Special Supplement

WAIVER OF TORT: AN HISTORICAL AND PRACTICAL SURVEY

J.M. Martin[*]

TABLE OF CONTENTS

* The author was called to the Ontario Bar in June, 2012 and will be joining Cassels Brock & Blackwell LLP as an associate in September of that year. The author is greatly indebted to Professors Jim Phillips and Simon Stern of the University of Toronto Faculty of Law for their invaluable feedback on earlier drafts of this paper, and wishes to thank Professor Jacob Ziegel, editor in chief of the Canadian Business Law Journal, and Glenn Zakaib, senior partner at Cassels Brock & Blackwell for their gracious support of its publication. The present paper was much too lengthy for standard acceptance at any Canadian law journal, and was until the present destined to join waiver of tort in its historical obscurity. Professor Ziegel is entirely responsible for making the within research available to the public, having made exceptional efforts to arrange its publication. Mr. Zakaib made his firm's resources available to subsidize this supplement at no additional cost to subscribers, while refusing to influence its contents and providing the author complete academic freedom in its completion. The author would like to express his gratitude for the great efforts and earnest curiosity of all these individuals, without any of whom the current publication would never have been possible. Any errors, of course, remain the author's own. He can be reached at jeremy.martin@utoronto.ca.

I. INTRODUCTION

Observers of Canadian class proceedings are being treated to a peculiar sight in motion courts across the country. Squadrons of cutting-edge litigators bedecked with smartphones, laptop cases and memory sticks are descending from glass towers with an aim to do multimillion-dollar battle over an arcane procedural doctrine predating Newton's discovery of gravity. "Waiver of tort," a creation of 17th-century common law courts, has found new application in class actions following the decision in *Serhan Estate v. Johnson & Johnson*.[1]

Class counsel maintain that the doctrine of waiver of tort essentially entitles class members to claim a disgorgement of the defendant's profits in place of compensatory damages in tort generally, or potentially that they can do so if particular criteria are met. (What these criteria might be is a matter of some dispute.) Defence counsel counter that the doctrine entitles a plaintiff class to such disgorgement only under very restrictive conditions, if indeed it is available at all. There is still more dispute as to whether waiver of tort is a cause of action in and of itself, or a mere election of remedies. There is further dispute still as to which torts may be waived, and when the election to waive must be made. The only common ground between class counsel, defence counsel, and the bench on the subject is that the scope and application of the doctrine is enormously unclear.

While there is some contemporary literature on the merits and difficulties associated with the current application of waiver of tort, nearly all of it is normative; it concerns the promotion or discouragement of the doctrine. It is crucial to note, however, that

1. (2004), 72 O.R. (3d) 296, 49 C.P.C. (5th) 283, at para. 33 (affd 269 D.L.R. (4th) 279, 85 O.R. (3d) 665 (Div. Ct.), leave to appeal to S.C.C. refused [2007] 1 S.C.R. x).

in waiver of tort class actions, class counsel propose the common issue, "Is the class entitled to waive the tort?" and argue in the affirmative. That is, they do not argue that the plaintiffs *should* be entitled to waive a tort — they argue that they *are* entitled to do so. That is not a normative proposition, but one that purports to have an objective basis in history: it is a question of jurisprudence and not one of legal philosophy or public policy. This article seeks to provide courts and practitioners with a survey of waiver of tort jurisprudence from its origins in the medieval Court of King's Bench to its contemporary usage in the 21st century in an attempt to cast some light on the actual state of the law concerning waiver of tort. While an historical survey cannot provide any insight into the normative questions facing the courts concerning the way in which the doctrine *should* develop, such a survey *is* capable of setting courts and practitioners alike on the solid precedential footing necessary to argue and decide those normative questions from a fully informed perspective.

This survey proceeds in seven parts. Part II describes the problem caused by the uncertain state of waiver of tort jurisprudence, and both the gravity and the recurring nature of the confusion. Part III describes the historical development of waiver of tort in order to establish what exactly the doctrine *is*, and what precisely a party elects to *do* when it waives a tort. In so doing, the survey will demonstrate that certain claims of waiver of tort enjoy a long-established cognizance at common law, whereas other modern claims are entirely new applications of the doctrine that bear little or no resemblance to waiver of tort as it has heretofore been known to the courts. Part IV proceeds to consider 20th-century developments in waiver of tort claims and their meaning as a matter of practical pleadings. In Part V, the paper considers Canadian jurisprudence specifically, from the early 20th century to the 2004 decision in *Serhan*, and examines the basis and subsequent development of the current confusion on the subject. Part VI applies the findings of the survey to questions frequently put before courts considering waiver of tort claims in class actions, answering those that admit of a clear response and framing those that are open to argument. Part VII concludes.

II. THE PROBLEM

The uncertainty of the waiver of tort doctrine is no small problem in the context of class actions. The disgorgement of

profits sought by class counsel in such cases almost always run into the tens of millions,[2] and as the majority of class proceedings are settled after certification of the action and before trial, the merit of the "waiver of tort" claim has never been properly tried in the eight years it has been a live issue before the courts. The result is aggravating for all parties involved; judges have little alternative but to affirm that the question of the doctrine's availability is indeed a live issue for trial, which can and does result in certification to the detriment of the defendant,[3] who is then practically compelled to pay a settlement to the plaintiff class. Lax J. has commented on the extent of this situation, noting that "in every case in which waiver of tort has been proposed as a common issue, certification as a class proceeding has been found to be the preferable procedure for resolving this claim."[4] Despite the apparent windfall to plaintiff counsel in such cases, the fact remains that those counsel have no concrete idea of the value of a waiver of tort claim, as there is no evidence upon which to estimate the likelihood of a case's success: a deep concern for the plaintiff's bar, which consists largely of small, specialist firms who, in many cases, "bet the firm" on every large case.[5] Finally, defence counsel find themselves in the impossible

2. Prolific class action specialists Ward Branch and Won Kim have a "rule of thumb" whereby they consider that any action with global damages of less than $1 million will not be considered a cost-effective class proceeding to launch: Ward Branch and Won Kim, "The Wheat and the Chaff: Class Action Case Selection" (Vancouver, Branch MacMaster LLP, September, 2005), online: <http://www.branchmacmaster.com/storage/articles/TheWheatAndTheChaff.pdf>.

3. See, *inter alia*, *Goodridge v. Pfizer Canada Inc.* (2010), 101 O.R. (3d) 202, 85 C.P.C. (6th) 267 (S.C.J.); *LeFrancois v. Guidant Corp.* (2008), 56 C.P.C. (6th) 268, 166 A.C.W.S. (3d) 432 (Ont. S.C.J.); *Heward v. Eli Lilly & Co.* (2007), 47 C.C.L.T. (3d) 114, 39 C.P.C. (6th) 153 (Ont. S.C.J.) (leave to appeal to Div. Ct. allowed 51 C.C.L.T. (3d) 167, 45 C.P.C. (6th) 309, affd 295 D.L.R. (4th) 175, 91 O.R. (3d) 691 (Div. Ct.)).

4. *Andersen Estate v. St. Jude Medical, Inc.* (2010), 87 C.P.C. (6th) 45, 2010 ONSC 77, at para. 22. Since the date of that decision, that claim is no longer strictly accurate; there are rare exceptions wherein the class is not certified, albeit on other grounds (*e.g.*, *Dennis v. Ontario Lottery and Gaming Corp.* (2010), 318 D.L.R. (4th) 110, 2010 ONSC 1332 (affd 209 A.C.W.S. (3d) 498, 2011 ONSC 7024 (Div. Ct.))). This case has, however, gone to trial and the decision is forthcoming. It is intended that this survey will be of some use to future cases or appeals thereafter, as the case has yet to reach the level of court at which it has the potential to disturb the extant authority on the subject.

5. Won Kim (of Kim Orr Barristers) has written that plaintiff counsel "bet" their own firms and personal assets when taking on new class actions: "Class Actions II: The Rebuttal: No 'Bet-The-Farm' Judgments in Canada,"*National Post*, November 23, 2005, at *Financial Post*, p. 9. Since that time, plaintiff's firms have been increasingly relying on the Class Proceedings Fund and looking towards the

position of being unable to argue waiver of tort on its merits, as their clients wish to avoid the costs and negative publicity of a full-blown class action trial — and thus settle every waiver of tort claim that is certified against them, however unmeritorious the claim may seem to them.

This confusion, at a time when class actions are growing in popularity and geographical scope,[6] is contagious and damaging. There is no uniformity between the provinces in treatment of waiver of tort actions,[7] which adds another layer of unpredict-

---

third-party funding that has recently been approved in Alberta and Ontario: *Hobsbawn v. ATCO Gas and Pipelines Ltd.* (May 14, 2009), Lovecchio J., File No. 0101-04999 (Alta. Q.B.) (unreported, sealed); *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785. In such situations, however, the same concerns prevail. Class counsel cannot determine the desirability of Class Proceedings Fund funding or bargain for third-party financing arrangements from a position of strength in the absence of any evidence as to the probability of their claim's success.

6. The Canadian Bar Association's Class Actions Database provides an unscientific but compelling reflection of the growing number of national class actions being advanced in Canada. Canadian Bar Association (April, 2012), online: <http://www.cba.org/classactions/main/gate/index/default.aspx>.

7. British Columbia has recently changed course from its sceptical position concerning waiver of tort as a cause of action (*Reid v. Ford Motor Co.* (2006), 149 A.C.W.S. (3d) 804, 2006 BCSC 712) to adopting *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1, in finding that its availability is at least a triable issue: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (2009), 312 D.L.R. (4th) 419, 2009 BCCA 503, addt'l reasons 317 D.L.R. (4th) 122, 2010 BCCA 91, leave to appeal to S.C.C. refused 317 D.L.R. (4th) vii, [2010] 1 S.C.R. x. For a fulsome treatment of the waiver of tort jurisprudence to date in British Columbia, see *Strata Plan LMS 3851 v. Homer Street Development Limited Partnership* (2011), 201 A.C.W.S. (3d) 662, 2011 BCSC 569, wherein Truscott J. refused to amend a pleading to include waiver of tort for a claim of negligent misrepresentation on the basis that such torts are "anti-harm," rather than "anti-enrichment." Alberta considers waiver of tort unobjectionable as a remedy, but considers its application as a cause of action to be a matter of some dispute (see *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.* (2010), 96 C.P.C. (6th) 293, 2010 ABQB 522). Saskatchewan has found that waiver of tort is available only where the plaintiff has a claim grounded in tort (*Ross v. HVLD Systems (1997) Ltd.* (1999), 170 D.L.R. (4th) 600, 185 W.A.C. 261 (Sask. C.A.)).

Manitoba has not considered waiver of tort since 1999, and at that point did not have to decide the claim on its merits (see *Davidson v. Manitoba Hydro* (1999), 140 Man. R. (2d) 229, [1999] M.J. No. 276 (Q.B.)). Nova Scotia has taken notice of waiver of tort claims but has not had to decide the issue: *Morrison Estate v. Nova Scotia (Attorney General)* (2011), 337 D.L.R. (4th) 577, 2011 NSCA 68; *National Bank Financial Ltd. v. Potter* (2005), 238 N.S.R. (2d) 237, 2005 NSCA 139. Québec, New Brunswick and Prince Edward Island have not yet addressed waiver of tort conclusively in their jurisprudence. Newfoundland and Labrador, oddly, has decided that waiver of tort requires the plaintiff to ground a claim in either tort or unjust enrichment — the latter providing the same remedy as waiver of tort and thus being in large part a redundancy: *Hurley v. Slate Ventures Inc.* (1998), 167 Nfld. & P.E.I.R. 1, [1998] N.J. No. 225 (C.A.).

ability and inefficiency to increasingly common national class proceedings.

This confusion is spilling over into the pages of class action judgments across the country. Cullity J., who until recently had been one of only a few Ontario judges specializing in class actions, recently refused certification of a class action on grounds unrelated to waiver of tort, while holding that waiver of tort would have been a live issue for trial if the plaintiffs had not failed on those other grounds. He wrote, "It is unfortunate that the law on the availability of what are sometimes referred to as restitutionary damages, or an account of profits, should remain in a state of uncertainty,"[8] and then went on to consider a recent English case on point — entirely in *obiter*, as the certification was denied — apparently for the collective benefit of the confused bench and bar. Gerow J. of the British Columbia Supreme Court noted in refusing the plaintiff's waiver of tort amendment in *Reid v. Ford Motor Co.* that the purpose of pleading waiver of tort appears to be that it is an easier claim for the plaintiff to make out than negligence: "[b]y pleading waiver of tort Ms. Reid is attempting to avoid the necessity of proving that the Class Members suffered any loss as a result of Ford's negligence or failure to warn."[9] This state of confusion is so widespread that it motivated another highly respected (and courageous)[10] class action judge to pen a frank article on the subject titled, "Something is Happening Here and We Don't Know What It Is,"[11] and to remark that the 400-year-old doctrine "has existed for decades."[12]

Given the high stakes of class proceedings and the considerably higher amounts in dispute when disgorgement of profits rather than compensation for loss is the measure of the defendant's risk, this uncertainty and manifest unfairness cannot be permitted to continue. As it has been eight years since *Serhan* introduced the problem to Ontario courts and there has not yet been a decision resolving the issue, the bench must find a way to be more comfortable with striking certain waiver of tort claims at the

8. *Dennis v. Ontario Lottery and Gaming Corp.*, *supra*, footnote 4, at para. 171.
9. *Reid v. Ford Motor Co.*, *supra*, footnote 7, at para. 17.
10. See, *inter alia*, *McCracken v. Canadian National Railway Company* (2010), 100 C.P.C. (6th) 334, 2010 ONSC 6026; *Peter v. Medtronic, Inc.* (2009), 83 C.P.C. (6th) 379, leave to appeal to Div. Ct. allowed 187 A.C.W.S. (3d) 684, 2010 ONSC 1984, affd 97 C.P.C. (6th) 392, 2010 ONSC 3777 (Div. Ct.).
11. Paul Perell, "*Serhan Estate v. Johnson & Johnson* and *Soulos v. Korkontzilas*: Something is Happening Here and We Don't Know What it is" (2007), 33 Advocates' Q. 375.
12. *Peter v. Medtronic, Inc.*, *supra*, footnote 10, at para. 28.

certification level when it is plain and obvious that a claim in waiver of tort must fail.

The primary difficulty in doing so, in my view, is that waiver of tort is such an arcane procedural election that the challenges it presents are frequently conflated. There are questions concerning waiver of tort that *do* admit of a simple yes/no answer (for example, "Do equitable defences apply to waiver of tort claims?"), and others that require a trial on the merits and a weighing of policy. However, as waiver of tort is often framed as a common issue in class proceedings trials and has very rarely been raised in contemporary individual actions,[13] pleadings on the matter are brief and non-illuminating. In *Peter v. Medtronic, Inc.*, for example, the plaintiffs reserved "the right to elect at the trial of the common issues to waive the torts of negligence and/or conspiracy and to have damages assessed in an amount equal to the gross revenue received by the Defendants, or alternatively, the net income received by the Defendants, or a percent of the sale of the Defibrillators."[14] By disentangling the issues the doctrine presents and taking a careful rather than cursory look at its historical development, judges can be comfortable in certifying or vindicating familiar pleadings of waiver of tort, and more sceptical about cases alleging unfamiliar rights or arguing for the recognition of new or modified principles.

It is of critical importance to the development of this area of the law that two frequently conflated questions cease to be treated as coterminous. The question of whether or not a plaintiff is entitled to waive a tort is often treated as a question of policy, and the question is addressed as though it had been, *should* the plaintiff be entitled to waive the tort? It must be understood that the matter of whether or not a plaintiff *is entitled* to waive a tort is a question of legal history and extant jurisprudence. If a plaintiff *is* entitled to waive a tort, then no policy considerations, nor even much controversy, enter into the inquiry unless the court is specifically minded to revise the doctrine. The rationales for allowing

13. *Transit Trailer Leasing Ltd. v. Robinson* (2004), 30 C.C.L.T. (3d) 227, 130 A.C.W.S. (3d) 874 (S.C.J.), and *Amertek Inc. v. Canadian Commercial Corp.* (2003), 229 D.L.R. (4th) 419, [2003] O.J. No. 3177 (S.C.J.) at paras. 369-372 (addt'l reasons 229 D.L.R. (4th) 419 at p. 554, 39 B.L.R. (3d) 287, revd 256 D.L.R. (4th) 287, 76 O.R. (3d) 241 (C.A.), leave to appeal to S.C.C. refused 261 D.L.R. (4th) vii, [2006] 1 S.C.R. v), are among the rare exceptions, and are the only modern Canadian cases cited by Cullity J. in *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1.

14. *Peter v. Medtronic, Inc.* (2007), 50 C.P.C. (6th) 133 (S.C.J.), at para. 53 (leave to appeal to Div. Ct. refused 55 C.P.C. (6th) 242).

disgorgement of profits in certain circumstances have been well settled, and if there is a question of policy or fairness, it must be raised by the defendant. If the plaintiff is *not* entitled to waive a certain tort as a matter of law, however, then the question of whether he or she *should* be entitled to do so is essentially one that the plaintiff must raise, arguing that the law should recognize an entitlement to disgorgement of profits on a lower threshold than is necessary to ground a claim in tort or unjust enrichment. In brief, the court must take note that in waiver of tort class actions, it must be clear as to whether the plaintiff class is asserting:

(a) that this is a case in which they *already have* the right to elect to waive the tort as a matter of law — which is a question of history and precedent; or,
(b) that although this is not the sort of case in which plaintiffs have historically had a right to waive the tort, the court *should recognize* such a right — which is an argument for a reinterpretation of the doctrine and, in effect, a relaxation of the well-established tests for disgorgement of profits in equity.

As the court noted in *Andersen Estate v. St. Jude Medical, Inc.*, "if waiver of tort is recognized as a cause of action, it could represent a fundamental 'sea-change' in Canadian law."[15] While Lax J. was certainly correct about the tumultuous effect recognizing waiver of tort as an independent cause of action would have on the common law, there are circumstances in which waiver of tort is entirely uncontroversial, and has been for centuries.

III. THE HISTORICAL ORIGINS OF WAIVER OF TORT

1. The Early Prehistory of Waiver of Tort

The history of waiver of tort begins with the invention of an action in *assumpsit*, a creation of the Court of King's Bench during the reign of Henry IV (1399-1413).[16] As some commentators have noted, waiver of tort was once referred to as "waiver of tort and suit in *assumpsit*."[17] This origin is worthy of note before

15. *Andersen Estate v. St. Jude Medical, Inc.*, *supra*, footnote 4, at para. 14.
16. Richard Storry Deans, *The Student's Legal History*, 3rd ed. (London, Stevens & Sons, 1913), at p. 78.
17. Charles Murray, "An Old Snail in a New Bottle? Waiver of Tort as an Independent Cause of Action", (2010), 6 Can. Class Action Rev. 5, at p. 10.

proceeding further. Many modern academics and jurists have wrongfully categorized the doctrine of waiver of tort as an equitable doctrine or as sharing an affinity with equitable arguments or considerations,[18] probably because its disgorging effect is similar to the more familiar equitable action in unjust enrichment. As the early cases show, however, waiver of tort unquestionably originated in the courts of common law. Indeed, it is a common malady of the jurisprudence to consider waiver of tort and unjust enrichment to be interchangeable or interlocking doctrines.[19] They in fact share no historical roots, and have only been associated with one another since the beginning of the current confusion in the early 1990s. The genesis and promulgation of that misconception is discussed in Part IV(4) *et seq*., *infra*.

The roots of waiver of tort and action in *assumpsit* in the common law courts preclude the possibility that equitable considerations enter into the modern treatment of claims of waiver of tort, as they would if the action had originated in Chancery or the ecclesiastical courts. This fact provides definitive answers to some questions courts will soon face concerning the nature of the contemporary claim. Equitable defences such as *laches* or maxims such as "those seeking equity must come with clean hands" do not apply to claims in waiver of tort. Nor is the disgorgement that follows from an election to waive a tort a discretionary remedy, as it would be if the election were originally an equitable procedure. A plaintiff that waives a tort is plainly entitled to his or her remedy in *assumpsit*, full stop. As we shall see, however, that remedy is not always a disgorgement of profits, and many torts are not conducive to waiver.

---

18. See, for example, *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1; *Transit Trailer Leasing Ltd. v. Robinson*, *supra*, footnote 13; *Reid v. Ford Motor Co*., *supra*, footnote 7; *Federal Sugar Refining Co. v. United States Sugar Equalization Board Inc*. (1920), 268 F. 575 (S.D.N.Y.), at p. 582, cited in *Serhan Estate v. Johnson & Johnson*, *ibid*., and Peter Maddaugh and John McCamus, *The Law of Restitution* (Aurora, Ont., Canada Law Book, 2004) (looseleaf).

