though the text of the decision suggests that it was decided within the context of waiver of tort as an independent cause of action, the case ultimately applies the parasitic theory because the wrongdoing

123. *Ibid* at para 594.

124. *Pro-Sys* SCC, *supra* note 99 (the Court released its judgment in 2013).

125. *Ibid* at para 97.

126. *Supra* note 33. This case was discussed in Part I, above, to illustrate that waiver of tort is unlikely to be supported by a breach of statutory duty under the parasitic theory.

required for waiver of tort was expressly understood as *legal* wrongdoing. Justice Neilson articulated the issue in the following way:

> If the doctrine of waiver of tort is viewed as an independent cause of action, it appears to have two constituent elements: *a legal wrong* by the defendant, and a benefit flowing to the defendant as a result. The question is whether the statutory breaches alleged by Ms. Koubi may constitute the required legal wrong.[127]

Unfortunately, Neilson JA did not recognize that conceptualizing waiver of tort as requiring a legal wrong actually affirms the parasitic theory over both independent cause of action theories. Nevertheless, the case was resolved on the basis that there was no legal wrong disclosed in the facts that would support waiver of tort.[128] As a result, the court decertified this class action with respect to waiver of tort. If this is the direction the law is going to take, courts should abandon all discussion of waiver of tort as an independent cause of action because it is fundamentally incoherent to insist on a prior legal wrong and then label it as an independent cause of action. Nevertheless, in the broader search for a principled approach to disgorgement, *Koubi* could be understood as affirming that the wrongdoing required for disgorgement is *legal* wrongdoing. It is worth noting, however, that *Koubi*'s analysis would not have happened but for *Andersen*'s recommendation to abandon the "full factual record" requirement before deciding waiver of tort issues.[129] Had *Koubi* been decided after the Supreme Court's decision in *Pro-Sys*, it seems unlikely that this analysis would have been given at all.[130]

Arora v Whirlpool[131] also rejected the certification of a class action on waiver of tort and negligence, again due in part to the encouragement proffered by *Andersen*.[132] With respect to the negligence claim, Perell J found "that it is plain and obvious that there is no product-liability negligence action for pure economic losses against a manufacturer

127. *Ibid* at para 41 [emphasis added].

128. *Koubi* CA, *supra* note 33.

129. *Ibid* at para 81.

130. The fact that *Koubi* only proceeded on the recommendation of *Andersen* further illustrates the point that *Pro-Sys* will needlessly prolong uncertainty and stagnation in the law of waiver of tort since the Court refused to comment on the doctrine when standing in a similar position to *Koubi*.

131. *Arora* SC, *supra* note 26.

132. *Ibid* at para 150.

for negligently designing a non-dangerous consumer product".[133] The implication of this finding is that the defendant owes no duty of care to the plaintiff in these situations.[134] As in *Koubi*, Perell J strongly affirmed the principle in *Aronowicz* and yet claimed to not decide the waiver of tort debate.[135] As noted earlier, *Aronowicz* created a precarious situation for waiver of tort as an independent cause of action. As a result, *Koubi* required a legal wrong for waiver of tort rather than mere moral wrongdoing. Similarly, in *Arora*, Perell J dismissed the waiver of tort claim for want of a legal wrong:

> [I]t is plain and obvious that there is no predicate wrongdoing upon which to base a plea of waiver of tort. All of the proposed causes of action are untenable and thus there is no predicate wrongdoing to support a claim of waiver of tort be it a remedy or a cause of action.[136]

For Perell J, it was not the absence of a breach of duty that revealed a lack of wrongdoing. Rather, there was no wrongdoing because the cause of action of negligence itself failed. As in *Koubi*, it is unfortunate that Perell J did not recognize the implications of his decision to reject waiver of tort because another cause of action was not disclosed in the pleadings. It cannot be true both that waiver of tort is an independent cause of action *and* that it is subject to defeat by the failure to disclose another cause of action. That would be a direct violation of the law of non-contradiction.[137] *Aronowicz* defeated the true independence theory and the combination of *Aronowicz*, *Anderson*, *Koubi* and *Arora* has defeated the substance of the quasi-parasitic theory. The only step remaining to completely do away

133. *Ibid* at para 202. The Court of Appeal found that Perell J erred in finding that this category of pure economic loss had been closed in Canada, but nevertheless upheld his *Anns* analysis with the result that a duty of care in this case was prohibited by policy reasons. See *Arora* CA, *supra* note 26 at paras 80–86, 95. Accordingly, Perell J was correct to find that the negligence claim had no chance of success at trial.

134. *Arora* SC, *supra* note 26 at para 204.

135. *Ibid* at paras 298–99.

136. *Ibid* at para 300. This analysis was affirmed on appeal. See *Arora* CA, *supra* note 26 at paras 117–21, leave to appeal to SCC refused, 35661 (13 March 2014).

137. The law of non-contradiction is a fundamental principle of logic, which states that a proposition cannot be both affirmed and denied in the same sense and at the same time.

with waiver of tort as an independent cause of action is for judges to cease using such language.[138]

Conclusion

Canadian courts have largely failed to recognize the significance of labelling waiver of tort a "cause of action", due in part to the policy of waiting for a full factual record at trial to settle a question of law. This policy has effectually discouraged judicial reflection while creating real and unnecessary risk for the parties involved. Such risk was most clearly manifested in the *Serhan* litigation, which settled *solely* on the basis of the legal uncertainty created by its own certification. Furthermore, although it is settled that disgorgement requires legal wrongdoing, proceedings in the context of waiver of tort have not brought the desired progress to the law of disgorgement. Now that it is clear that waiver of tort is not an independent cause of action, the uncertain state of the law need not persist. Since the independent theories of waiver of tort lead courts into danger and incoherence, and since the parasitic theory of waiver of tort is no more than a jargonistic way to select disgorgement, it ought to be abandoned altogether in favour of a principled approach to the availability of disgorgement. The waiver of tort experiment underscores the need to refocus on the fundamentals of our common law legal system in the search for a principled approach. Granting disgorgement without proof of loss (when it would otherwise be required) results in disgorgement arising out of legal nothingness. We need an approach to disgorgement that permits courts to bridge directly from a cause of action to the remedy of disgorgement without any detour through waiver of tort.

138. This must be qualified by the Supreme Court of Canada's decision in *Pro-Sys*, which completely overlooked these developments. *Supra* note 99.