19. See, *inter alia*, *Transit Trailer Leasing Ltd. v. Robinson*, *supra*, footnote 13, at para. 100 *et seq*., where the court applies the unjust enrichment test despite waiver of tort being the pleading, and *Reid v. Ford Motor Co*., *supra*, footnote 7, at para. 28, where despite noting at para. 14 that its understanding of waiver of tort cases is that "the wrongdoer must account for such ill gotten gains to the person impacted by the tort, *even if the person has lost nothing* or suffered no damage," the court went on to its analysis thus:

> The underpinning of waiver of tort is that there has been some unjust enrichment to the defendant. Unjust enrichment is comprised of three elements: 1. an enrichment; 2. *a corresponding deprivation*; and 3. no juristic reason for the enrichment. (All emphasis mine.)

To understand waiver of tort in its modern context, we must begin by understanding the action in preference of which torts were traditionally waived: namely, the action in *assumpsit*. *Assumpsit* has always been and still remains the action that a plaintiff chooses to pursue by waiving an action in tort. It was because the two actions could not be pursued simultaneously that waiving a tort was originally necessary and the procedural concept of "waiver of tort" came to be. As a result, it is necessary for a trial court hearing a waiver of tort case to understand *assumpsit* as the alternative action to tort and to understand the procedural difficulties that had traditionally been addressed by waiver of tort, in order to get a sense of when and why waiver of tort has historically been pled.

Assumpsit derives from the Latin *quare cum assumpsisset*: "because he had undertaken." The *assumpsit* action is, in essence, an action under an imputed contract where no actual contract can be produced for the court; it entails the imputation of an enforceable "undertaking" on the part of the defendant. The Court of King's Bench developed this legal fiction over the course of the 15th century due to a proliferation of plaintiffs that had suffered losses on contracts made for good consideration, but who could not recover because those contracts were not made under seal. At the time, the royal court was precluded from enforcing unsealed private contracts. Because the plaintiffs in these cases were clearly wronged but were without recourse to the courts in the absence of a sealed contract, the courts established the fiction of *assumpsit* in order to impute a binding obligation on the part of the defendant to perform his unsealed contract satisfactorily. The courts imputed this obligation on the basis that "he had undertaken" to perform satisfactorily, despite the fact that no legally cognizable contract actually existed. (It would be later still before the courts would hear cases in which the contract was alleged not to have been performed at all.)

The earliest cases in *assumpsit* were brought to impute contracts to perform satisfactorily in cases that we would today classify as tort actions. For example, a binding undertaking to ferry a horse across water was imputed when a ferryman negligently sank his ferry and drowned the plaintiff's horse. Similarly, a binding undertaking to perform a shave was imputed when a barber negligently caused great damage to the plaintiff's face with a razor, and so on.[20] In such cases, damages for breach of contract followed for failure to perform satisfactorily.

20. James Barr Ames, "History of Assumpsit" (1888), 2 Harv. L. Rev. 1, at p. 2.

There is a peculiar but important reason why plaintiffs would seek to have contracts imputed rather than suing in tort in these cases, which would seem the more obvious way for a plaintiff to proceed. Simply put, the plaintiffs *couldn't* sue in tort due to the strictures of the pleading process. Even as early the 15th century, the Court of King's Bench was an ossified legal institution, unamenable to change and novel pleadings, and at risk of losing jurisdiction to the growing Court of Chancery. Any pleading that was not a carbon copy of a recognized one had to be held over for the consideration of Parliament before it was confirmed,[21] and there was a prevailing concern that the recognition of new forms of action would confer upon the Chancellor and the judiciary the power of the king in Parliament to allocate rights and duties.[22] As a result, personal actions had to be brought in conformity with recognizable forms under the catchall of "trespass on the case" (later "action on the case"), which typically required the plaintiff's claims to sound in either tort or contract; a plaintiff that was unable to 'fit' his claim under one of those two heads would have no recourse.[23]

These contracts were "imputed" rather than "recognized" for the reason above-noted; courts of common law in this time period could not enforce private contracts that were not made under seal. From their perspective, these oral agreements were not proper contracts at all; the *assumpsit* thus permitted recovery where there was no other basis to find for the plaintiff.

21. This was the effect of Lord Coke's famous proclamation, "*Et quotienscumque de cetero evenerit in Cancellaria quod in uno casu reperitur breve et in consimili casu cadente sub eodem jure et simili indigente remedio, concordent clerici de Cancellaria in brevi faciendo vel atterminent querentes in proximo parliamento et scribant casus in quibus concordare non possunt et referant eos ad proximum parliamentum et de consensu jurisperitorum fiat breve ne contingat de cetero quod curia diu deficiat querentibus in justicia perquirenda*." ("And whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and let the cases be written in which they cannot agree, and let them refer them until the next Parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.") Maitland, *infra*, footnote 26, at p. 41. Note that the reference to Chancery in this time period does not suggest that these forms were equitable in nature; at this point in history the Chancery clerks were responsible for preparing writs for submission to common law courts, and it is to that practice Lord Coke refers in this passage.
22. *Ibid.*
23. William Keener, *A Treatise on the Law of Quasi-Contracts* (New York, Baker, Voorhis and Co., 1893) (1926 reprint), at p. 14, citing 1 Spence Eq. Jur. 243. See the latter for a deeper discussion of individual cases comprising this jurisprudence, also cited as George Spence, *The equitable jurisdiction of the Court of Chancery: comprising its rise, progress, and final establishment: to which is*

The plaintiffs in these cases could not sue in tort because in the medieval courts, the strict pleadings in "tort" assumed that torts could only be committed by total strangers to the plaintiff; they were acts "in which the plaintiff did not in any way participate,"[24] which meant that, in the above situations — in which plaintiffs *invited* the wrongdoers to interact with them and their property — an action in tort could not lie. As a result, the courts concluded that the only potential for recovery the plaintiff had was if his action could somehow be framed in contract. But if no sealed contract existed, no action in contract lay either.

Therefore, wishing to see justice done, the Court of King's Bench crafted this quasi-contractual "undertaking" in *assumpsit* so that the plaintiff could pursue his action on the case as though there *had* been a cognizable contract, and receive damages in contract instead of in tort.[25] Because the parties had already engaged in some form of unsealed agreement (*e.g.*, to ferry horses or perform a shave), the imputation of a contract was fairly easy to justify; permitting action in tort when the barber or ferryman was clearly not a stranger to the plaintiff was, in contrast, nonsensical to the medieval judge. This legal fiction was known as a "special," or "express" *assumpsit*: the imputation of a binding undertaking where an actual undertaking actually existed, but was not made under seal. (Much later, in the 17th century, this legal fiction of express *assumpsit* grew to encompass an *implied* or "*indebitatus*" *assumpsit*, in which case the court imputed an *entirely fictional* undertaking where there was *no* express agreement between the parties. This latter action had a much broader application, as we shall see in discussing the 17th century.)

The express *assumpsit* carried on as a legal fiction through to the dawn of the 16th century. It was in this period that the frequent use of *assumpsit* in bringing action on the case led to action in *assumpsit* becoming confirmed as a form of action of its own, rather than a mere legal fiction permitting the more general "action on the case."

This reference to "forms" of action requires some brief explanation. A problematic factor in our modern understanding

---

prefixed, with a view to the elucidation of the main subject, a concise account of the leading doctrines of the common law and of the course of procedure in the courts of common law in regard to civil rights: with an attempt to trace them to their sources: and in which the various alterations made by the legislature down to the present day are noticed, v. 1 (Philadelphia, Lea and Blanchard, 1846-1850), at pp. 238-247.

24. Ames, *supra*, footnote 20, at p. 3.

25. *Ibid.*, at pp. 3-4.

of waiver of tort and action in *assumpsit* is that no living person still recalls the daily practice of law when the law was concerned with *forms* of action rather than *causes* of action. For centuries courts were overwhelmed with the prospect of resolving messy interpersonal conflicts and cautious of infringing on the king's powers by creating new law, and thus required all claims to conform to a standard, unobjectionable "form of action." If one wished to plead *assumpsit*, for example, one was required to fill out a standard-form pleading to that effect. The same went for all actions: trespass, ejectment, trover, and so forth. If the court found at trial that the wrong form had been pled on the facts of the case, it would be fatal to the action. Indeed, much of the private litigation in this era centered around whether or not the facts in evidence amounted to the claims put forward in the standard "form" of action. It was not enough to plead the facts and request an appropriate remedy, as it is today; rather, the appropriate form would be submitted, evidence in support of the allegations in that form would be led, and the standard remedy for that form of action would be sought. These forms were absolutely rigid. An action in implied *assumpsit* would have to take precisely this form:

> The King to the sheriff &c. *as in Trespass* to shew:
>
> for that, whereas the [said] X heretofore, to wit (*date and place*) was indebted to the [said] A in the sum of ____ for divers goods wares and merchandises by the [said] A before that time sold and delivered to the [said] X at his special instance and request.
>
> and being so indebted, he the [said] X in consideration thereof afterwards to wit (*date and place* [*aforesaid*]) undertook and faithfully promised the [said] A to pay him the [said] sum of money when he the [said] X should be thereto afterwards requested.
>
> Yet the [said] X, not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtilly [*sic*] to deceive and defraud the [said] A in this behalf, hath not yet paid the [said] sum of money or any part thereof to the [said] A (although oftentimes afterwards requested). But the [said] X to pay the same or any part thereof hath hitherto wholly refused and still refuses, to the damage of the [said] A of ____ pounds as it is said. And have you there &c.[26]

26. Frederic William Maitland, *The Forms of Action at Common Law; A Course of Lectures*, A.H. Chaytor and W.J. Whittaker, eds. (Cambridge, Cambridge University Press, 1968), at p. 74. This publication is a reprint of lectures given by Professor Maitland prior to his death in 1906. Professor Maitland was himself called to the bar in 1876 and practiced in equity until appointed a reader at Cambridge in 1884. One can see by the strictures of the form the extent of the legal craftsmanship that would be necessary in order to "shoehorn" a real case —

It was because pleadings were so uniform and rigid, and because Chancery was increasingly seen as a more flexible forum in which to bring one's action (and to spend one's court fees) that the King's Bench began to apply legal fictions, much as it had with *assumpsit* in the 15th century, in order to "shoehorn" complex real-life situations into the specific claims laid out in these forms, thereby appearing to be equally capable of providing justice (and, of course, securing more court fees in so doing). It was widely understood that, to some extent, real cases would be only analogous to the situations described on these forms, and this gave rise to significant litigation concerning the extent of the liberties a lawyer might take in drawing such analogies.

As we shall see in the next section, the courts became more and more comfortable with recognizing loose analogies to traditional cases of express *assumpsit* — that is, cases where one party committed what appeared to be a tort (that is, an unlawful, injurious interference with personal or proprietary right) but the plaintiff could not bring a tort claim, nor proceed in contract without using *assumpsit* to impute an undertaking to perform competently on the part of the defendant. As a result, a jurisprudence gradually developed in which the courts permitted *assumpsit* to proceed and a contractual remedy to be given in many different kinds of cases, such as when the defendant converted the plaintiff's goods. The next section considers the way in which *assumpsit* grew from its original sense of imputing a defendant's undertaking to perform competently when there was some form of agreement between the parties (in the case of personal torts), to imputing a undertaking to perform *as agent* when no actual agreement existed at all (in the case of proprietary torts). The legal result of this new interpretation of *assumpsit* was to imply an undertaking to perform as agent (*i.e.*, to turn over profits made from the principal's property), which yielded the familiar remedy of an agent's accounting for profits made with the principal's property. Thus, the study of the development of *assumpsit* from the 16th to the 19th century provides the answer to the question, "how did it come to pass that a waiver of tort could yield an account of profits?" The answer is that it never did — it was always an action in *assumpsit* that permitted an account of profits — but it was discovered in short order by courts in the early modern period that

perhaps involving the return of chattels rather than money — into fitting this very specific statement of fact.

in order to proceed in *assumpsit* in such cases, a plaintiff would have to forever waive a tort.

2. Tension Between Tort and *Assumpsit*

As we have seen, it was necessary for courts to allow lawyers some leeway in bringing forward cases that might only loosely conform to rigid forms of action in the 16th century. It is in the framework of this more accommodating court system that we encounter an important action in *assumpsit* in 1572, in the case of *Tottenham v. Bedingfield*.[27] This case demonstrates the original relationship between *assumpsit* and tort and gives a clear example of why it became necessary to waive torts; that is, it exemplifies the problem with *assumpsit* that was eventually solved by introducing waiver of tort.

In *Tottenham*, the Court of King's Bench had a unique problem. The plaintiff brought an action for account against the defendant, claiming that the defendant had fraudulently gone around collecting rents (in the form of food) from the plaintiff's parsonage, presumably by holding himself out to be the plaintiff's rent collector. The defendant had subsequently sold this food, and was in possession of the proceeds from the sale. The difficulty the court faced was that Bedingfield was a con man; there was no privity between him and the plaintiff. They had no contract with each other — and an account of profits was a purely contractual remedy.

The plaintiff sued Bedingfield because his bilked tenants, despite still owing him the legal obligation to pay rent, presumably could not afford to pay a second time and were thus poor targets for litigation. He sought an account of profits rather than damages because he had no standing against the defendant in tort — the rents had not yet been delivered to him, so any rights in the stolen food had never vested in him. In the absence of class proceedings legislation, suing on behalf of every defrauded tenant individually would have been entirely uneconomical. As a result, the plaintiff sought to extend the legal fiction of *assumpsit* to imply an undertaking on the defendant's part to pay over the wrongfully collected proceeds. His crafty lawyer pled, in effect, that the collection of the plaintiff's rents gave rise to an implied undertaking to collect those rents as agent for the plaintiff, which *assumpsit* would construe as having a subsidiary obligation to do

27. (1572), 3 Leo. 24, 74 E.R. 517 (K.B.).

so competently — that is, to turn over the profits in performance of that implied agreement. If the court implied that undertaking, then the plaintiff could plead the defendant in an action of account, citing that undertaking as the necessary contractual basis for the action. This was a new extension of the idea of assumpsit — an early attempt at extending the doctrine of express *assumpsit* to an *entirely implied assumpsit*.[28]

The court refused to accept the pleading, however, finding that "wrongs are always done without privity: and yet I do agree, that if one doth receive my rents, I may implead him in a writ of accompt."[29] That is, the defendant was a mere tortfeasor, and there was no actual agreement — but if the plaintiff *had* hired a receiver or agent who had not delivered over the rents, a writ of account would lie pursuant to their actual agreement. Even if there was no recognizable contract made between the plaintiff and an actual receiver under seal, express *assumpsit* would construct an undertaking to perform the duties of receiver satisfactorily, provided there was good consideration for the bargain, and the plaintiff would thus have standing to recover. In this case, however, unlike the cases of the ferryman and the barber *supra*, there was no actual agreement and no privity between the parties, and *assumpsit* would not read in conditions of a non-existent contract, nor construct a fictitious contract between total strangers. If the court attempted to do so, that imputation of privity could be rebutted by the defendant pleading his own tort and proving that there was, in fact, no agreement.

The court ultimately ruled that, even if the plaintiff *had* been in possession of the rents, no *assumpsit* would lie to permit an action in account: "if one disseiseth me of my land, and taketh the profits thereof, upon that no action of accompt lieth; for it is meerly a wrong" and the action must sound in tort.[30] Manwood J. refers to the unfortunately anonymous "principal case" on the subject, noting that in that precedent the plaintiff *already had* possession of the rents, which were subsequently stolen by the defendant. That case concerned a tort, the court explained, and in such a case no action would lie for account via *assumpsit*: a tortfeasor can only be a stranger, and there must be privity in order to ground an action in contract. Since in *Tottenham* there was no evidence that the

28. More obscure law reports note that the lawyer "prayed the opinion of the Court if the action would lye, for otherwise he would not trouble the Court": *Tottenham v. Bedingfield* (1572), 83 Ow. 916 (K.B.).
29. *Tottenham v. Bedingfield*, *supra*, footnote 27.
30. *Ibid.*

parties to the litigation had been in privity, and the defendant could prove that a tort rather than a lawful collection took place on the tenants' doorsteps, the courts concluded that the parties were strangers, and strangers can't be parties to a contract — even a fictional one.

At this point, we can see the tension that existed between pleadings of tort and *assumpsit*. The court could not hear that a wrong had been done by a stranger (*i.e.*, a tort had been committed), and hear also that there was privity between the parties giving rise to an undertaking (*assumpsit*) in that same act. Such a situation would require two contradictions from the court's point of view: first, the defendant would have to have been a stranger trespassing *and* have been invited to act by the plaintiff; and second, the act would have to have been done both without consent of the plaintiff (tort) *and with* the plaintiff's consent (contract). Little wonder that courts over the next few centuries would find that, in order to proceed in an implied *assumpsit*, one would have to forever *waive the tort*; the two were contradictory pleadings.

Unfortunately for Mr. Tottenham, he had no standing to pursue the defendant in tort, as the fraud was committed against his tenants. Even if this had been a case like the anonymous "principal case," wherein the tort was the conversion of rents in the plaintiff's possession, account could not lie even if the courts went so far as to imply *assumpsit* where there was no actual agreement, because the defendant could prove that he was a tortfeasor and a stranger, destroying that imputation of privity. Over the next 200 years, however, courts would come to countenance the possibility of a "waiver of tort and action in *assumpsit*": a recognition that the facts suggested a tort (*i.e.*, a stranger wrongfully interfered with proprietary or personal rights), but that an action in quasi-contract was to be available to the plaintiff nonetheless.[31]

3. Introduction of Waiver of Tort and Action in *Assumpsit*

Through the end of the 16th century and into the 17th, *assumpsit* grew into a standard presumption that the parties undertook to perform satisfactorily in contracts for consideration, particularly in the context of bailments.[32] Increasingly, however, courts began to move away from the strictures prevailing at the time of *Tottenham* and began to read constructive agreements and

31. James Barr Ames, "History of Assumpsit" (1888), 2 Harv. L. Rev. 2, at pp. 53-54.
32. Ames, *supra*, footnote 20, at p. 7.

undertakings in *assumpsit* into cases that looked less and less like they involved an actual contract:

> The judges attempted . . . by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of assumpsit, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.
>
> In the action of assumpsit, as the word assumpsit implies, whether it be [express] or indebitatus assumpsit, a promise must always be alleged, and at one time it was an allegation which had to be proved [*i.e.*, express *assumpsit*, which required proof of an actual agreement, predated implied *assumpsit*]. It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of contract, should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that "the law implied a promise."[33]

Thus the courts in the 17th century began to fashion fictitious undertakings on the part of a defendant in order to justify providing a quasi-contractual remedy to the plaintiff where clearly no agreement had existed. These were actions at common law, and they were exclusively cases concerning property.[34] Frequently interference with property enriched the defendant without injuring the plaintiff or giving him an action in tort, and in the absence of the doctrine of unjust enrichment, the courts implied undertakings in *assumpsit* in order to justify the vindication of the plaintiff's property rights. These actions, however, were still inconsistent with the allegation or fact of a tort, and while the court was open to implying these fictitious undertakings, *assumpsit* could lie only where there was no tort on the facts to spoil the imputation of privity. Indeed, in many of these cases privity was easy to make

33. Keener, *supra*, footnote 23, at pp. 14-15 (insertion mine.)

34. Early in the 17th century, the legal form of "action on the case" was still required in order to recover money had and received, with *assumpsit* acting as a mere legal fiction. See, for example, *Cavendish v. Middleton* (1629), Cro. Car. 141 (K.B.), in which a defendant exacted payment twice for the same goods and the plaintiff could not bring *indebitatus assumpsit* to recover. By mid-century, however, *assumpsit* itself increasingly became the standard approach to recovery. Consider *Bonnel v. Foulke* (1657), 2 Sid. 4 (K.B.): "*[S]i jeo pay monies in satisfaction del duty & come duty, & il a qui est pay nad title de ceo receiver & issint le duty nest satisfie il a qui est pay est indebt a moy & issint jeo maintainer action vers luy*." By 1692, money paid to a stakeholder to hold pending the outcome of a wager could be recovered by *assumpsit* as money received by the defendant to his use: see *Martin v. Sitwell* (1691), 1 Show. K.B. 156. On this point, see Sir William Searle Holdsworth, *A History of English Law*, vol. 8 (London, Methuen, 1925), at p. 94.

out. *Assumpsit* became a go-to pleading for money had and received; while there may have been no actual exchange of promises or consideration between two parties, they had in many cases acted face-to-face in relationships of agency or bailment and possession of property had generally changed hands.[35] Thus, the threat of the defendant pleading his own tort to rebut the imputation of privity was not a prevailing concern with the earliest successful cases of implied *assumpsit*.

Towards the end of the 17th century, courts began to expand the scope of *assumpsit* — particularly *indebitatus assumpsit* — still further.[36] Where in the medieval period courts had been willing to imply an undertaking to perform an express promise competently, and in the mid-17th century they were willing to imply an undertaking to perform on the grounds that the defendant was a receiver and wrongful detainer of the plaintiff's property (absent a tort on the same facts), in the late 17th century the courts began to apply this ductile tool to imply undertakings and grant quasi-contractual damages for duties imposed purely by law.

In *The Mayor of London v. Gorry*,[37] the defendant had not paid the fee for scavage to the office of the mayor. The jury held that the duty to pay the custom for that activity was owed by virtue of *assumpsit* despite the absence of an express agreement on the defendant's part to pay it. This case, particularly as it was one of many *assumpsit* cases concerning unpaid duties or customs, was representative of the quasi-contractual circumstances in which *indebitatus assumpsit* lay towards the end of the 17th century.[38]

Despite the growth of the doctrine of *indebitatus assumpsit* to include these implied duties throughout the 17th century, it was still impossible to plead a tort and *assumpsit* together (as the plaintiff was required to choose only one form of action to submit) or to plead *assumpsit* on the facts of a tort — that is, where the defendant was a stranger to the plaintiff and wrongfully interfering with his person or property. Tortfeasors were by definition strangers to the plaintiff acting without license, and that fact was

35. See *ibid.*
36. This was, to some extent, an inevitable consequence of *Slade's Case* (1602), 4 Co. Rep. 92 (K.B.), which held that *assumpsit* could be heard at King's Bench even when the Court of Common Pleas had concurrent jurisdiction over the subject matter with its archaic and inconvenient action in debt. After that case, *assumpsit* became a much more commonly pled action and many more creative pleadings and inventive judgments inevitably followed.
37. (1675), 2 Lev. 174 (K.B.).
38. Holdsworth, *supra*, footnote 34, at pp. 91-93.

anathema to the legal fiction of an undertaking having been made to the plaintiff.

In a few exceptional cases in the late 17th century, however, courts were finally convinced to allow the plaintiff to proceed in *assumpsit* despite the existence of a tort that could have otherwise been pled, provided the plaintiff set aside his claim in tort forever and thus barred the prospect of double recovery. It is thus that we encounter for the first time actions that could properly be called "waiver of tort and action in *assumpsit*": actions wherein the fact that the defendant is a stranger and a tortfeasor could be permanently set aside in order to proceed with the action implying that an agreement was made between the parties. This extended nomenclature, while tedious, demonstrates that from its inception *waiver of tort was not itself a cause of action*. Indeed, "causes" of action were as yet unheard of, as the submission of "forms" of action were the plaintiff's originating process. When the concept of "waiver of tort" first came into use, it existed as an election to forever set aside the potential action in tort in order to bar the defendant's proof of that tort, and to proceed in the well-established action of *assumpsit* instead. The plaintiff's originating process was in *assumpsit*, never in "waiver of tort."

Jackson's study of 17th and 18th-century cases revealed three areas in which courts were willing to allow a tort to be waived and an action in *indebitatus assumpsit* to follow:[39]

1. *The defendant has wrongfully obtained from a third person money due from the third person to the plaintiff*. In these matters, typically usurpation of office cases, there had long been a remedy at common law for disturbance of office: an assize of novel disseisin, which permitted the plaintiff to recover profits. While that remedy was obsolete as regards recovery of land, it was still available for recovery of office in the late 17th century. Thus, when a plaintiff came to court asserting a tortious interference with his office, he had a valid remedy in assize of novel disseisin that was financially superior

39. For this list I am very much indebted to the original list by Richard Meredith Jackson, *History of Quasi-Contract in English Law* (Cambridge, Cambridge University Press, 1936), at pp. 61-84. The list above and the following subsection on the "Money Restriction" are largely a crystallization of Jackson's findings and citations, with the exception of section three and the "Money Restriction" subsection, which seem to be the most relevant for our purposes. Those sections are augmented with my own analysis and citation of cases on point, several of which were not in the Jackson text.

to his claim in tort. In such cases, the court would permit the plaintiff to waive the tort and move forward with his more muscular remedy despite the possibility that the defendant was a complete stranger.[40] While these usurpation of office cases were technically "waiver of tort and action in assize of novel disseisin," third-party receipt cases that did *not* involve usurpation of office relied on *assumpsit* instead. This had the effect, for example, of solving the "problem" posed by *Tottenham*: where the defendant wrongfully obtained rents due from a third party to the plaintiff, the action in *assumpsit* would now finally lie, as the defendant's tort could be set aside, preventing his rebuttal of imputed privity.

2. *The defendant has wrongfully compelled the plaintiff to pay money that was not due*. Where the plaintiff has paid money because he could not exercise his legal rights, with the exception of a taking of money equivalent to trespass, an action in *indebitatus assumpsit* would lie, implying an undertaking to pay the money back, and the tort of compulsion could be waived to permit that action to go forward.[41] In *Astley v. Reynolds*, for example, a pawnbroker would not return a client's goods unless the client agreed to overpay.[42] With little choice but to comply, the client overpaid and brought action in *assumpsit*, waiving the tort. It was necessary that the plaintiff demonstrate that the overpayment was not voluntary.[43] The most common cases on this point concerned money paid into court judgments that were subsequently overturned[44] and cases in which plaintiffs were compelled to

40. In *Arris v. Stukely* (1677), 2 Mod. 260, 86 E.R. 1060 (K.B.), the defendant asserted what was essentially the *ratio* in *Tottenham v. Bedingfield*, *supra*, footnote 27; namely, that where there is a disseisin *indebitatus assumpsit* cannot lie as if the disseisin is "meerly a wrong" bereft of privity. The court dismissed that argument, holding that "indebitatus assumpsit will lie for rent received by one who pretends a title; for in such a case an account will lie. Wherever the plaintiff may have an account, an indebitatus will lie." That reasoning was upheld by the court in *Howard v. Wood* (1679), 2 Lev. 245, 2 Show. K.B. 21. After *Howard v. Wood*, *indebitatus assumpsit* was the standard approach to recovery in cases of usurpation of office.
41. At the time, it was a tort to unlawfully demand payment of money without colour of right: see Jackson, *supra*, footnote 39, at pp. 7 and 64-72, and Percy Henry Winfield, "Quasi-Contract Arising From Compulsion" (1945), 62 S. African L.J. 25, at pp. 25 and 37-9.
42. *Astley v. Reynolds* (1731), 2 Str. 915.
43. *Morgan v. Palmer* (1824), 2 B. & C. 729 (K.B.), at p. 734. *Per* Lord Kenyon in *Fulham v. Down* (1798), 6 Esp. 26*n*: a payment is not voluntary where there is "immediate and urgent necessity" to pay an illegal demand.

pay for the return of wrongfully distrained chattels.[45] In such cases, the defendants paid over the amount of their damages (*e.g.*, the value of the pawned goods) *and then some*, which made the quasi-contractual remedy of disgorgement preferable to an action in detinue.

3. *The plaintiff wishes to waive conversion, deceit or trespass*. This formulation most closely mirrors the modern form of "waiver of tort." The leading case is *Lamine v. Dorrell*.[46] Following *Howard v. Wood*,[47] where (as the first form of cases recognizes) the court permitted the plaintiff to waive the tort of usurpation of office in order to pursue a more powerful remedy, the *Lamine* court extended that authorization to encompass waiver of conversion rather than usurpation of office, and permitted action in *assumpsit* rather than assize of novel disseisin. The defendant in that case had his authority as administrator of an estate revoked, but subsequently sold certain of its debentures. The rightful executor of the estate recovered the proceeds of the sale by claiming *indebitatus*

44. These cases include *Mead v. Death* (1700), 1 Ld. Raym. 742 (K.B.), in which the plaintiff failed to recover because there was a more appropriate action for a judicial writ for restitution in the event the judgment had been overturned; *Cobden v. Kendrick* (1791), 4 T.R. 431 (K.B.), in which the plaintiff successfully sought to recover a settlement paid to dispose of a frivolous action against him by the defendant (which was not relitigation of a claim as there had been no judgment); *Brown v. M'Kinally* (1795), 1 Esp. 279 (K.B.), in which the plaintiff failed to recover money he was ordered to pay for the defendant's defective goods in a breach of contract case (as this *was* relitigation); and *Marriot v. Hampton* (1797), 7 T.R. 269 (K.B.), in which the plaintiff paid twice for defendant's goods by court order as he could not find a receipt, and failed in his action in *indebitatus assumpsit* when he found the original receipt. This was held to be another case of relitigating a settled claim. Jackson notes that *Farrow v. Mayes* (1852), 18 Q.B. 516, 118 E.R. 195, took it for granted that if A pays part of a debt to B, and then is forced by judgment to pay the whole, A is entitled to succeed against B to have the original, partial payment returned in an action for money received.
45. Such claims were recognized but unsuccessful in *Lindon v. Hooper* (1776), 1 Cowp. 414 (K.B.), and *Knibbs v. Hall* (1794), 1 Esp. 84 (K.B.). In the first case, the plaintiff failed for claiming a circumstantially unfair form of remedy (for damage feasant), and in the latter the plaintiff had failed to claim replevin in order to avoid paying over the illegally charged funds and was taken to have paid them voluntarily. This principle was followed in *Gulliver v. Cosens* (1845), 1 C.B. 788 (C.P.) and distinguished mildly on the facts in *Green v. Ducket* (1883), 11 Q.B.D. 275 (Div. Ct.). The availability of an action for money had and received when such funds are paid under compulsion was affirmed by the Court of Appeal in *Maskell v. Horner*, [1915] 3 K.B. 106 (C.A.), though it noted that the earlier cases largely turned on causes of action now abolished.
46. (1705), 2 Ld. Raym. 1216 (K.B.).
47. *Supra*, footnote 40.

assumpsit for money had and received against the defendant. Waiver of trover was treated as settled law in *Thomas v. Whip*[48] and was applied in many cases thereafter.[49] Jackson cites many cases for this latter proposition, but one in particular is notable. In *Hambly v. Trott*,[50] Lord Mansfield held that while actions in tort die with the tortfeasor, a wrongdoing that involves the acquisition of property shall still be actionable after his death. That is, while the right to compensation for the tort itself may terminate, the right to profit in property that continues to be legally vested in the plaintiff despite the tort is still actionable. The court held that the mandatory nature of the waiver of the tort against the deceased's estate — which could not respond to the claim *in personam* — still left open an action in *assumpsit* for the profits acquired from the plaintiff's property. The state of the law was that torts for which only monetary damages could be received in satisfaction of the claim (such as battery, deceit and false imprisonment) necessarily died with the tortfeasor.[51] If, however, some *property* belonging to the plaintiff remained in the possession of the tortfeasor's estate as a result of the tort, the fact that the defendant was a tortfeasor was not held to disrupt the imputation of an agreement, and thus the plaintiff's right to recover or profit from that property. Actions in replevin or detinue,[52] trover,[53] *assumpsit*, etc. were still available, where actions *not* rooted in the defendant's possession of plaintiff's property were not.[54]

48. (1715), Bull. N.P. 130.
49. Jackson lists *Hitchin v. Campbell* (1771), 2 Wm. Bl. 827 (K.B.); *Feltham v. Terry* (1773), Lofft 207 (K.B.); *Hambly v. Trott* (1776), 1 Cowp. 371 (K.B.); *Longchamp v. Kenny* (1779), 1 Doug 137 (K.B.); *Smith v. Hodson* (1791), 4 T.R. 211 (K.B.); *Bennett v. Francis* (1801), 2 Bos. & Pul. 550 (C.P.). In *Marsh v. Keating* (1834), 1 Bing. N.C. 198 (H.L.), the House of Lords assumed the law on this point was well settled.
50. *Hambly v. Trott*, *supra*.
51. John Houston Merrill *et al.*, eds., *The American and English Encyclopaedia of Law*, vol. 7 (Northport, Long Island, New York, Edward Thompson Co., 1889), at p. 332.
52. *Le Mason v. Dixon* (1627), W. Jones 173 (K.B.), p. 174.
53. Merrill, *supra*, footnote 51, at p. 334, note 2.
54. Merrill provides the example of *Perkinson v. Gilford* (1639), Cro. Car. 539 (K.B.), in which an action for debt was available against the executors of a sheriff that misapplied money, though there was no action available in the tort after his death. The tort of escape, however, in which the escape of a dangerous animal or substance from one's property on to another's is actionable, was not available to a plaintiff suing the tortfeasor's estate, as it had acquired no benefit therefrom: *Martin v. Bradley*, 1 Caines R. 124 (N.Y. Sup. 1803).

From these cases, we can see that when the pleading of a certain tort was impossible or unprofitable, *assumpsit* did not necessarily follow unless the defendant was in possession of the plaintiff's property, or profits resulting therefrom.[55] Neither the harm to the plaintiff nor the benefit to the defendant was a relevant consideration, except where the benefit to the defendant was derived from the use of the plaintiff's property and the plaintiff was thus concretely entitled to a remedy at law, in which case *assumpsit* would permit enforcement of that right.

4. The Money Restriction

Early cases of waiver of tort and action in *assumpsit* adhered to the old rule of an action in debt and assumed that *assumpsit* would not lie unless the defendant had received a specific amount of money.[56] The writ for action in *assumpsit* required a specific amount to be claimed,[57] and, in hearing *assumpsit* claims, the courts followed the common law rule developed under the form of action in debt that held that if a plaintiff did not state explicitly the amount of money had and received to the defendant's use in filling out his writ, the action would fail. As this meant that a defendant could escape liability simply by trading the wrongfully acquired property for other chattels,[58] and thereby not having received an identifiable amount of money by virtue of his wrong, this rule was gradually relaxed throughout the 18th century to permit recovery when the defendant had converted goods, benefited from detinue, etc. and the actual value he received could not be known precisely.[59]

---

55. Jackson notes that an action for trespass would *not* be recognized against the executors of an estate, and that *assumpsit* would *not* be permitted against them in such circumstances. This is counterintuitive to our understanding of waiver of tort and action in *assumpsit* being at this point used to vindicate property rights. As Ames explains, however, this was another quirk of ancient procedure; action for the debts of a lessee of land (actual or implied by trespass) were available against executors generally, so the action in *assumpsit* would have been superfluous. James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge, Mass., Harvard University Press, 1913), at pp. 167-168. For his own part, Lord Mansfield in *Hambly v. Trott*, *supra*, footnote 49, assumed trespass could be waived without turning his mind to this distinction.
56. *Nightingal v. Devisme* (1770), 5 Burr. 2589 (K.B.). This fusion of debt and *assumpsit* principles was all but inevitable, following *Slade's Case*, *supra*, footnote 36.
57. See *supra*, footnote 26.
58. Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution*, 7th ed. (London, Sweet & Maxwell, 2007), at p. 803.
59. *Longchamp v. Kenny*, *supra*, footnote 49.

It was still necessary to establish, however, that there was a presumptive or actual sale of the wrongfully possessed goods in order for the plaintiff to bring *assumpsit*.[60] If the defendant was still in possession of those goods, actions such as detinue and trover would be more appropriate. Nineteenth-century courts, for example, were firm that trover could be waived only if it would not prejudice the defendant's right to simply return the goods and pay nominal damages.[61] It *would*, in those cases, still be possible to waive the tort and sue the defendant in *assumpsit* if he had, for example, agreed to pay the value of the goods into court rather than agreeing to provide the goods themselves if the litigation was lost.

Jackson notes that "[p]resumably the reason why no plaintiff has ever sought to waive assault or libel is because he would be unable to establish any 'money received' by the defendant . . . he does not show that the defendant has received anything, for in such cases the loss to the plaintiff bears no relation to the gain (if there is any) to the defendant."[62] In the case of personal torts, *assumpsit* appears simply not to have been a useful action; it would have been impossible to fill out the physical "form of action" in its entirety, including the pleading of specific money amounts. Such pleadings would necessarily be incomplete and improper. Finally, waiver of tort and an action in *assumpsit* was also traditionally applied to proprietary cases wherein an action on the tort itself was barred, by statute or otherwise.[63]

5. The 19th Century and Statutory Reforms

Thus, at the dawn of the 19th century, waiver of tort was understood as a procedural step unique to proprietary claims in *assumpsit*: a way of permitting full recovery of profits wrongfully

60. *Leery v. Goodson* (1792), 4 T.R. 687 (K.B.); *Thurston v. Mills* (1812), 16 East 254, 104 E.R. 1085 (K.B.); *Swain v. Morland* (1819), 1 Br. & B. 370, 129 E.R. 766 (C.P.). Later cases suggested that the value of labour enticed away could be considered money had and received (*Lightly v. Clouston* (1808), 1 Taunt. 112 (C.P.), and *Foster v. Stewart* (1814), 3 M. & S. 191 (K.B.)), but the precedential value of these cases has been called into question: Jackson, *supra*, footnote 39, at p. 80, note 4. Be that objection as it may, nearly all of sampled 19th century treatises concerning waiver of tort refer to the enticement of apprentices as a valid ground for that waiver and action in *assumpsit*, which does support the notion that the money restriction continued to be eased throughout that period. See citations in footnote 67, *infra*.

61. *Bennett v. Francis*, *supra*, footnote 49.

62. Jackson, *supra*, footnote 39, at p. 80.

63. *Ibid.*, at p. 81.

derived from one's property, without that action being effectively precluded by the defendant pleading his own tort and rebutting the imputation of a quasi-contractual undertaking to pay those proceeds over. An 1829 treatise is explicit:

> In some cases where goods have been wrongfully taken, the plaintiff may wave [*sic*] the tort and sue upon an implied contract, as for goods sold and delivered. . . . But in cases where the tort is waved [*sic*], and an action of assumpsit brought, it is incumbent on the plaintiff to show a clear and indisputable title to the property.[64]

"Clear and indisputable title to the property" appears to have been a term of art pertaining to waiver of tort in the early 19th century, as it appears again and again in treatises describing waiver of tort.[65]

Starkie gives a helpful summation of the waiver of tort cases recognized by 1833, classifying the cases as matters of usurpation of office or title, fraud (*e.g.*, a bigamist holding marital property incident to an illegal second marriage), or of monies or chattels taken under duress.[66] Each of the cases cited involve the defendant's wrongful possession of the plaintiff's property, and the tort being waived in order to permit the plaintiff to proceed with a claim for a contractual remedy in *assumpsit* — often in cases where the preference for account of profits to damages would appear to be the natural motivator.

At this point, it is still evident that waiver of tort was not understood as an action of its own; *assumpsit* continued to be the form of action that required waiver of an underlying tort. The

64. Samuel March Phillipps, *A Treatise on the Law of Evidence*, 7th ed. (London, Joseph Butterworth and Son, 1829), vol. 2, at p. 110. Phillipps cites Abbott Ch. J. in *Lee v. Shore* (1822), 1 Barn. & Cress. 97 (K.B.), as the leading case. (Some editions will show 1 Barn. & Cress. 94.)

65. See, *inter alia*, Henry Roscoe, *A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius*, 3rd ed. (London, Saunders and Benning, 1834), at p. 227; Thomas Charles Morton, *A Practical Treatise on the Law of Vendors and Purchasers of Chattels Personal* (London, V. and R. Stevens, 1837), at p. 245. Note that the Morton text underscores the proprietary nature of waiver of tort, asserting without further adumbration that torts may not be waived if they cross the line into felony theft, also at p. 245. (Morton cites *Thorp v. How* (1702), Bull. N.P. 130, and *Sampson v. Gisling* (1702), Bull. N.P. 131) Day and Powell have it thus: "Where the owner of property, which has been taken away by another, waives the tort, and seeks to raise an implied assumpsit, it is incumbent on him to show a title to the property; and mere possession is not sufficient," *infra*, footnote 67, p. 478.

66. Thomas Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings*, 2nd ed., vol. 2 (London, J. & W.T. Clarke, 1833), at pp. 65-66.

strict forms of action had not yet been abolished by statute, and courts continued in the early 19th century to be concerned with the "form" of action rather than the "cause" of action: with the standard-form pigeonhole into which the action purportedly fit, rather than the fact pattern giving rise to an action. By the mid-19th century, the concept of waiver of tort had changed very little from its 18th-century conception.[67]

It was in the mid-19th century that the forms of action had at long last run their course. The standard-form pleadings were abolished by a series of acts in the latter half of the 19th century, and replaced with the now-familiar "cause of action" pleadings. That is, rather than simply filling out the pleadings as illustrated *supra*[68] and attempting to persuade the court that the facts of the case fit those uniform pleadings closely enough for the plaintiff to succeed, or that a legal fiction should be imposed so as to "make" the facts fit the form, plaintiffs were free to simply plead the actual

67. Consider the following definition:

> *Waiver of tort* — If a man has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property; or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterwards treat him as a wrong-doer, nor can he affirm his acts in part, and avoid them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong.

Charles Greenstreet Addison, *Wrongs and Their Remedies: Being a Treatise on the Law of Torts*, 2nd ed., vol. 2 (London, V. and R. Stevens, Sons, and Haynes, 1864), at p. 30. The overlap between waiver of tort and ratification that is apparent in this definition is one of the subjects in issue in *United Australia, Ltd. v. Barclays Bank*, [1941] A.C. 1 (H.L.). This definition coheres with those in contemporary treatises in both England and the United States. See, *inter alia*, Sir Arthur Underhill, *A Summary of the Law of Torts; or, Wrongs Independent of Contract* (London, Butterworths, 1873), at pp. 160-161; Francis Hilliard, *The Law of Torts or Private Wrongs*, 2nd ed., vol.1 (Boston, Little, Brown, and Company, 1861), at p. 44; William Wait, *The Practice at Law, in Equity, and in Special Proceedings, in all the Courts of Record in New York*, vol. 2 (Albany, New York, William Gould & Son, 1873), at pp. 359-360; and Sir John Charles Frederic Sigismund Day and Maurice Powell, *Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius*, 12th ed. (London, Stevens & Sons, 1870), at p. 529, which adds a normative suggestion:

> The right to maintain this action seems in such cases to be founded, not on the right to treat a mere tort as a contract, but on the right to refrain from suing for the tort, and to estop the wrongdoer from setting up his own wrong to defeat the plaintiff's remedy for the proceeds.

(That is, to estop the wrongdoer from the *assumpsit* defence that we have seen in the early 17th century: pleading and proving that he acted tortiously and that there was no actual or implied agreement, thus defeating the claim in constructive contract *and* being free from liability for the waived tort by virtue of estoppel.)

68. *Supra*, footnote 26.

facts of the case and request an appropriate remedy, as they are today. This process began with the Uniformity of Process Act 1832, which collapsed all forms of action into a single Writ of Summons, but still required the specific form of action to be pled therein.[69] Pleadings were then substantially revised by the Common Law Procedure Act 1852, which removed the necessity to plead a particular form of action in the uniform Writ of Summons; legislated revocable power over procedure to the courts; and institutionalized the practice of pleading a cause of action with specific reference to the facts and the remedy requested without requiring formal language.[70]

This procedural amendment was mirrored in equity by an Act that permitted plaintiffs to write a simple narrative bill of facts with a request for the remedy to which they felt entitled.[71] The two courts were then fused into a single Supreme Court of Judicature by the Judicature Acts 1873-1876.[72] These Acts ostensibly did away with the forms of action, and thereby the need for the legal fiction in *indebitatus assumpsit* to "shoehorn" a tortious act into one in quasi-contract, as the courts were now free to hear the facts and simply find a remedy in account to be appropriate. Despite that fact, treatises and cases continued to define waiver of tort and action in *assumpsit* as they always had. The basis for the court's awarding of remedies of account continued to be the legal fiction that a plaintiff that can prove indisputable title to property in a tortfeasor's hands (or profits from the conversion of that property) may choose to treat that tortfeasor as though he had undertaken to be the plaintiff's agent.

---

69. An Act for the Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster, 2 Will. IV, c. 39.

70. Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76; see s. 3:

> It shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons, issued under the authority of this act.

Section 224:

> Such new or altered Writs and Forms of Proceedings may be issued, entered, and taken, as may by the Judges of the said courts . . . be deemed necessary or expedient for giving effect to the provisions herein-before contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order.

and Schedule "B," respectively.

71. Act to amend the Practice and Course of Proceeding in the High Court of Chancery, 1852, 15 & 16 Vict. c. 86, generally, ss. 1-10 in particular, especially s. 10.

72. Most importantly, Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66; Supreme Court of Judicature Act 1875, 38 & 39 Vict., c. 77. Twelve Judicature Acts were passed in total between 1873 and 1899.

As the now-unitary English courts entered the 20th century, waiver of tort and action in *assumpsit* was alive and well, though it was no longer strictly necessary to plead that legal fiction of an agreement. As the facts and desired remedy could now be pled freely, it was no longer necessary for the law to impute that there was *in fact* an agreement between the wrongdoer and the plaintiff. Rather, the *effect* of the legal fiction — the right of the plaintiff to effectively elect between pursuing a tort or quasi-contractual action in these circumstances — persisted, though its form, which alleged an actual agreement, did not. A pleading of the facts in such a case would plainly show that there was no actual agreement between the plaintiff and the tortfeasor. It was thus widely understood at the turn of the 20th century that plaintiffs were entitled to waive a tort and proceed in *assumpsit* in order to extract a contractual remedy from a defendant in wrongful possession of the plaintiff's money or property. With the forms of action abolished, the imputation of a promise on the wrongdoer's behalf ceased to be mentioned in pleadings, as such an agreement would not exist on the facts, and the facts of the case were now the entire content of the pleadings. As a result, the imputation of a promise was de-emphasized in treatises and cases on the subject. The treatment of waiver of tort and action in *assumpsit* as a mere election of remedies came to be ascendant in its stead in treatises and textbooks across England, the United States and Canada.[73]

In summary, by 1900 waiver of tort and action in *assumpsit* had evolved into a plaintiff's option to waive his right to pursue tort damages (through waiver of tort) and instead claim a contractual remedy (through action in *assumpsit*) when a tort lay on the facts and the defendant was a tortfeasor in possession of property to which the plaintiff had clear and indisputable title.

6. The Question of Election

The matter of electing to waive a tort is one that has suffered from some degree of confusion in recent years, and here it may be appropriate to digress from our chronology to address the modern question as to whether waiver of tort, if it still exists, may be either

73. See, *inter alia*, Keener, *supra*, footnote 23, pp. 159-213; Thomas Willes Chitty, John Herbert Williams and Herbert Chitty, eds., *A Selection of Leading Cases on Various Branches of the Law*, vol. 2 (London, Sweet and Maxwell, 1903), pp. 146-159; International Correspondence Schools, ed., *Principles of Law*, vol. 1 (Scranton, Pennsylvania, International Textbook Company, 1902-1903), p. 57; Sir Arthur Underhill, J. Gerald Pease, and W.J. Tremeear, *The Law of Torts*, 3rd Canadian ed. (Toronto, Canada Law Book Company, Ltd., 1912), pp. 289-290.

a cause of action or an election of remedies. With the adoption of the procedural reforms — reforms that in large part still dictate the form of our civil procedure — we have the clearest picture as to whether waiver of tort is one or the other. Waiver of tort has never been considered a cause of action of its own. *Assumpsit*, often referred to in the 20th century as an action in "quasi-contract," was recognized as a cause of action after these reforms, as it had long been a recognized *form* of action prior to those reforms. With these procedural changes instituted, however, there ceased to be any practical difference between a pleading in tort and a pleading in waiver of tort and action in *assumpsit*; both revealed that a tort had been committed on a bare reading of the facts, though the remedies requested were clearly distinct from one another.

The facts pled in cases of waiver of tort and action in *assumpsit* after the Common Law Procedure Act 1852 always demonstrated that a tort had been committed. This was necessarily so, as, without a tort, there would be no impetus for the court to impute the quasi-contract. Because the pleadings in tort and "waiver of tort and action in *assumpsit*" would necessarily be identical, it is plain that the waiver is merely a choice of remedies, rather than a cause of action. The two actions are no different until the remedies stage; the facts in the pleadings must be proven, and this will invariably require the plaintiff to prove both the tort and the title to the property in the defendant's possession.

When the forms of action prevailed, an express agreement was pled as per the standard form reproduced *supra*, and the court applied a legal fiction in *assumpsit* to impute that such an agreement did in fact exist. Following the Act, as the actual facts of the case were pled, they would necessarily demonstrate a tort rather than an express agreement. As a matter of precedent, however, it was well established that victims of a tort with clear and indisputable title to property in the hands of a wrongdoer could sue in *assumpsit* for a contractual remedy. Thus, the plaintiff had only to *prove the tort* in order to be entitled to the contractual relief; that is, the plaintiff had to show that the defendant was a wrongdoer, and one in possession of the plaintiff's property. This fact was still plainly recognized by the House of Lords in the mid-20th century:

> The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, i.e., damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has

> wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress.[74]

Provided that title to the wrongfully held property was proven, the facts that gave rise to a compensatory remedy in tort also gave rise to the implication of a contract in *assumpsit*, and the only difference that could concern the plaintiff was the remedy he would prefer after having proven the facts in the case, being required to waive forever the alternate cause of action before final judgment in the matter had been given.[75,76] Professor Keener puts the matter of election succinctly:

> If any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in assumpsit to recover the value of that which has been tortiously taken or used. The *remedies* in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and if he elect to sue in assumpsit, he is said to waive the tort. *The doctrine of waiver of tort is simply a question of the election of remedies*. With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. . . . In fact, when the assumpsit is brought, *it is only by showing that the defendant did a tortious act that the plaintiff is able to recover*. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.[77]

---

74. *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 19.
75. As the plaintiff could not have the benefit of both causes of action, the tort and the quasi-contract, due to the manifest unfairness to the defendant of paying both damages *and* returning the plaintiff's property and potentially profits derived therefrom, the plaintiff was required to elect one action or the other prior to judgment. This late-stage election is demonstrative of the fact that the facts to be proven did not differ between tort and waiver of tort pleadings; the defendant merely had to defend the tort, and the distinction between tort and quasi-contract was only relevant at the remedy stage. At the time of Professor Jackson's writing in 1936, actions in tort such as trespass and trover and actions in waiver of tort for money had and received could be pled simultaneously, as long as the conclusive election was made prior to judgment: Jackson, *supra*, footnote 39, at pp. 83-84.
76. It was long understood, of course, that *res judicata* barred an election to proceed in waiver of tort and action in *assumpsit* where the underlying tort had already been resolved. For example, winning a case against a defendant in trover (*i.e.*, for return of the property or the value thereof) barred an action in *assumpsit* for money had and received (*i.e.*, for the profits the defendant obtained from the wrongfully obtained property, which has now been returned): *Hitchin v. Campbell*, *supra*, footnote 49.
77. William Keener, "Waiver of Tort" (1892), 6 Harv. L. Rev. 223, at p. 223 (emphasis mine).

That being the case, "waiver of tort" has since that Act been only a matter of election of remedies. If "waiver of tort" could be considered a cause of action, its elements would be no different from those of the underlying tort, with proof of title to the wrongfully held property in addition — though these were more properly understood as the elements of the *assumpsit*. The waiver of tort has always been the mere procedural step of formally abandoning one's right to sue in tort in order to proceed with the quasi-contractual action; it was the quasi-contractual action in *assumpsit* that required proof of facts sufficient to ground the court's implication of a contract (*i.e.*, the tort and the title to the property wrongfully in the defendant's hands), and that provided a quasi-contractual remedy in disgorgement of profits.

7. The Supposed Birth of "Waiver of Tort" as an Independent Action

Although waiver of tort was a mere election to proceed in quasi-contract, in the early 20th century treatises and scholarly works begin to abbreviate the action to mere "waiver of tort." Although it was clearly understood by scholars in that period that the notional action was in quasi-contract, and that a waiver of tort merely permitted the recognized action in *assumpsit*, the waiver itself was now where the "action" was. The actual suit may formally have been in *assumpsit*, but now that the forms of action had been abolished and the pleadings were identical as between the *assumpsit* and the tort, the defining feature of pleading in quasi-contract was in fact the waiver and not the assertion of an undertaking. Since only the election of remedies made the *assumpsit* pleading any different from the tort pleading, the act of waiver came to be the distinguishing factor of the former action.

It is for this reason, I expect, that treatises began to headline their chapters on the subject "Waiver of Tort" without referring to the increasingly arcane action in *assumpsit*, and that judges came to refer simply to plaintiffs choosing to "waive the tort" without going through the formality of articulating the legal fiction. Thus did the phrase referring to the procedural *precondition* to action in quasi-contract come to be understood as referring to the action *itself*, and authorities began gradually to speak of the "doctrine of waiver of tort." It must be borne in mind, however, that if "waiver of tort" and "waiver of tort and action in *assumpsit*" are to be conflated under the former term of art, it does so only

conditionally upon the knowledge that "waiver of tort" was never an originating process, before or after the abolition of the forms of action. Prior to the abolition, the originating process was one in *assumpsit*, and by bringing that action, the potential action in tort was said to have been waived; the plaintiff chose to submit one writ rather than another. Following the abolition, the tort was directly pled on the facts and by receiving a quasi-contractual remedy the plaintiff was held to waive the right to recover tort damages.[78] To cohere with the time period under discussion, and at long last in the interests of concision, I will henceforth refer to the doctrine of waiver of tort and action in *assumpsit* merely as "waiver of tort."

IV. THE 20TH CENTURY TO THE PRESENT

Before delving into 20th century developments in waiver of tort, a brief comment on the organic nature of the common law and the limitations of an historical analysis of the common law is in order.

1. The Adaptability of the Common Law and the Role of History

As will shortly be seen, as the Bench and Bar grew further and further removed from the practice and study of the old forms of action, the precise content and justification for waiver of tort began to disintegrate, and shifting purposes came to be imputed to the doctrine. Judgments concerning *causes* of action required *reasons why* a given set of facts led to a certain result. It no longer sufficed to say that this was an action in X, all cases of X are pled identically, and if the facts underlying X are proven, Y is the remedy. In the absence of the *forms* of action that made waiver of tort necessary and demonstrated a normative relationship between the facts pled and the remedy received, legal authorities began (and continue) to apply their best judgment as to the principles underlying the doctrine, or that *should* underlie the doctrine, and to extrapolate from that multifarious reasoning the direction in which the doctrine should develop.

The proprietary restriction on waiver of tort, for example — which the reader will recall was initially not a *restriction*, but a relaxing of the forms of action in order to allow a plaintiff to proceed with a more muscular remedy than the one available in

78. The question of when precisely this election could be considered to have taken place and conclusively barred future actions in tort was considered by the House of Lords in the currently controlling *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67.

earliest "express" *assumpsit* — was apparently further relaxed in the 20th and 21st centuries.[79] In the absence of historical context, there was to the 20th century practitioner no apparent reason why personal torts could not also be waived. Without the benefit of the historical background, the contradiction between asserting a quasi-contract intended to permit the vindication of property rights and the simultaneous assertion of a personal tort would be impossible to appreciate — particularly in an era where the two could seemingly be pled together as a matter of intuition. It would never occur to a modern practitioner that there had been at one point a belief that a tortfeasor could only be a stranger, and that that fact would destroy the imputation of privity in quasi-contract. Ignorance of the source of the problem, however, does not necessarily invalidate this development of the law.

As a pressing current matter, there is an ongoing question as to why waiver of tort cases appear to entitle plaintiffs to an account of profits on a lower threshold than is necessary in equitable actions in unjust enrichment or constructive trust. It is not immediately clear to the modern reader from cases cited in treatises why it is that on the facts of a tort plaintiffs have apparently been entitled to claim the defendant's profits for centuries. Without the historical lens showing that each successful case was one in which the plaintiff had already proven title to the property in the defendant's possession, normative explanations necessarily began to develop in place of historical ones. This *ad hoc* development of principle is not unique to waiver of tort, however. Nor are these assumptions or conjectures to be considered necessarily "wrong."

Unlike statutory law, the commonly regarded strength of the common law is its amenability to change and shifting justifications. Indeed, some of our most sacrosanct common law principles, such as the necessity of finding an accused guilty "beyond a reasonable doubt," have been predicated on a misunderstanding — even a *perverse* understanding — of the rationale behind the original doctrine.[80] As developments in waiver of tort increasingly

79. As will be shown directly, however, this is not really a *development* of the doctrine, but a hearkening back to the original form of express *assumpsit*: a reading-in of a promise to perform satisfactorily in a contract not made under seal. Consider, for example, the pleadings in *Koubi v. Mazda Canada Inc.* (2010), 189 A.C.W.S. (3d) 32, 2010 BCSC 650, in which the plaintiff class alleged the sale of unmerchantable products. To be precise, the "new" development is not the waiver of a personal tort but the contention that personal torts should give rise to a disgorgement of profits, where in the earliest — but precisely analogous — *assumpsit* cases, the remedy was in breach of contract.

80. Professor Whitman argues rather persuasively that the "beyond a reasonable

demonstrate a misunderstanding of the original doctrine in the late 20th and early 21st centuries, it is important to remember that inconsistency with the original principles of the doctrine does not necessarily indicate bad law or a perverse development. It is not only open to the common law to "repurpose" arcane rules to fit modern needs — it is occasionally to its great and especial credit that it does so.

As an example of this organic capacity of the common law, 20th century courts did come to contemplate that personal torts could be waived, though to no appreciable benefit. The election was ultimately one to proceed in contract rather than tort — with a remedy for breach of contract, rather than restitution. The earliest cases of *assumpsit*, as we have seen, were actions in *express assumpsit*: they were essentially tort actions between contracting parties that were shoehorned into the law of contracts. The reader will recall the case of the negligent barber who agrees to shave the plaintiff and causes him great injury — the courts would not recognize the personal tort, as the defendant was not a stranger to the plaintiff, and therefore imputed the contractual provision into the express agreement that the work should be done competently.

This principle was still alive in the 20th century. It was understood that personal torts could be waived in order to proceed in *assumpsit*:

> If, for instance, the plaintiff was injured through the negligence of a railway company carrying him as a passenger, then he could sue in case or assumpsit; under the Common Law Procedure Act, 1852, s. 41 the two forms of action could be brought together as separate counts in one action; there is no need of election, for *there is both a tort and a breach of contract*, and judgment may be given for the plaintiff without specifying whether he has succeeded on one count or on both.[81]

---

doubt" standard was initially intended to *secure* convictions from a justifiably fearful jury that sought any fanciful excuse to avoid condemning a neighbour to the gallows, rather than to promote a heavy burden on the Crown or the principle of the presumption of innocence: James Q. Whitman, *The Origins of Reasonable Doubt: theological roots of the criminal trial* (New Haven, Connecticut, Yale University Press, 2008).

81. Jackson, *supra*, footnote 39, at p. 82. At the time of his writing, both actions in tort such as trespass and trover and actions in waiver of tort for money had and received could be pled simultaneously, as long as the conclusive election was made prior to judgment (pp. 83-84). Lest I be counted guilty of the narrow citation currently endemic to the waiver of tort jurisprudence, I must be clear that Jackson is saying, in context, that there is no need to elect between the two *actions*, as the pleadings are identical — a "win" on tort is a "win" on quasi-contract — though he is later clear that there is a need to elect between the *remedies*.

Note that the remedies available in both the railway and barbershop examples above are in tort or in breach of contract, not tort or disgorgement of profits. The *assumpsit* lies not on tortious use of property, but on the earliest justification for the form of action: the implied promise to perform competently. Disgorgement of any profits realized by the defendant in this case would not be available, as unlike proprietary cases in trover, conversion, etc., breach of contract does not admit of that remedy. Thus, as of 1936 it would be expected that several of today's class proceedings, such as *Serhan Estate v. Johnson & Johnson*,[82] *Koubi v. Mazda Canada Inc.*,[83] and *Goodridge v. Pfizer Canada Inc.*[84] could never succeed in a restitutionary claim in "waiver of tort." They would be entitled to either tort damages or damages under the undertaking to perform satisfactorily implied by express *assumpsit* in the actual contracts for sale of goods; they would have no proprietary basis for bringing the *implied* ("*indebitatus*") *assumpsit*, which would admit of a disgorgement remedy.

The plaintiffs in *Serhan* and a segment of the class in *Goodridge*, however, could not go even this far as *assumpsit* would not lie, either in its proprietary or contractual sense. The defendants were not in possession of any property that belonged to the plaintiffs, nor did they have any contracts with them. The *Serhan* class had their blood glucose monitors paid for by the government, and the *Goodridge* class consists of those persons who were prescribed and ingested the drug Neurontin and their family members — not necessarily those who *purchased* the drug. As a result, if these plaintiff classes were to waive the tort and proceed in assumpsit in terms of reading in an implied promise to perform competently, they would fail in their cause of action; the defendants *were* strangers to the plaintiffs, and there is no contract into which a court could read the undertaking to perform competently via express assumpsit. As there could also be no evidence that the property of the plaintiffs was wrongfully in the hands of the

82. *Supra*, footnote 1: a product liability case in which the plaintiff class claimed disgorgement of profits despite being unable to demonstrate any injury or loss resulting from a defective product, and being further unable to demonstrate that they were parties to the (actual) contract.

83. *Supra*, footnote 79: a product liability case in which the plaintiff class proposed as a common question whether or not the class was entitled to "any part" of the sale proceeds from vehicles that were allegedly more prone to break-ins by virtue of an allegedly defective door-locking mechanism.

84. *Supra*, footnote 3: a pharmaceutical case in which the plaintiff class sought some part of the proceeds from the sale of the drug Neurontin, which the class alleged could cause suicidal ideation in some of its users.

defendants, even if there was an underlying tort proven on the facts, there could be no quasi-contract to return the money had and received to which the plaintiff classes could show clear and indisputable title and thus *indebitatus assumpsit* would fail. At the common law of 1936, therefore, these could only be recognized as tort cases.

This is perhaps the clearest example of the role history can play in informing the development of the common law. Whether or not disgorgement is appropriate in the circumstances of a personal tort is an open question. There is a lively and principled debate on the subject, and weighty authorities carry the banner on both sides. This question is, however, in essence an argument that the court should make available a *new* remedy in waiver of tort, not an argument that courts traditionally *have* made that remedy available. They have not. That certainty is the contribution of history. In considering whether or not courts *should* make it available, or whether or not the movement towards that new principle is positive, history is not competent to inform the debate.

2. The 20th Century: The Doctrine Before *United Australia*

Returning to the "meat" of the development of waiver of tort throughout the 20th century, the understanding of the doctrine continued to be applied as it was at the turn of the century for more than 40 years. Treatises were still clear as to the content of the doctrine:

> When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff. But, by waiving the tort, the plaintiff estops himself from recovering any damages for it.[85]

The quoted work, published in Canada in 1912, does away with the language of *assumpsit* in its chapter on waiver of tort.

The leading American authority on waiver of tort, as cited in 1924,[86] was explicit that the proprietary requirement was still in force in 1910:

> It is not enough that a moral obligation exists, for such an obligation exists in all cases of crimes and torts. If A batters B's face, . . . a duty to act certainly

85. Underhill, *supra*, footnote 73.

86. The Corbin article immediately below is cited as leading authority by Yale law professor Walter Wheeler Cook in his *Cases and Other Authorities on Equity*, vol. 3 (St. Paul, Minnesota, West Publishing Company, 1924), p. 1007.

> devolves upon A immediately. He should repair the damage, . . . but B cannot use the action of *assumpsit*. B can use that action only in case A's wrongful act has resulted in A's unjust enrichment. In such case A has a sum of money or other property in his possession, and he is under a duty of giving it to B.[87]

The author noted express *assumpsit*'s continued use in reading implied conditions into contracts, and recognized that *indebitatus assumpsit* lay for money and goods held or converted, and that action lay for implied hire in the event the goods had been returned.[88] Increasingly, however, textbooks collapsed the distinction between the two forms of *assumpsit*, referring to both powers as actions in simple "*assumpsit*." The modern reader should be cautious, however, to recall — as these authorities did — that the former action was not predicated on a proprietary interest, but the latter was.

The only personal tort outside of contract the leading American text recognized in 1910 as being amenable to waiver of tort was the tortious compulsion of labour, as it was analogous to detainer of goods.[89] The work coheres with 19th century jurisprudence in calling waiver of tort a mere election of remedies, though it is finally explicit that the action is one in tort rather than *assumpsit*, now that there is no distinction between the two in pleadings:

> The cause of action is a tort, and the tort exists as the cause of action and must be proved as the cause of action from first to last. No trick or legerdemain on the part of the plaintiff can change the tort into a contract. Neither can the law do this . . . The *assumpsit* alleged in these cases is a mere fiction and is not the cause of action. . . .
>
> . . . . .

87. Arthur Linton Corbin, "Waiver of Tort and Suit in Assumpsit" (1910), 19 Yale L.J. 221, at p. 226. Professor Corbin was emphatic that waiver of tort should be abolished where the forms of action were no longer in place. In discussing the expansion of the ancient forms of action throughout legal history, his commentary at pp. 221-222 is particularly *à propos*:
    > [I]t suffices to say that . . . the application of old remedies to new rights caused lawyers and judges, from that day to this, to describe the new rights in the same terms as the old rights. The habit is inveterate and the results are often pernicious. The new rights are actually different from the old rights, but it requires a clear head for analysis and some knowledge of legal history to tell them apart and to understand their true character . . . [a]n examination of the cases dealing with [quasi-contractual forms of action] will quickly demonstrate how many are the judges who do not understand their true character, and how easy it is to be led astray by the misleading terminology.
88. *Ibid.*, at p. 229.
89. *Ibid.*, at pp. 233-234.

> Is the action of *indebitatus assumpsit* in these cases *an action for damages for a tort*? Yes, it is. Except, because of the *form* of action used, the damage is to be measured by the value of the goods or use or labor. Other elements of damages are waived. This is what waiving the tort and suing in *assumpsit* really means.[90]

The author does refer, however, to "much incorrect theory on the subject of [the] election of remedies," and deals at some length with issues of timing: when can a plaintiff be said to have irrevocably elected to waive the tort? His position is that "the doctrine of election is really an application of the doctrine of estoppel . . . [M]erely *bringing* suit in one form should not be regarded as a conclusive election."[91] Identical controversy was taking place in the rest of the common law world in the mid-20th century. While most of the concepts underlying waiver of tort remained consistent with the above through to 1936,[92] the question of timing persisted as a difficulty. This was presumably because plaintiffs in the age of forms of action clearly waived an action in tort by submitting a writ in *assumpsit* instead — and if that action failed, the tort action would be precluded by virtue of estoppel. Following the procedural reforms of the 19th century, as the pleadings admitted of a remedy in either tort *or* quasi-contract, it was for the first time unclear when that tort had been conclusively waived. The House of Lords sought to dispense with that question in a 1937 case, *United Australia, Ltd. v. Barclays Bank*,[93] which is held by many contemporary authorities to be the most recent, controlling decision on the doctrine of waiver of tort in Canada.[94]

---

90. *Ibid*., at pp. 235 and 243. It is intriguing to note that the normative arguments so persuasively made by H. Michael Rosenberg in his recent article, "Waiving Goodbye: The rise and imminent fall of waiver of tort in class proceedings" (2010), 6 Can. Class Action Rev. 37, concerning the extent of the defendant's liability to the plaintiff actually coheres with those advanced by authorities at the turn of the century:

    > But it may be said that the plaintiff ought to recover the full amount of the defendant's unholy enrichment because it is unjust for the defendant to retain any of it. It does not seem so certain, on examination, that this is true. Is the plaintiff justly entitled to be put in any better position than he was in before the tort was committed? If the defendant puts the plaintiff in the same position, is he not square with the world, or at least with the plaintiff? Is he not, as against the plaintiff, entitled to keep anything else that he has obtained? Perhaps the defendant ought to be *punished* for his tort, but if so the fine ought to go to the state, and it ought to be measured by the character of the wrong, and not by the amount of the profit made out of it by the defendant.

    Corbin, *ibid*., at pp. 244-245.
91. *Ibid*., at p. 239.
92. See Jackson, *supra*, footnotes 39 and 75.
93. *Supra*, footnote 67.
94. See, most recently, Rosenberg, *supra*, footnote 90, at pp. 47, 55 and especially pp.

3. *United Australia*

The facts of *United Australia* may be briefly stated. Corporation A drafts a cheque for £1,900 to Trust B. The secretary of Corporation A endorses it to Trust B without proper authority. Trust B puts the endorsed cheque in the bank. Bank C makes no inquiries as to the suspicious endorsement. Corporation A sues Trust B, claiming money had and received to the defendant's use or a constructive loan of the money: an apparent claim in quasi-contract. Corporation A is successful in default of Trust B's appearance, but that judgment is set aside. Trust B then goes into liquidation, and Corporation A's hopes of recovery sour. Corporation A then realizes that its secretary is responsible for the endorsement of the cheque. Corporation A realizes Bank C's fault in accepting that improperly endorsed cheque and takes action against it in conversion, or alternatively negligence, or alternatively money had and received, claiming that the conversions of the secretary, Trust B and Bank C had all been tortious. Bank C defends, admitting the conversion but saying that by successfully taking action against Trust B in quasi-contract, Corporation A had irrevocably waived whatever tort in which Bank C may be jointly liable.

The matter in question is one of timing. When did Corporation A waive the tort, if it ever did? Did it do so by claiming in quasi-contract against Trust B? Did it do so in obtaining judgment in quasi-contract against Trust B? Did it never waive the tort, as its judgment was never satisfied? There is an ancillary question as well: Does proceeding in quasi-contract against Trust B bar an action in tort against a third party? The House of Lords ultimately decided that a tort is not waived until judgment is satisfied, and that proceeding against one party in waiver of tort does not bar an action in tort against a third party, as the rights asserted in both cases are consistent with each other.[95] (That is, as both rely on the

59-60 (though Mr. Rosenberg does suggest that *Serhan Estate v. Johnson & Johnson* (2004) is the leading Canadian case at p. 51. Cullity J. does not, however, purport to define the doctrine in that case, but holds that its content is a valid subject for trial. Indeed he concedes it has not been defined in *Dennis v. Ontario Lottery and Gaming Corp.*, *supra*, footnote 4; Murray, *supra*, footnote 17, at pp. 10-11.

95. We have Lord Denning to thank for the result of this judgment. Newly King's Counsel, he acted as barrister for the successful corporation. This is more than mere trivia. As we shall see, one of His Lordship's judgments, *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, [1952] 1 All E.R. 796 (C.A.), has recently been taken in Canada as supporting the proposition that no harm

same pleading of the same tort on the facts, there is no waiver in the first case of the *fact* of the tort and the right to recover therefrom.)

The House of Lords attempted to bring some order to conflicting precedent by overruling several contemporary lower cases. In so doing, their speeches largely affirm the received wisdom on the subject of waiver of tort.[96] Their Lordships are consistent with precedent that a tort must be proven in order to proceed in waiver of tort,[97] and that there is no distinction between pleading tort and pleading waiver of tort, save for the remedy requested.[98] Viscount Simon L.C. concluded that it is *satisfaction* of a claim in quasi-contract that constitutes an irrevocable election.[99] In terms of the third-party question, it was held that the facts demonstrated two separate conversions, and both torts stood independently of one another: "two persons are not joint tortfeasors because their independent acts cause the same damage."[100] As a result both of the bank's tort being independent and the claim in quasi-contract never being satisfied, Viscount

---

need be proven in order to waive a tort. It is thus relevant to note here that Lord Denning was extremely well acquainted with the doctrine of waiver of tort just 11 years prior to penning the decision in *Strand Electric*, and that he made no reference to it whatsoever in that case. That omission is evidence that he did not intend for *Strand Electric*, discussed further *infra*, footnote 148, to engage or affect waiver of tort jurisprudence.

96. Lord Atkin gives particular thanks to Professors Ames, Jackson, Holdsworth and Winfield for their explanations of the doctrine of *indebitatus assumpsit*. With the exception of Winfield, who coheres with the other authors, these are the same authorities the reader will be familiar with from the earlier Parts of this article. *United Australia v. Barclays Bank* is consistent with and decided upon the same historical accounts of waiver of tort canvassed in this paper. *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 26.

97. *Ibid.*, at p. 18:

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

98. *Ibid.*, at pp. 18-19:

> [A]fter the Common Law Procedure Act, 1852, and the Judicature Act, 1875 . . . it is now possible to combine in a single writ a claim based on tort with a claim based on assumpsit, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. . . . The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, i.e., damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress.

99. *Ibid.*, at pp. 16-18.

100. *Ibid.*, at p. 19.

Simon held that the action against the bank was not barred by the action against the trust.

Lord Atkin explored the doctrine in more length, in accord with the authorities above.[101] His Lordship noted that waiver of tort is different from the case of ratification, in which case both parties consent that the tort should be considered a contract: in such a case, the tort is truly waived before the case is satisfied; both parties call the act a contract and proceed with pleading facts that would not be consistent with the fact of a tort.

The distinction between ratification and waiver of tort, His Lordship explains, is that the first involves pleading *rights* inconsistent with a tort, and the latter involves receiving a *remedy* inconsistent with a tort. In this case, for example, the corporation could have ratified the act of the secretary, calling the endorsement an authorized one and proceeding against the bank in debt, implying that both parties acted *rightfully*. The pleadings and affidavits filed to that effect would certainly have been inconsistent with any allegation of a tort. Thus the tort would have been said to have been waived prior to judgment, due to ratification of the tort. In explaining this distinction, His Lordship set forth the most famous and widely cited part of his speech, which is often and incorrectly quoted as though it was the *ratio* of the case:

> [I]n the ordinary case the plaintiff has never the slightest intention of waiving, excusing or in any kind of way palliating the tort. If I find that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them I am not excusing him. I am protesting violently that he is a thief and because of his theft I am suing him: indeed he may be in prison upon my prosecution. Similarly with the blackmailer: in such a case I do not understand what can be said to be waived. The man has my money which I have not delivered to him with any real intention of passing to him the

101. *Supra*, footnote 96. Lord Atkin does diverge slightly from the chronology of this paper on an historical point largely irrelevant to our purposes. His Lordship notes that the extension of the legal fiction in *assumpsit* may have come about in the first place because the action in debt in ancient times allowed wager of law: a defence in which a defendant could be successful by bringing in 11 witnesses to swear along with the defendant that he did not owe the plaintiff any money. This does not seem to be the case — *assumpsit* was quite well established before the courts set aside wager of law and assumpsit was largely preferred to the ancient debt forms in *Slade's Case*, *supra*, footnote 36. Certainly there were many procedural reasons to prefer the application of *assumpsit* rather than pursuing other actions, as for example the inability of plaintiffs to bring tort actions against those with whom they have been in privity. The latter does appear to have been the predominant cause for extending the legal fiction of *indebitatus assumpsit*, however, from a view of the very earliest cases and authorities, *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 26.

> property. I sue him because he has the actual property taken: and I suggest that it can make no difference if he extorted a chattel which he afterwards sold.[102]

The language Lord Atkin uses here has been widely taken out of its context: a distinguishing between ratification and waiver of tort. His Lordship contrasts this "ordinary case" to one of *ratification*, in which one *does* "excuse" or "palliate" the tort. We can see, not only from the part of his speech directly prior to this citation, but standing now in the historical context His Lordship understood at the time of his judgment, and mindful of the facts of the case, that Lord Atkin is *not* saying that there is no such thing as waiver of tort, nor that he cannot comprehend how a tort can be waived (he manifestly can), nor that the first case (against the trust) should have been considered one of tort *simpliciter*. Indeed, Lord Atkin finds that the plaintiff was justified in both cases. What this passage says, counterintuitively, is that the facts of the tort are not waived in a waiver of tort case — and we know this, as we understand that the pleadings in both are identical. As we have seen throughout this chronology, the tortious facts are *necessary* to prove entitlement in quasi-contract.

Lord Atkin holds here that the facts of a tort are waived in ratification, but not in waiver of tort cases. Ratification, it is held, is not waiver of tort — in waiver of tort, a tort is pled and the plaintiff elects a remedy in quasi-contract, while still *assuming there was no agreement*. In a waiver of tort case after the procedural reforms there is no longer any pretence that the plaintiff did in fact assent to the tort; the plaintiff *does* violently protest about it, but only requests his well-established quasi-contractual remedy while complaining of the tort. Lord Atkin says the tortious facts in the case of the blackmailer cannot be said to be waived by the plaintiff in a waiver of tort case. The respondent bank is claiming in effect that the fact that it committed a tort *was* waived conclusively by the plaintiff by its proceeding against Trust B in waiver of tort, which involves the legal fiction of a contract between the two — and Lord Atkin is *rejecting* that argument. Indeed, that formulation would make no sense after the procedural reforms of the 19th century; the fact that the defendant is a tortfeasor is necessary to making the quasi-contractual claim. In rejecting the bank's defence that the legal fiction of a contract precludes action in tort, His Lordship goes on to say:

102. *Ibid.*, at pp. 28-29. Note that Lord Atkin still comprehends waiver of tort as requiring the plaintiff to have title to the "actual property taken."

> I protest that a man cannot waive a wrong unless he either has a real intention to waive it, or can fairly have imputed to him such an intention, and in the cases which we have been considering there can be no such intention either actual or imputed. These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.
>
> Concurrently with the decisions as to waiver of tort there is to be found a supposed application of election: and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect *it is essential to bear in mind the distinction between choosing one of two alternative remedies, and choosing one of two inconsistent rights.*[103]

Modern authorities tend to close the above quotation at the end of the first paragraph, which is unfortunately quite misleading.[104] Lord Atkin says here, effectively, that as the corporation has never pled any facts that would imply inconsistent rights (*e.g.*, ratifying the acts of the secretary in one case and pleading the secretary's wrongdoing in another), it cannot be taken to have had the intention to waive the wrong, and the defendant cannot take advantage of that supposed waiver. The plaintiff did, in fact, plead the facts of the wrong throughout, though originally intending to elect a quasi-contractual remedy on those facts, rather than a compensatory tort remedy. The "ghost of the past" complained about by Lord Atkin is the bank's argument that the action in waiver of tort *really does* still impute an actual agreement as it did in the 17th century, and thus the very bringing of a waiver of tort claim against the trust implies a real contract (as it would in the case of ratification), which would involve claiming that there was an actual agreement with the secretary, and that all parties acted rightfully under this imputed contract — and that *would* be inconsistent with the rights in tort asserted at the second trial. Lord Atkin rejects that argument, holding that the contract is a mere fiction in waiver of tort cases, and that the ancient fiction of an actual contract may now be dispensed with; in the first case the corporation did not ratify the secretary's act or plead that there was an actual agreement by pleading waiver of tort — it was merely pleading tort with an intention to claim the quasi-contractual remedy. His Lordship thus concludes, explicit that waiver of tort is still valid purely as an election of remedies.[105]

103. *Ibid.*, at p. 29 (emphasis mine).

104. See, *inter alia*, Murray, *supra*, footnote 17, at p. 11; Maddaugh and McCamus, *supra*, footnote 18, at p. 24-8.

Lords Thankerton and Romer concur with the above, with Lord Romer also reinforcing the legitimacy of waiver of tort as an election of remedies in cases of conversion of the plaintiff's property, saying that after the election, "what was waived by the judgment was not the tort, but the right to recover damages for the tort."[106] His Lordship concurs that the pleading of an actual agreement was unnecessary after the Common Law Procedure Act, and that an action in waiver of tort does not ratify the tortious act, but pleads the wrongness of it in order to ground the plaintiff's entitlement to the quasi-contractual remedy. Lord Porter concurs as well, predicating his concurring speech on precedent supporting Lord Atkin's judgment that waiver of tort cases were always predicated on the fiction of an actual agreement. Lord Porter explains in detail that waiving a tort and pleading *assumpsit* was never properly understood to mean a waiver of the facts of a tort, but that the law implied a promise from tortious facts, and this pleading was not inconsistent with those facts.[107]

Thus, this judgment does *not*, as some have suggested, "kill" waiver of tort; it merely reinforces the fact that no actual contract need be pled, and that such has been the case since the statutory reforms of the late 19th century. It affirms that the facts of a tort are not waived in waiver of tort cases, as was well known, and that this is because it is the fact of a tort that gives rise to the quasi-contractual remedy. A bare reading of the case makes clear that the court recognizes the continuing validity of waiver of tort; indeed, the court justifies those elections both historically and normatively.

4. Canada before the Class Action

What few Canadian waiver of tort cases exist begin with an 1871 decision concerning the conversion of wheat[108] and a 1904 case for the value of a horse had and received, both of which conform with

105. *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, p. 30:
> I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one.

106. *Ibid.*, at p. 34.

107. *Ibid.*, at pp. 42-46. In his speech, Lord Porter aligns the origin of waiver of tort with the impossibility of pleading contract and tort together in the 17th century (*ibid.*, at p. 42).

108. *Rimmer, Gunn & Co. v. Hope*, 31 U.C.Q.B. 143 (Ont. H.C.).

the established jurisprudence;[109] they required clear and indisputable title, a proven tort, and did not require proof of an express agreement. Just prior to the decision in *United Australia*, the Supreme Court of Canada was similarly doctrinaire and in fact decided as the House of Lords did in terms of the timing of election in the case of *Overn v. Strand*.[110]

An Ontario Court of Appeal decision following *Overn* in 1932 is explicit that waiver of tort involves money had and received to the defendant's use, and was available when a bailee wrongfully converted the bailor's goods.[111] The doctrine then fell largely into disuse after *United Australia*,[112] possibly in light of the surging case law in unjust enrichment and constructive trust in the latter half of the 20th century. As it returned to use in the 1990s, however, the effect of the decades-long gap in the doctrine's use became unfortunately plain. A few examples will suffice.

In 1999, the Saskatchewan Court of Appeal heard the case of *Ross v. HVLD Systems (1997) Ltd.*,[113] and the difficulty presented by a court's reference to incomplete information had an unfortunate result. The plaintiff wished to waive the tort of negligent misrepresentation in order to claim expectation damages, and the court was required to rule on the allegation of material defects in an affidavit. Specifically, the plaintiff's pleading did not cohere with the usual requirement that the plaintiff establish title to property held by the defendant, which grounds the normative justification for entitling the plaintiff to the proceeds of his or her own rightful property. The court took up part of the plaintiff's waiver of tort claim in what appears to be *obiter*.

The court quoted Fridman's *Restitution*[114] thus:

> In the case of certain torts, where, by a wrongful act, the defendant acquired a liquidated sum of money or other tangible benefit, it was a frequent

109. *Henry v. Mageau*, 5 Terr. L.R. 512 (N.W.T. S.C.).

110. *Overn v. Strand*, [1931] S.C.R. 720, at p. 725:

> *Where goods have been wrongfully taken and sold* the owner may either treat the taker as a tortfeasor and sue him for damages for wrongful conversion, or he may treat him as his agent to make the sale and sue him for the purchase price as money had and received.
>
> If he adopts this latter course *and the taker pays over the purchase money received by him*, the courts hold the owner to have elected conclusively to waive the tort and to treat the taker as his agent, and he cannot afterwards treat him as a wrongdoer. (Emphasis mine.)

111. *Trusts & Guarantee Co. v. Brenner*, [1932] 2 D.L.R. 688 (Ont. C.A.) (revd on other grounds [1933] 4 D.L.R. 273).

112. *Supra*, footnote 67.

113. *Supra*, footnote 7.

114. G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto, Carswell, 1992).

> practice under the old forms of procedure for the plaintiff to "waive" the tort and sue for the liquidated sum as money had and received by suing in the action for *indebtedness* [*sic*] *assumpsit* rather than claiming damages by bringing the appropriate writ for the particular tort in issue.[115]

As should now be apparent, this definition is dangerously imprecise; the "wrongful act" leading to an account of profits was always the wrongful possession of the plaintiff's property, and the "acquisition" was always as a result of that wrongful possession. The "certain torts" were proprietary ones such as trover or conversion. The basis for the plaintiff's right to "the liquidated sum as money had and received" was the law's implication that the plaintiff should be entitled to have his or her property or the proceeds therefrom returned.

The court further blurred the content of the passage thus: "[W]aiver of tort is a means by which a party can claim a specified amount as compensation for certain wrongful acts instead of pursuing a claim for damages."[116] The court did, however, say that it was not necessary to decide the matter.[117] The effect of the court's restatement of the doctrine in Saskatchewan has yet to be determined.

This is to be contrasted with the Newfoundland Court of Appeal's historically compatible use of the same Fridman text in the 1998 case of *Hurley v. Slate Ventures Inc.*[118] The court declared that the phrase "waiver of tort" was an "unfortunate and unhelpful description of what is actually an election of remedies," and quotes Professor Fridman at the point at which he is explicit that the plaintiff was entitled to the benefit accruing to the defendant as a result of the latter's "wrongful dealings with the property [of the plaintiff]."[119] That court, however, also did not rule on waiver of tort directly.

Manitoba also had cause to consider waiver of tort in 1999, but the matter was a bit of a logical *ouroboros* that did not consider the merits or content of the election.[120]

---

115. *Ross v. HVLD Systems (1997) Ltd.*, *supra*, footnote 7, at para. 9.
116. *Ibid.*
117. *Ibid.*, at para. 11:
> We are not asked to say whether the tort of negligent misrepresentation is the type of tort which can be waived or whether the facts as plead constitute this tort. Nor is it our function to comment upon the merits of the action or, indeed, the legal points which will arise in order for the plaintiff to make out his claim.

118. *Supra*, footnote 7.
119. *Ibid.*, at para. 144.
120. *Davidson v. Manitoba Hydro*, *supra*, footnote 7. The plaintiff in that case sought to amend his pleadings in order to include a claim in waiver of tort. The court

There is then, in Ontario, a pair of cases concerning waiver of tort in 2003 and 2004. It is this line of authority that was cited directly in the decision of Cullity J. to certify the *Serhan* class, and it, in combination with a different Newfoundland precedent, collectively represents a new development in waiver of tort that may be referred to as the McCamus formulation, after Professor John D. McCamus, an eminent Canadian restitutionary theorist.

V. THE McCAMUS FORMULATION

In *The Law of Restitution*, co-authored with Peter Maddaugh, Professor McCamus argues that "once its true nature and scope is fully appreciated, waiver of tort ranks as one of the most useful and innovative tools for achieving the goals of the law of restitution."[121] His formulation would bring waiver of tort into a unified theory of restitution by doing away with the historical proprietary requirement in waiver of tort:

> [It] was once thought that the doctrine was limited to "proprietary" torts and that it had no application to "personal" torts . . . The reason for this is simply because the defendant will not usually be unjustly enriched as a result of such wrongdoing.[122]

As we have seen, it was thought at the time of their writing, and it *was indeed the law* that such was the case, and as has now been made clear, this was not the reason waiver of tort had always only been applied to proprietary cases.[123] The authors then cite *Hambly*

declared without further support that "[p]laintiffs' counsel have advanced the enrichment claim as an alternative to negligent breach of duty and have relied on the procedural concept of waiver of tort, which means no allegation of fault is made." (This is, as we have seen, not correct.) The court then held that there was no unconscionable conduct on the defendant's part, and that a motion to amend pleadings to include a claim in *unjust enrichment* could not be made out. It appears, in brief, that the plaintiff misunderstood waiver of tort, the court accepted the plaintiff's error as fact, the court then ignored that fact and conflated waiver of tort and unjust enrichment, ultimately dismissing the amendment on the equitable grounds that there was no unconscionable conduct. Miraculously, despite the fact that the plaintiff successfully mis-pled the test for waiver of tort and the court used the test for unjust enrichment instead of the action advanced, its result was correct in law for both actions.

121. Maddaugh and McCamus, *supra*, footnote 18, at p. 24-36. The nomenclature this paper applies to the formulation is predicated on Professor McCamus' apparently active advocacy for the above changes: see *Amertek Inc. v. Canadian Commercial Corp.*, *supra*, footnote 13; *infra*, footnote 139.

122. Maddaugh and McCamus, *supra*, footnote 18, at p. 24-9.

123. Note that the authority Professors Maddaugh and McCamus cite for this proposition is *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61, 101 A.C.W.S. (3d) 722 (Ont. S.C.J.). The ratio in that case is as follows (para. 14):

v. Trott[124] and put forward an ambitious new idea: "In our view, 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."[125]

The McCamus formulation would also obviate the need to prove an underlying tort.[126] While *United Australia*[127] is still the law in Canada, the McCamus formulation has been increasingly adopted in its place, often unconsciously, by trial courts across the country. This new formulation is not the basis for the confusion concerning waiver of tort, which has indeed persisted throughout its convoluted history.[128] There does, however, appear to be a direct lineage between Professors Maddaugh and McCamus' work and the current confusion over the necessity to prove a tort or clear and indisputable title to the defendant's profits. *The Law of Restitution* was first published in 1990, and its impact was immediate. Though the work is unambivalent about the fact that it challenges the present law and seeks to bring about a unified theory of restitution, it appears as though both courts and academics have been accepting the monograph as though the professors' able argument was in fact a statement of the law, which it is not.[129]

> [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. There is no unjust enrichment to the defendant. (Emphasis in original)

As I have raised elsewhere, this is a very recent case that dispenses with the question in a paragraph. Furthermore, saying that the doctrine is not available in the absence of unjust enrichment is not the same as saying that the *only reason it would not* be available is if there is an absence of unjust enrichment: G.M. Zakaib and J.M. Martin, "Recent Developments in Product Liability Class Proceedings" (Toronto, 2010 Ontario Bar Association Class Actions Colloquium, December 1, 2010), at Tab 7. As we have seen, this was not the reason courts "restricted" "waiver of tort" to proprietary claims. Rather, express *assumpsit* was *extended* to proprietary claims through the invention of *indebitatus assumpsit*. Personal torts had never been "waived" in this manner first because they would not satisfy the requirements of the express *assumpsit* form of action unless they were committed in the performance of an agreement, and secondly because the plaintiff would have had no other, more lucrative right in favour of which to waive tort compensation as plaintiffs did in these proprietary *indebitatus* cases.

124. *Supra*, footnote 49.

125. Maddaugh and McCamus, *supra*, footnote 18, at p. 24-9.

126. *Ibid*., at p. 24-2, note 4.

127. *Supra*, footnote 67.

128. Consider the famous couplet that has properly become obligatory content in waiver of tort papers: John Leycester Adolphus, "The Circuiteers — An Eclogue" (1885), 1 L.Q. Rev. 232, at p. 233.

1. Adoption of the McCamus Formulation before *Serhan*

With reference to the Maddaugh and McCamus text, the Newfoundland Supreme Court in *Club7 Ltd. v. E.P.K. Holdings Ltd.* adopts the uncontroversial point that the doctrine is an election of remedies that can apply in cases of conversion.[130] The court then articulates the action in quasi-contract as one in "unjust enrichment."[131] This is either an unfortunate conflation of the concept of quasi-contract with the equitable concept of unjust enrichment, which has a distinct jurisprudence of its own, or an oversimplification of the professors' nuanced argument that waiver of tort should be reconciled with equitable principles. The court then imports the unjust enrichment authorities into the doctrine of waiver of tort, with specific reference to equitable principles and the tripartite test for unjust enrichment previously alien to the doctrine of waiver of tort.[132] It reinforces that conflation by noting (correctly) that actions in *unjust enrichment* typically do not require proof of a tort or a contractual remedy.[133] That has, of course, never been the case in *waiver of tort* jurisprudence. The court then concludes by adopting the theoretical position of Maddaugh and McCamus on multiple points,[134] ultimately ruling that the plaintiff had made out a case in unjust enrichment.[135] This case was cited as

129. The authors refer to the concept in its general terms as part of their argument that it should be applied more broadly. Their non-specific introduction to the doctrine, "the plaintiff is simply giving up the right to sue in tort and instead electing to base the claim in restitution, thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct," (p. 24-1) was adopted as a statement of the law in *Pro-Sys Consultants v. Microsoft Corp.*, 2010 BCSC 285 (revd 2011 BCCA 186, leave to appeal to S.C.C. allowed 337 D.L.R. (4th) iv), at para. 42, and *Koubi v. Mazda Canada Inc.*, *supra*, footnote 79, at para. 60, despite the authors' forthrightness that the doctrine traditionally applied only to proprietary torts. The latter case cites the authors' work as standing for the proposition that "There is support in the recent authorities and among some academic commentators that an action in restitution *is* available to compel a defendant to disgorge an unjust enrichment gained through a wide-range [*sic*] of wrongdoings, such as breach of contract, breach of statutory duty, or breach of fiduciary duty." *Koubi v. Mazda Canada Inc.*, *ibid.*, at para. 62. (Emphasis mine.) Here it would have been more accurate to state that there is support for the proposition that the action in restitution *should be* available in such broad circumstances.
130. *Club 7 Ltd. v. E.P.K. Holdings Ltd.* (1993), 115 Nfld. & P.E.I.R. 271 (Nfld. S.C.), at paras. 200-202.
131. *Ibid.*, at para. 203.
132. *Ibid.*, at paras. 209-210.
133. *Ibid.*, at para. 220.
134. *Ibid.*, at paras. 225-228, 253, 258-64, 268 and 293.
135. *Ibid.*, at para. 319.

authority on *waiver of tort* in both the *Serhan* certification motion before the Divisional Court and the *Reid v. Ford Motor Co.* motion to amend.[136]

The direct lead-up to the present difficulties in the class proceedings jurisprudence was a pair of cases in Ontario that ultimately grounded Cullity J.'s decision in *Serhan*.[137] The first was the 2003 case of *Amertek Inc. v. Canadian Commercial Corp.*, which was overturned for reasons unrelated to waiver of tort in 2005.[138] Professor McCamus was actually on record for the successful plaintiff in that case. The Ontario Superior Court ultimately made no mention of the proprietary requirement in its explanation of waiver of tort.[139] The court then went on to cite *United Australia*[140] for the propositions that deceit could be waived, and that waiver of tort was an election of remedies. Goff and Jones are narrowly cited as follows, without reference to their support for the proprietary position: ". . . a tortfeasor should be personally liable to make restitution for *any* benefit gained at the plaintiff's expense, whether that benefit be positive or negative."[141] The court ultimately held that "if 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 obtained by the Government Defendants through their wrongful acts."[142]

This case was picked up the next year in *Transit Trailer Leasing Ltd. v. Robinson*: a case in detinue.[143] The court held that the plaintiff in a detinue case may recover the defendant's profits generally, without reference to the plaintiff's loss or property rights.[144] The court then adopts the overly narrow Goff and Jones citation from *Amertek*, that "a tortfeasor should be personally

136. *Supra*, footnotes 1 and 7, respectively.
137. *Supra*, footnote 1.
138. *Amertek Inc. v. Canadian Commercial Corp.*, *supra*, footnote 13.
139. *Amertek Inc. v. Canadian Commercial Corp.*, *supra*, at para. 369:

> [A] victim is permitted to elect to pursue the restitutionary claim to recover the benefits secured by the wrongful activity of the tortfeasor as an alternative to suing for the victim's claim for damages. "Waiver" is misleading — the victim need not elect to forego any remedy in tort as the price of pursuing the claim of restitution — the remedies are in the alternative and may be claimed together in one action, in the alternative. The successful victim/plaintiff is entitled to an award on the basis of the measure yielding the higher quantum.

140. *Supra*, footnote 67.
141. *Amertek Inc. v. Canadian Commercial Corp.*, *supra*, footnote 13, at para. 371. (Emphasis added.) For Goff and Jones supporting the proprietary position, see *Serhan*, *supra*, footnote 1, at para. 45.
142. *Amertek Inc. v. Canadian Commercial Corp.*, *supra*, at para. 372.
143. *Supra*, footnote 13.
144. *Ibid.*, at paras. 74-77:

liable to make restitution *for any benefit gained at the plaintiff's expense*, whether that benefit be positive or negative,"[145] reading that out-of-context statement as a universal principle, and goes on both to import the principles of equitable unjust enrichment from *Deglman v. Guarantee Trust of Canada*[146] and to quote *United Australia* very narrowly, to the effect that any "benefit capable of valuation" should be recoverable if it "has been received as a result of a wrongful act at the plaintiff's expense."[147]

The decision goes on to cite Lord Denning's judgment in *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*,[148] which does not concern waiver of tort or unjust enrichment, but rather the proper quantum of damages in cases of detinue where charging the defendant for rental throughout the detinue would greatly exceed the rental the plaintiff could have expected under normal market conditions. This case *did* apply to the result of *Transit Trailer*, as it *was* a detinue and rental case, and it was thus factored into the unjust enrichment test used by the court. *Strand Electric* held that the fact that the plaintiff has suffered no injury *in a detinue case* does not prevent the plaintiff from recovering the full rental of the goods while they were detained. It is to be borne in mind that Lord Denning, who decided *Strand Electric*, was actually counsel for the successful corporation in *United Australia*. He understood waiver of tort quite well, having made the submissions that were adopted as law, and he made no reference whatever to that doctrine in *Strand Electric*; that case had no relation to waiver of tort. However, because the quantum of damages rule for detinue from *Strand Electric* was (properly) used in the Ontario Court's unjust enrichment analysis in *Transit Trailer*, and that case was later taken as authority in *Serhan*,[149] there is now a lingering and unjustified impression in the class actions jurisprudence that no loss — and potentially no harm — need be proven in waiver of tort cases.

> [The plaintiff may] waive the tort and sue for restitution within which any third party benefits received by the plaintiff would not have to be accounted for to the defendant.
>
> It is here within the election for restitutionary relief the law provides that the plaintiff may recover any acquired benefit received by the defendant as a result of his wrongful act or any loss of benefits sustained by the plaintiff which ever [*sic*] is the greater. . . . It is within these principles that the plaintiff is able to recover more than its loss.

145. *Ibid.*, at para. 79 (emphasis mine).
146. *Deglman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725.
147. *Transit Trailer Leasing Ltd. v. Robinson*, *supra*, footnote 13, at para. 80.
148. *Supra*, footnote 95.
149. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1.

Thus, *Transit Trailer* also conflates waiver of tort with unjust enrichment and cites authority for restitution in wrongdoing without reference to property rights, while at the same time creating a circumstantial but popularly compelling reference to recovery without harm or loss. This fact is exacerbated by the court summarizing its judgment in overly generalizing terms:

> Denning L.J. noted in *Strand Electric supra*, that in cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it even though the plaintiff has lost nothing and suffered no damages.[150]

While it cannot conclusively be said that waiver of tort *does* require loss — indeed, as will be discussed in Part V, I do not believe it does — it is plain that *Strand Electric* is not a conclusive or even applicable authority on this point.

2. *Serhan*

Cullity J. drew directly on these cases when considering the certification motion in *Serhan*.[151] In that case, users of an allegedly defective blood glucose monitor sued the manufacturer of that monitor despite the fact that the monitors were purchased for and distributed to them by provincial health insurers, and that their personal injuries as a result of the alleged defect were *de minimis*: occasionally, the plaintiffs alleged, upon an "error" reading, users would have to prick their fingers a second time to achieve a clear reading. In considering the Ontario Class Proceedings Act's certification qualifications in s. 5(1),[152] the court was required to evaluate first whether or not the certification motion disclosed a cause of action. The difficulty faced by the class was that it shared no privity with the defendant, as provincial health insurers were the parties who actually contracted for the allegedly defective blood glucose monitors. Moreover, the class had suffered no losses; a defective reading on the monitor merely necessitated a second reading. As a result, the defendant disputed the plaintiffs' ability to claim damages for pure economic loss and their claim for a constructive trust as an independent cause of action. The defence claimed that it was plain and obvious that even if the facts pleaded were true, remedy would not be available under those putative causes of action.

150. *Transit Trailer Leasing Ltd. v. Robinson*, *supra*, footnote 13, at para. 102.
151. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1.
152. Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).

The class used the language of equity in its pleading, in line with the claim for constructive trust: "[T]he plaintiffs plead that good conscience requires the defendants to hold in trust for the plaintiffs . . . all revenue they received . . . from the sale of SureStep meters . . . and to disgorge this revenue."[153] As a result, Cullity J. articulated his approach to waiver of tort from an equitable standpoint, claiming that fraud was one of the traditional heads of equity jurisdiction and that "in cases where the 'doctrine' of waiver of tort applies, the equitable remedy of an accounting of profits will often be appropriate and has often been granted," citing Maddaugh and McCamus and the equitable case of *Attorney General v. Blake*, which did not concern waiver of tort.[154] Waiver of tort, the court noted, was not pleaded, but the reference to good conscience could ground such a claim.[155] Such facts, the court held, would constitute a cause of action for which the remedies of constructive trust or an accounting of revenues would be available. Cullity J. then quoted Maddaugh and McCamus citing an American authority predating *United Australia*[156] by 20 years and not considered by that court, which suggested that the plaintiff need prove no loss, and that waiver of tort turned on equity and good conscience.[157]

Cullity J. then went on to hold that "[w]aiver of tort, as a cause of action, is said to have the advantage for a plaintiff that proof of loss as an element of the tort is not required,"[158] citing Maddaugh and McCamus, *Amertek v. Canadian Commercial Corp.* and *Transit Trailer Leasing Ltd. v. Robinson*, repeating the professors' belief that "if it exists," this advantage might have a special significance at the common issues stage of certification under the

153. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1, at para. 29.

154. *Ibid.*, at para. 33, citing *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.).

155. *Ibid.*, at para. 34. Of course, as a common law doctrine, good conscience has never been a motivating factor in the court's recognition of a remedy in quasi-contract; as we have seen, the decision to permit such actions was originally to remedy the procedural strictures of the common law, not to engage the conscience of the defendant.

156. *Supra*, footnote 67.

157. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1, at para. 34, citing *Federal Sugar Refining Co. v. United States Sugar Equalization Board Inc.*, *supra*, footnote 18, 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.

158. *Serhan Estate v. Johnson & Johnson*, *ibid.*, at para. 35.

Class Proceedings Act. The court then considered *Soulos v. Korkontzilas*,[159] the Supreme Court's leading constructive trusts case, and effectively rebutted the Supreme Court's emphasis on the necessity of pre-existing relationships in such cases with reference back to Maddaugh and McCamus, via Professor Scott.[160]

Cullity J. noted that Goff and Jones recognized the proprietary interest intrinsic to waiver of tort, but held that such a view was inconsistent with the concept of constructive trust — an entirely distinct concept from an entirely distinct court system — and on that ground permitted the *waiver of tort* pleading to go forward.[161] The court then asserted that waiver of tort principles may admit of both proprietary and personal remedies: a tenet of Maddaugh and McCamus repeated without direct citation.[162] While the court did articulate "may" as regards this latter proposition, class proceedings tend to settle after certification. As a result, the court's "may" proved to be effectively as powerful as "do." Notably, the certification decision in *Serhan* does confirm that waiver of tort presupposes that a tort has been committed.[163] That decision, and the confusion it recalls, confirms, and generates, is the genesis of the overwhelming modern interest in waiver of tort as it pertains to class proceedings. To date, that confusion remains unresolved.

VI. ANALYSIS: RESPONSES TO MODERN QUESTIONS

This survey of the historical and jurisprudential development of waiver of tort is capable of answering some of the most pressing questions facing trial courts with some degree of certainty. Other questions remain live issues, and it is certainly open to the parties in a particular case and to the court to adjust the doctrine in order to meet the needs of modern actions in general, and class proceedings in particular. What answers history can conclusively provide, and some suggestions as to what may be extrapolated from that history, are briefly canvassed in this section.

1. Is Waiver of Tort Dead?

No. The leading case from the highest appellate authority binding on Canada at the time of judgment, *United Australia v.*

159. [1997] 2 S.C.R. 217.
160. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1, at para. 41.
161. *Ibid.*, at para. 45.
162. *Ibid.*, at para. 46.
163. *Ibid.*, at para. 65.

Barclays Bank,[164] recognized and awarded a remedy in waiver of tort. There has been no discernible movement towards eliminating the doctrine altogether since that case, and the case law in the latter half of this century — while beset with confusion and misapplication — has consistently held that the doctrine is available to plaintiffs.

2. Should Waiver of Tort be Discontinued Altogether?

There are sound and pragmatic arguments for the discontinuation of waiver of tort. Certainly the doctrine has caused great confusion from its very inception, and it is understood by virtually no one today. Certainty in law is obviously desirable, and the resuscitation of this doctrine may prove to be more effort than it is worth. Understood in its proper context, and with the content the doctrine carried for centuries at the common law, the onerous resuscitation of the doctrine in its historical form has very little to recommend it, though its discontinuation would not be entirely value-neutral; it *does* have some useful features boasted by neither conversion nor unjust enrichment. On the other hand, the arguments obtaining in certification courts on waiver of tort concern largely new normative principles of disgorgement to which courts have been receptive, even if they do bear little on the actual substance of the doctrine as it has been known historically. As a result, a court entertaining a waiver of tort case in the 21st century must decide not only whether or not to put an end to the doctrine as it is understood in its historical context, but also whether or not to breathe new life into it by expanding the principles for which it has historically stood.

While the procedural difficulties that gave rise to the action of "waiver of tort and suit in *assumpsit*" are long dead, the *effect* of the ancient action — the imputation of an agreement to pay over profits from a proprietary tort to the exclusion of compensatory recovery — continues to have some application. It was useful throughout the 16th, 17th, and 18th centuries for plaintiffs to waive torts in order to move forward in quasi-contract and, in so doing, to deprive a defendant of the defence that because he was a tortfeasor and a stranger, an action in quasi-contract must fail for lack of privity.

Following the procedural reforms of the 19th century and the rejection of the fiction of a contract in *United Australia*, however, it

164. *Supra*, footnote 67.

became entirely unnecessary for a plaintiff to choose between an action in tort and an action in contract;[165] plaintiffs were thereafter able to plead in the alternative and take whatever remedy they chose if the facts were made out. The peculiar utility of waiver of tort today, after those reforms, is that it currently permits a plaintiff to receive a disgorgement remedy if she can demonstrate incontrovertible title to the property tortiously dealt with by the defendant, even if that plaintiff cannot prove an agreement, loss, or privity with the defendant. Discontinuing the doctrine would eliminate these rights historically afforded to plaintiffs. Obvious questions follow: how unique are those rights? Have we not developed other, better-understood doctrines capable of vindicating those rights? If the benefits the doctrine bestows upon plaintiffs are duplicated elsewhere, or are sufficiently *de minimis* as to make its preservation unworthy of the challenges that preservation will entail, it may be the case that waiver of tort should properly be remitted to the ranks of legal obscurity. A consideration of those questions follows.

3. What Benefits Does the Doctrine, as Historically Understood, Still Provide Today?

There are substantive rights tied up in the doctrine of waiver of tort that will be lost if it is discontinued. For example, the use of waiver of tort as an election of remedies — a precedentially acceptable practice today where the plaintiff's title in goods held or converted by the defendant is proven — permits a plaintiff unable to make out a case in contract to receive a disgorgement of profits so long as her title and the defendant's tort is proven. This is not duplicated by the doctrine of unjust enrichment, or of constructive trust for several reasons. Both constructive trust and unjust enrichment are equitable doctrines, which place the plaintiff at a significant comparative disadvantage. As equitable doctrines, the remedies in unjust enrichment and constructive trust are discretionary, and equitable maxims concerning "clean hands" and "sleeping on rights" can operate against the plaintiff. These are disadvantages a plaintiff need not overcome if she is claiming in waiver of tort. In unjust enrichment, moreover, the plaintiff must prove loss, and that there is no juridical reason for recognizing the defendant's right to the profits. Neither of those restrictions apply

165. The leading Canadian case on point is *Baron v. Muskoka Lake Navigation & Hotel Co.*, [1947] O.W.N. 383 (H.C.J.).

to waiver of tort, which, as we have seen, was predicated on *assumpsit*, a creation of the common law courts.

Constructive trust based on wrongful conduct is still more restrictive, requiring the plaintiff to establish that the defendant was under an equitable obligation to the plaintiff; that the property wrongfully disposed of by the defendant was in his or her hands as a result of an agency relationship; that there is a legitimate reason for seeking a proprietary remedy; and that the imposition of a constructive trust would not be unjust in all the circumstances of the case.[166] None of these obligations are imposed on a plaintiff claiming waiver of tort in order to receive a disgorgement of profits.

Neither does waiver of tort entirely overlap with the tort of conversion, which is its nearest cousin. Conversion historically provided for a remedy of the fair market value of the converted goods, rather than a count of the profits accruing to the defendant.[167] (The availability of a restitutionary remedy in conversion is still under debate in Canada.)[168] In the early 20th century, when waiver of tort was more broadly understood and widely articulated, the doctrine was occasionally classified as a subspecies of conversion that permitted the plaintiff, by electing the restitutionary remedy, to recover the defendant's profits from a wrongful conversion of goods *as opposed* to the fair market value of those goods.[169]

Even if a court were to decide conclusively that restitution of profits was appropriate in cases of conversion where tortiously held goods were sold at a profit, however, the difference between

166. *Soulos v. Korkontzilas*, *supra*, footnote 159, at para. 45.

167. Adopted in Canada in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, 27 C.L.T. 489, at para. 22. The remedy in conversion was said to be the market value of coal *in situ* minus the expenses undertaken by the defendant in bringing about the conversion (if the defendant was unwittingly appropriating the plaintiff's goods), or the market value proper, minus the strict cost of taking the goods to market (if appropriating the goods wilfully). That is, Canadian law reflects the proposition that the measure of damages in conversion takes as a starting point the profits that could have been realized by the plaintiff, not the profits acquired by the defendant that might constitute a "windfall" to the plaintiffs: *Montreal Trust Co. v. Williston Wildcatters Corp.* (2004), 243 D.L.R. (4th) 317, 2004 SKCA 116, leave to appeal to S.C.C. refused [2005] 1 S.C.R. xiii, at para. 114.

168. On the current Canadian law, see H. Michael Rosenberg, "When Gains Trump Losses: An Analysis of Restitutionary Relief for the Tort of Conversion" (2010), 68 U. Toronto Fac. L. Rev. 39.

169. Sir Arthur Underhill and Albert Charles Hagon, eds., *A Summary of the Law of Torts, or, Wrongs Independent of Contract*, 11th ed., (London, Butterworth and Co., 1925), at pp. 290-293.

conversion and waiver of tort would still be relevant. From an evidentiary perspective conversion is a tort of strict liability, whereas waiver of tort relies on the proof of an underlying tort, which will frequently require a fault component. Furthermore, conversion requires a voluntary act of the defendant vis-à-vis the plaintiff's property, whereas waiver of tort requires only that the defendant be in wrongful possession of that property. In cases where the defendant comes into possession of the plaintiff's goods through an omission or the act of a third party, waiver of tort may be the plaintiff's only route to recovery. Naturally, these distinctions will only rarely be relevant in practice and it will always be available to a court to expand the doctrine of *conversion* in order to accommodate these gaps in plaintiffs' rights. Indeed, the Canadian private law seems to have survived for the last century without a principled distinction between the two — but it must be noted that a great many plaintiffs in conversion cases (and particularly those engaged in mineral extraction) would have been greatly interested to have known that they were entitled to disgorgement of profits rather than fair market price for converted goods at common law.

Thus, the outright termination of the doctrine of waiver of tort would foreclose upon long-recognized rights, howsoever infrequently exercised they may be. A court considering the termination of waiver of tort must weigh the comparative value of these advantages against the manifest inconvenience and confusion inhering in modern claims of waiver of tort.

4. Should Waiver of Tort be Expanded to Permit Disgorgement of Profits for any Wrongful Act?

If a court is disinclined to either do away with waiver of tort altogether, or to restrict it to the content it has traditionally had, it is still open to that court to expand the doctrine to form a species of common-law restitution in the vein of the arguments put forward by class counsel across Canada. This is fundamentally a normative question that history is incompetent to answer, and that has attracted a vigorous debate of its own in the academic literature. Certainly the recognition of such a principle would constitute the "sea-change" in Canadian law that Lax J. envisioned.[170] As waiver of tort has always been a largely uncontroversial (if confounding) recognition of a plaintiff's right

170. *Andersen Estate v. St. Jude Medical, Inc.*, *supra*, footnote 4.

to the profits from the sale of her own property and not a remedy in disgorgement for *any wrong*, this expansion would constitute an abrupt departure from the centuries of common law jurisprudence articulating damages in tort law as compensation for the infringement of personal or proprietary rights, and there are different schools of thought concerning the desirability of such a change.

History and jurisprudence are competent to respond, however, that there is no precedent for such a proposition. Leaving aside the selective or mis-reading of treatises on the subject, there is no basis for the belief that waiver of tort allows a plaintiff to recover the defendant's profits from *any* wrongful act. The jurisprudence prior to the current confusion is perfectly clear that waiver of tort is a means to vindicate existing proprietary rights. Goff and Jones offer a very generous taxonomy of successful claims to date:

> A claimant may obtain restitution of the benefits gained from the following tortious acts: conversion and detinue (wrongful interference with goods); trespass to land and to goods; deceit; (probably) passing off and injurious falsehood; and (possibly) inducing a breach of contract. No injured party has sought to recover the benefit gained by a defendant who committed the torts of defamation or nuisance, although these are torts which may enrich a tortfeasor. In contrast, assault, battery and negligence do not, although exceptionally they may do so.[171]

What little normative guidance history may provide on the subject amounts to this: the normative basis for waiver of tort has always been that a plaintiff should be entitled to the vindication of his or her *established* rights. Torts were originally waived in order to permit courts to grant the proprietary remedies to which plaintiffs would have been entitled, but for the obstacles posed by civil procedure when a tort existed on the facts. A legal fiction was established to compel defendants to pay over whatever benefits they derived from property, the right to profit in which was properly vested in the plaintiff.

Plaintiffs in modern class proceedings, however, claim the profits made by defendants in relation to *any* wrongful act. That is,

171. Goff and Jones, *supra*, footnote 58, at pp. 808-809. Note that the authors do not cite any precedent for the latter proposition concerning assault, battery and negligence, and can only cite the American *Federal Sugar Refining Co. v. United States Sugar Equalization Board Inc.*, *supra*, footnote 18, which predates *United Australia* by more than 20 years, in support of their inclusion of breach of contract. They add that their inclusion of passing off and injurious falsehood is speculation based on extension of principle, and that they have no authority on that point.

it is solely the *act of the defendant* and to no extent the *rights of the plaintiff* that class counsel argue should entitle the plaintiff class to a disgorgement remedy.[172] This is an argument for an entirely new and ahistorical principle. The plaintiff in a standard waiver of tort case elects to waive her compensatory rights in tort in favour of her accounting rights in property. Entitled to two incompatible remedies, she chooses one. Having proven that the defendant committed a tort and is in possession of her goods or proceeds therefrom as a result, the plaintiff waives the compensatory remedy to which she is entitled as the victim of a tort, and instead imputes a contract to pay the profits back, claiming the proprietary remedy to which she is *also* entitled as an owner. The two cannot be claimed together for the reason explained in *United Australia*: it would be partial double recovery for the plaintiff to recover both the value of what was taken and the full amount the defendant profited from it.[173]

172. This argument was accepted in the *Andersen Estate v. St. Jude Medical, Inc.* amendment motion:

> This submission [that pleading waiver of tort fundamentally changes the nature of an action originally pled as negligence] misses the mark because it ignores that the waiver of tort claim, like the negligence claim, is entirely focused on the defendants' conduct and alleged wrongdoing. All of the material facts giving rise to waiver of tort have been pleaded with respect to the negligence claim . . . the action remains one where the plaintiffs must prove that the defendants' conduct was wrongful in order to establish liability whether in negligence or waiver of tort.

Andersen Estate v. St. Jude Medical, Inc., *supra*, footnote 4, at para. 12. While it should be clarified that it has traditionally been the proprietary rights of the plaintiff and not the act of the defendant that entitled the plaintiff to a disgorgement remedy, the court was precisely correct in terms of its holding in this motion. The court was not only correct in terms of the scope of discovery, it managed as well to intuit the proper historical principle. Discovery for waiver of tort (if waiver of tort is understood in the context of its content to date) is largely identical to discovery for negligence, as the tort must be proven in order to elect the disgorgement remedy. The argument that pleading waiver of tort fundamentally changes the litigation strategy of the defence has been rejected by authorities ever since the procedural reforms of the 19th century, as the pleadings in tort and waiver of tort are identical, save for the proof of plaintiff's title in property held or converted by the defendant. (See footnotes 81 and 90, *supra*.) Arguments concerned with settling the confusion on the subject of waiver of tort would, of course, require substantial preparation — but no discovery against the representative plaintiff beyond that necessary for the negligence claim would be appropriate for waiver of tort, save for proof of the proprietary interest. (Indeed, as that interest has not been pled by the plaintiff in *Andersen Estate v. St. Jude Medical, Inc.*, waiving the tort of negligence will be disastrous for the class unless the doctrine is overhauled and entirely re-imagined at trial. In the absence of an extant, alternative proprietary remedy, that plaintiff class is effectively arguing for the right to waive its compensatory remedy in tort, full stop.)

173. *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 28:

In personal torts, however, a plaintiff has only one remedy: compensation. A plaintiff class in a negligence class action that waives its compensatory rights has nothing left.[174] In the case of personal torts, there is no more muscular remedy in favour of which that compensatory remedy could be waived. What must be understood is that *waiver of tort has always permitted the election of remedies, not the genesis of them*. Waiver of tort has never *brought about* the entitlement to a defendant's profits, but was rather the procedural move that permitted the *exercise* of that *existing* entitlement. In order to argue that disgorgement should be available by waiving a personal tort, one must establish that there is another remedy to which the plaintiff is entitled, and that the plaintiff may elect to claim instead of compensatory damages: that the plaintiff was *already* entitled to those profits by virtue of suffering tortious injury. That is not, and never has been the law. It is, of course, open to the courts to determine that the measure of a plaintiff's damages in general *should be* the profit accruing to the defendant in some degree of connection to a tortious injury it inflicted, rather than compensatory damages. Nothing short of that, however, will permit the doctrine of waiver of tort as it has historically been understood to entitle the plaintiff to a disgorgement of profits. In order for that result to be reached, the concept of waiver of tort would have to be re-imagined wholesale. What such a re-imagining of the doctrine would entail is beyond the scope of this paper.

5. Is Waiver of Tort an Election of Remedies or a Cause of Action?

It is an election of remedies. Before causes of action were recognized procedurally, the form of action that involved a waiver of tort was an action in *assumpsit*. *Assumpsit* had always been the originating process, and the waiver of tort was a mere procedural step that permitted the *assumpsit* action to go forward. Courts recognized that a tort existed on the facts, but permitted plaintiffs to waive that tort and proceed as though the defendant had undertaken in *assumpsit* to pay over the proceeds of that tort.

> [I]n cases where the money had been received as the result of a wrong [the plaintiff] still had the remedy of claiming damages for tort in action for trespass, deceit, trover, and the like. But he obviously could not compel the wrongdoer to recoup him his losses twice over. Hence he was restricted to one of the two remedies: and herein as I think arose the doctrine of "waiver of the tort". Having recovered in contract it is plain that the plaintiff cannot go on to recover in tort. Transit in rem judicatam.

174. Indeed, defendants in such cases should welcome a plaintiff class' election to set aside tort damages!

After the procedural reforms of the 19th century, it was no longer necessary to plead the quasi-contract of *assumpsit* formally — that is, to claim that there actually *was* an agreement to pay over the proceeds — but rather it sufficed to plead the *facts*, not the fictions, that would have traditionally permitted one to recover in quasi-contract under the old waiver of tort and action in *assumpsit*: the defendant's tort and the plaintiff's entitlement to the property or converted funds in the defendant's hands. (The fiction of the artificial contract was officially discarded in *United Australia*.) As articulated in section III(7), *supra*, this meant that a pleading of waiver of tort and action in *assumpsit* was formally indistinct from a pleading of tort accompanied by a proof of title in the wrongfully possessed goods and a request for an accounting of profits resulting therefrom.

Waiver of tort is not and never has been an originating process; it is the election the plaintiff makes after having established the defendant's liability in tort and her own entitlement to the profits from the goods wrongfully possessed by the tortfeasor. Having proven the tort and the proprietary interest, the plaintiff chooses to treat those facts either as a tort, claiming compensation; or as a quasi-contract, claiming disgorgement in *assumpsit*. Choosing one precludes future action for the other. Whether the actual originating process is understood as one in tort or *assumpsit* is legally irrelevant; both require the proof of a tort, and in order to claim a disgorgement of profits as remedy for that tort, indisputable title to the goods wrongfully possessed by the tortfeasor must be proven. Waiver of tort requires an underlying cause of action; indeed, a waiver of tort in the absence of an action in tort or assumpsit would be precisely what it sounds like: a waiver of one's rights to compensation for tortious injury. All waiver of tort *ever* does, or has ever done, is to set aside the right to be compensated for a tort. It has no elements or remedies of its own. In the context of a cause of action that admits of both a compensatory and a proprietary remedy, there is a reason for the plaintiff to set her action in tort aside via "waiver of tort": she prefers not to collect on her compensatory right, and must waive that right in regards to future actions in order for a court to authorize restitutionary relief.

In conclusion, waiver of tort has always been predicated on an action in *assumpsit* (prior to the 19th century reforms) or a cause of action demonstrating an entitlement to both a compensatory remedy in tort and a proprietary remedy (after those reforms), and

has never been anything more than the term of art used to describe the binding election to take the proprietary remedy, which forever precludes the possibility of suing for compensation on those facts. It may be argued that academics and litigants have been asking the wrong question: that the real question is "is *indebitatus assumpsit* a freestanding cause of action that permits a disgorgement remedy?" The jurisprudence has shown that it was a freestanding originating process prior to the destruction of the forms of action, but that after the 19th century reforms, the way to plead *indebitatus assumpsit* is to plead the facts that would have underlay it as a *form* of action: a tort and a proprietary interest in the defendant's profits.[175] Thus, waiver of tort is not a cause of action — and to the extent *assumpsit* still is, it is indistinguishable from an action in tort that also pleads a pre-existing proprietary interest in the defendant's profits.

6. Is Waiver of Tort "Parasitic" on an Underlying Tort?

The answer to this question is, regrettably, a multifaceted one that engages normative argument even in articulating the interpretation of precedent. In brief, waiver of tort in the procedural sense of setting aside a compensatory remedy in tort is, obviously, parasitic on an underlying tort. However, what restitutionary scholars tend to mean when they suggest that "waiver of tort" should not be parasitic on an underlying tort is that *assumpsit* should lie in the absence of a tort. The waiver of a tort — the election to set aside a compensatory remedy in favour of a proprietary one — is obviously unnecessary when there is no tort, and therefore no compensatory remedy available. Referring to a suit for disgorgement of money had and received in the absence of a tort as "waiver of tort" is a patently confusing elision of the two concepts. That use of the phrase should be discouraged.

A claim that there is an implied undertaking to pay back money in the absence of a tort is a quasi-contractual claim without the involvement of a waiver of tort: effectively, an old action for money had and received — or, more currently and properly, grounds for an action in unjust enrichment. A claim that the defendant *has committed a tort* and is in *wrongful* possession of the

175. Beyond the scope of this paper is the possibility that *assumpsit* may still be available in its original form: to read in a binding undertaking for satisfactory performance in a negligently performed contract. While that use of *assumpsit* has apparently become obsolete with the advent of modern contract law, a systematic study would be necessary to gauge its current validity as a cause of action.

plaintiff's property or its proceeds, and that the plaintiff will elect the quasi-contractual remedy rather than the compensatory one is a case for waiver of tort.

Thus, waiver of tort is clearly parasitic on an underlying tort. A plaintiff cannot elect to waive something that doesn't exist. But is an action in *assumpsit* available, absent the facts of a tort? The historical answer appears to be "yes" — but not in as plenary a sense as restitutionary scholars and class counsel suppose.

From the earliest days in the 14th century, *assumpsit* was always brought against wrongdoers. In the very beginning, *assumpsit* permitted quasi-contractual action on what we would today understand as a tort against defendants in privity with the plaintiff. Recall the negligent barber example, *supra*. Plaintiffs could not claim in tort against those with whom they had been in privity, so *assumpsit* was created to provide a contractual remedy to the injured parties that would have had an action in tort if only the defendant had been a stranger, by reading a condition for satisfactory performance into their agreement. Thus, at the very beginning, *assumpsit* was not only parasitic on an act that would today be considered a tort, but also on a pre-existing (albeit unenforceable) agreement between the parties.

As we have seen, *assumpsit* eventually grew from an imputed condition to perform satisfactorily in actual agreements via express *assumpsit* into a self-sufficient legal fiction in *indebitatus assumpsit*: an imputed agreement that required a wrongdoer to pay over the proceeds from his own wrongful use of the plaintiff's property even in the absence of an agreement. When waiver of tort was eventually developed in relation to this action in *assumpsit*, it was to prevent defendants from pleading their own torts in order to destroy the fictional imputation of privity that the *assumpsit* action required. As we have seen, that defence was successful in *Tottenham*; the fact that a tort was committed — albeit in that case not one against the plaintiff — destroyed the court's ability to assume an agreement between plaintiff and defendant, and thus the plaintiff's ability to recover his property. So, both *assumpsit* and waiver of tort developed in the context of an underlying tort, or more properly, facts that we would regard today as demonstrating a tort.

Between the 17th and 19th centuries, courts increasingly permitted plaintiffs to disregard the fact that the defendant was a tortfeasor and a stranger in order to pursue their proprietary remedies in *assumpsit*, but the fact that the defendant had

committed a tort was generally mandatory. In the absence of a tort, there would be neither a wrongful act motivating a court to impute the agreement in *assumpsit* that the defendant must make restitution to the plaintiff, nor the fact of a tort threatening that imputation of privity for waiver of tort to set aside. Without a tort, there could be no impetus for *assumpsit*, nor a waiver of tort to defend that *assumpsit* from the tortfeasor's defence. There were a few exceptions to this proposition, as will be discussed shortly in the context of academic literature promoting a non-parasitic theory of waiver of tort. For the moment it suffices to say that the authorities in this era required proof that the defendant had unlawfully taken possession of the plaintiff's property by commission of a tort or, exceptionally, and as will shortly be discussed, a breach of statute.

Following the procedural reforms of the 19th century, it was no longer the case that plaintiffs had to choose to submit one standard form of action or another. Rather than choosing *assumpsit* over tort, intending to waive the fact that a tort had been committed at trial, plaintiffs now simply pled the facts of the case and requested a remedy. Historically, the facts animating cases in waiver of tort and action in *assumpsit* were these: a defendant had wrongful possession of the plaintiff's property or converted profits therefrom.[176] Thus, when the new age of "causes" of action required facts to be pled rather than forms, these facts were considered to be the necessary pleadings in order to ground an action in waiver of tort and suit in *assumpsit*. In such a case, the plaintiff was required to prove those facts: the tort, which entitled him to the compensatory remedy, and the proprietary interest, which further entitled him to the disgorgement remedy. After having proven his case, the plaintiff could elect to treat the defendant as a tortfeasor and claim compensation, or as a quasi-contractual agent and claim disgorgement of his property and the profits therefrom. If no tort had been proven, the plaintiff typically failed; the facts necessary to establish *assumpsit* — specifically, that the defendant was in wrongful possession of the plaintiff's property — would not have been made out. Thus, the plaintiff failed to prove a tort and the *assumpsit* imputed as a result of that tort. *However*, to the extent

176. The historical underpinning of *assumpsit* in tort was noted by Lord Porter in *United Australia, Ltd. v. Barclays Bank*: "The fiction forming the basis of the action of assumpsit may be an implied promise but the substance is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them . . ." *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 54.

that a defendant could be proven to be wrongfully in possession of the plaintiff's property without resorting to proof of a tort, as in the case of an official innocently charging what turned out to be illegal fees for services,[177] it is certainly arguable that the action in *assumpsit* survived and could be pled in the absence of establishing an underlying tort.

That nuance was set aside, however, in the mid-20th century. The House of Lords in *United Australia* was perfectly explicit that there was no action in *assumpsit* without an underlying tort: "[I]ndeed, if it were to be understood that no tort had been committed, how could an action in assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution."[178] Indeed, their Lordships thought the point sufficiently important that it was emphasized later in the same judgment: "As has been pointed out by the Lord Chancellor the action of assumpsit would not lie if it were to be understood that no tort had been committed."[179] This firm result is echoed by Goff and Jones, who refer to the argument that *assumpsit* should not require proof of a tort as contrary to the "hitherto accepted principle that the restitutionary claim is parasitic, in the sense that its existence is dependent on it being demonstrated that a tort has been committed."[180]

Literature supporting the idea of waiver of tort as independent of tort — that is, supporting the idea that *assumpsit* should lie in the absence of a tort — draws attention to several cases in which

177. For example, *Morgan v. Palmer*, *supra*, footnote 43; *Steele v. Williams* (1853), 8 Ex. 625 (Ex. Ch.).

178. *United Australia, Ltd. v. Barclays Bank*, *supra*, footnote 67, at p. 18. It is important to note that Viscount Simon L.C., is speaking with specific reference to proprietary torts, and is not making any statement about restitution for wrongs generally. He refers to the acquisition *of the plaintiff's property* and has just made reference to Winfield's list of torts appropriate for waiver: "conversion, trespass to land or goods, deceit, occasionally action upon the case, and the action for extorting money by threats": *Ibid.*, at p. 12.

179. *Ibid.*, at p. 35. Lord Romer is also quite explicitly speaking about proprietary torts only, having articulated the doctrine of waiver of tort thus earlier in his speech:

> A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrongdoer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages that he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. But, in my opinion, this is not due to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies.

Ibid., at p. 34.

180. Goff and Jones, *supra*, footnote 58, at p. 802.

assumpsit succeeded despite a tort not being pled. The Ontario Divisional Court, hearing an appeal from the certification of *Serhan*, cited two authorities in this literature as advancing the proposition that "an action in restitution lies to compel the defendant to disgorge an unjust enrichment gained through *any type* of wrongdoing."[181] This holding is another unfortunate example of oversimplifying a sophisticated argument pertaining to waiver of tort. First, the authorities cited by the Divisional Court never state that an action lies through *any* type of wrongdoing (indeed, they argue that a wrongdoing may not be necessary!) They generally adhere to the concept that waiver of tort requires a proprietary interest, though they suggest (in significantly weaker, normative arguments) that the doctrine might expand.[182] Second, these authorities are subject to the treatment Maddaugh and McCamus experienced; they are clear that they are articulating ambitious normative arguments for the unification of restitutionary principles, but they are cited as though they are arguing that their proposal is the current state of the law.

This distinction can be a subtle one, and can easily be misconstrued if these works are read out of their prescriptive context. The proposal that restitution constitutes a cause of action independent of an underlying, proven tort relies largely on a reading of ancient and modern cases with a view to deriving an animating principle behind the court's use of equitable doctrines and adaptations of common law forms in cases where the benefit to the defendant exceeds the harm to the plaintiff, and then claiming that the unarticulated principle should be recognized as distinct from the reasons directly given in those cases. It is an intriguing and often persuasive proposition, and certainly the general principles of restitution across the common law and equity could benefit from substantial revision and a return to first

181. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1 (Div. Ct.), at para. 54. (Emphasis mine.)

182. "The 'waiver of tort' mechanism *should* simply be seen as the core of a class of restitutionary claims based on the wrongful acquisition of a benefit. This is certainly so where the defendant has taken or used the plaintiff's money or property. *It is arguably also the case* in other situations in which the defendant has been enriched *by the misappropriation of an interest of the plaintiff's which is properly treated as part of his wealth*." Sir Jack Beatson, "The Nature of Waiver of Tort," in *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution*, Sir Jack Beatson, ed., (Oxford, Clarendon Press, 1991), at pp. 242-243 (emphasis mine). Note also that Maddaugh and McCamus recognize that waiver of tort was historically limited to proprietary torts, and that they intend to argue against that line of precedent: Maddaugh and McCamus, *supra*, footnote 18, at pp. 24-9 and 24-14.

principles. These authorities do not argue that they state the law, however. That interpretation does their ingenuity great disservice.

These authorities propose, rather, that the extant law should be understood in a new way — one that most interested parties admit the law is likely not mature enough to accept.[183] Beatson and Friedmann, the authorities cited by the Divisional Court as supporting the independent-action proposition, actually argue in the cited works for an expansive and revolutionary unification of multiple restitutionary principles, from breach of fiduciary duty to constructive trust, to gains from criminal acts, to the measure of damages in detinue and *assumpsit*, and even a new principle in property law, claiming that the treatment of these areas of law as distinct has crippled the development of a unitary restitutionary doctrine.[184] They manifestly do not speak to the current state of the law.

At the risk of leaving strict historical exposition aside and entering briefly into the normative debate, there is one dimension in particular that this literature tends not to appreciate that is relevant to a court hearing argument on the subject of waiver of tort as an independent cause of action in restitution, and that is the slippery use of the term "parasitic" in the normative literature. Judges must be cautious in interpreting this literature to be certain of the meaning of academic authorities when they discuss whether or not an underlying tort is necessary; do they mean that there must *be* an actionable tort in order for waiver of tort to be pled, or do they mean that there *must have been* an actionable tort? A brief discussion of those authorities will clarify the important difference between the two.

Beatson goes to great lengths to assert that because the proof of a tort was not always possible or necessary in certain cases of *assumpsit*, quasi-contractual actions exist independently of the existence of a tort and that there is therefore an independent restitutionary cause of action that may be brought against non-tortfeasors. It is not clear that Beatson or Friedmann, who support

183. Daniel Friedmann, "Restitution for Wrongs: The Basis of Liability," in William Rodolph Cornish *et al*., ed., *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998), at p. 142; Beatson, *ibid*., at p. 243 (noting, however, a recent step in its "maturation"); Goff and Jones, *supra*, footnote 58, at p. 802. Maddaugh and McCamus are more assertive, though circumspect, claiming that on the basis of their restitutionary theory, waiver of tort "ranks as one of the most useful and innovative tools for achieving the goals of the law of restitution," "once its true nature and scope is fully appreciated": Maddaugh and McCamus, *supra*, footnote 18, at p. 24-36.

184. Beatson, *supra*, footnote 182, at p. 243.

this idea, draw any distinction between cases in express and *indebitatus assumpsit*, which explains in several of their *assumpsit* cases the absence of a proven tort (express *assumpsit* gradually coming to be used as a standard contract action after the 17th century, following *Slade's Case*);[185] or between actions pled before and after the procedural reforms of the 19th century, which also account for the demonstration of a tort in some cases and a pleading of privity in others, and which are effectively incomparable to one another as a result.

In arguing that there is a restitutionary remedy not "parasitic" on an underlying tort, Beatson cites cases wherein plaintiffs succeeded in claiming *assumpsit* against officials to pay over illegal fees in *colore officii*[186] and cases wherein offices are wrongfully usurped or customary duties wrongfully avoided.[187] (He also cites usurpation of office cases — cases that were once considered tortious and giving rise to remedies in waiver of tort, but that were thereafter discontinued as torts. He ascribes the preservation of the restitutionary remedy in these cases to the independence of the restitutionary remedy, rather than judicial inertia.)[188] With respect to the learned professor, it does not follow that because the wrong that was committed in these cases did not amount to a tort that the restitutionary remedy is entirely independent. Even where the apparent independence of those claims are not explained by the overlooked historical principles above, it is at least as consistent with the cases cited to say that there was not an independent restitutionary remedy, but that courts always operated *in vindication of property rights*, as opposed to ordering the disgorgement of the proceeds of a wrong, where the defendant was in possession of property that never properly vested in him.

The oft-raised assertion is this: if action on a tort is barred by death or statutory limitations, but the court permits restitution of the plaintiff's property interests nonetheless, it cannot be said that restitution is parasitic on a wrongdoing.[189] If it was, it is argued, the bar against claiming compensation for the wrongdoing should similarly bar restitution on the property interest. There is an

185. *Slade's Case*, *supra*, footnote 36.
186. *Morgan v. Palmer*, *supra*, footnote 43; *Steele v. Williams*, *supra*, footnote 177, in Beatson, *supra*, footnote 182, at p. 221.
187. Beatson, *ibid.*, at p. 220.
188. *Ibid.*, For the historical explanation for the use of waiver of tort when these other remedies were available, see the treatment of Jackson in this article, *supra*, on p. 494.
189. *Ibid.*, at p. 215; Friedmann, *supra*, footnote 183, at p. 137.

innocent but treacherous dissonance between the way Professors Friedmann and Beatson use the term "parasitic" and the way it may be popularly understood. They suppose that "parasitic" means, effectively, "coterminous": if one ends, so does the other. Others may understand that term to mean, effectively, "predicated upon," as Goff and Jones do.[190] Professor Friedmann is unquestionably correct in that actions for restitution are not parasitic in the sense that they die when the wrongdoing upon which they are predicated dies — a bare observation of the cases demonstrates the truth of that proposition — but to say that this is evidence that the entitlement to a restitutionary remedy is entirely independent from the wrongdoing is to assume the negative of the antecedent. That is, they formulate their position thus: sometimes waiver of tort succeeds when a wrongdoing is actionable; sometimes waiver of tort succeeds when a wrongdoing is not actionable; therefore a wrongdoing is not a necessary antecedent for waiver of tort. This is akin to saying that some people live and have mothers, other people live and do not have mothers, therefore a mother is not a necessary antecedent for being a person. It does not take account of the change in conditions over time. If "parasitic" means "predicated upon," then I suggest that quite apart from the House of Lords' binding statement that a tort must be proven in order to proceed in *indebitatus assumpsit*, waiver of tort has also *historically* been "parasitic" — *i.e.*, predicated — on the proof of a wrongdoing.

The cases cited by Beatson and Friedmann illustrate that disgorgement is available when *the defendant is in demonstrably illegal possession of the plaintiff's property or its proceeds*. In traditional cases of waiver of tort, the restitutionary remedy is parasitic on the defendant's tortious possession or conversion of the plaintiff's property. It is the fact that that possession was and continues to be illegal that causes the court to impute the duty to return that property. In the *colore officii* and customary duty cases the authors cite, it is the defendant's possession of property that it was illegal to take or illegal not to have paid over that causes the court to impute the duty to repay. The proof of this underlying wrong — the possession of property that either never vested in the wrongdoer, or that the wrongdoer retains despite a legal duty to pay it over — always been necessary in order to ground a claim in quasi-contract. The restitutionary claim is not independent of the wrongdoing, nor is just any wrong sufficient to give rise to that

190. See footnote 180, *supra*.

restitutionary claim. These cases are predicated on a wrongdoing that caused the defendant to be in possession of property that it is illegal for him to retain, and it is the right of the plaintiff, and not the wrongdoing of the defendant, that has historically given rise to the restitutionary claim.

This is not a distinction without a difference. It will inevitably be argued that it is the wrongful act and not the property right that gives rise to the restitutionary claim. Plaintiffs will allege that the defendants are compelled, having allegedly broken the law and obtained the plaintiff's property in some connection to that unlawful act, to pay back the profits they received from the plaintiff. Take, for example, an automotive class action in which the defendant is alleged to have breached consumer protection regulations. Relying on the Ontario Divisional Court's reading of Beatson's principle, class counsel will argue that a statutory wrong has been committed, and that disgorgement of profits is appropriate despite the plaintiffs' inability to prove negligence, as "an action in restitution lies to compel the defendant to disgorge an unjust enrichment gained through any type of wrongdoing."[191] Indeed the class in *Serhan* alleged that the breach of a duty of care, without more, was sufficient to prove entitlement to a restitutionary remedy.[192]

Such an argument will ignore, first, the mandatory proof of a proprietary interest demonstrated throughout the history of waiver of tort jurisprudence and recognized by these very authorities;[193] and second, the fact that the breach of a regulation does not mean the defendant has no legal right to the money it received in exchange for the automobile.

If, for example, the defendant is liable to pay a significant fine for its breach of regulations, this does not connote that the defendant was wrongfully in possession of the plaintiff's property by virtue of having been paid for its product; the money properly vested in the defendant with the execution of the contract. The defendant may owe the plaintiff compensatory damages for any torts it may have committed, fines for any statutory wrongs it may have committed, and compensation for any breach of the contract of sale. But it will not have a duty to disgorge its profits from the sale — much less *all* the profits from ever having sold a similar product to anyone — as the defendant is not in possession of the

191. *Serhan Estate v. Johnson & Johnson*, *supra*, footnote 1 (Div. Ct.), at para. 54.
192. *Serhan Estate v. Johnson & Johnson*, *supra*, at para. 47.
193. Beatson, *supra*, footnote 182, at pp. 210-211.

plaintiff's property. It is entitled, in the strict legal sense, to the proceeds from its sale of the automobile.

The argument that the money should be said retroactively not to have vested in the defendant, and is the plaintiff's still and thus should be returned by virtue of waiver of tort, actually goes well beyond the strict liability complained of by defence counsel. Strict liability would only result in compensatory damages being assigned without proof of fault. It would amount to much more than even a rescissionary remedy in the event that any wrongdoing — even one outside the wording of the contract — was found to have been committed by the defendant, as plaintiff classes do not allege that they will give up the proprietary interests in the products they have purchased; they claim both the product *and* the price they paid for it. It is an argument that any wrongdoing on the part of a defendant empowers a plaintiff to repudiate the bargain while still retaining the benefit of it, taking back property that had properly vested in the defendant and retaining the property for which they bargained. This is an entirely new principle that bears no resemblance to the doctrine of waiver of tort. What the *assumpsit* cases have in common, and what Professor Beatson and class counsel appear to miss, is that defendants in waiver of tort cases have always been required to return property *that never properly vested in them*, and any profits resulting from their use of that property, which they had no right to hold or use. It was never the case that disgorgement followed from the wrongful act itself.

7. Should a Disgorgement of Profits be Available for Non-Proprietary Torts?

This question is likely to be a battlefield between class and defence counsel as waiver of tort continues to develop, especially in the class proceedings context where the motivation of the parties to either establish or preclude that expansion of principle is particularly acute. This is a normative question that an historical and practical survey is not competent to answer, and it should properly be left to academics such as Maddaugh, McCamus, Watson and Rosenberg to carry on a fulsome debate on philosophical and policy grounds.

What history can contribute, however, is a statement of traditional principle. Every development in waiver of tort jurisprudence has come about as a result of the justice system's failure to accommodate the extant rights of the plaintiff due to a

civil procedure malfunction. It became clear in the 14th century that plaintiffs were going uncompensated for what would have been perfectly actionable torts, but for the contractual privity that existed between the parties. These cases would also have been perfectly actionable in breach of contract, but for the procedural requirement that contracts be made under seal and held to their strict terms. The courts invented *assumpsit* to impute binding undertakings for satisfactory performance into those contracts, which were made for good consideration, allowing the plaintiff to overcome the procedural technicalities barring recovery.

Centuries later, courts found themselves unable to vindicate plaintiffs' proprietary rights to their fullest extent because a plaintiff was required to choose one form of action or another in order to recover. Choosing tort would often be unsatisfactory to plaintiffs who had been deprived of their property and may not have suffered any damages themselves as a result of the tort. Choosing quasi-contract was a sure loser. That form of action could be overthrown by a defendant pleading that he was a tortfeasor, and that he therefore could not have been in privity with the plaintiff, nor under any contractual obligation to make restitution of profits to him. Common law judges thus allowed for a waiver of tort when choosing the quasi-contractual form of action (*assumpsit*) so that plaintiffs could exercise their proprietary rights without the strictures of civil procedure granting a perfect technical defence to the tortfeasor.

After the procedural reforms of the 19th century, it was clear that plaintiffs had long been entitled to vindicate their proprietary rights through disgorgement when a tortfeasor was in possession of their property (or profits generated therefrom). Thus, under the new system of pleadings, once the tort and title to the property had been proven by the plaintiff, that plaintiff was entitled to his proprietary remedy. Procedural technicalities standing between the plaintiff and those proprietary remedies were struck down once more in the 20th century. In *United Australia*, a defendant attempted to take advantage of an alleged "waiver of tort," setting up a defence that by simply *initiating* a claim of waiver of tort against another tortfeasor on the same facts, that plaintiff had forever set aside the fact that a tort had taken place, effectively ratifying the defendant's acts. As a result, the defence argued, the plaintiff was estopped from imputing any wrongdoing to them. The House of Lords held that this technicality of civil procedure — the imputation of a quasi-contract — could not stand in the way of

the vindication of the plaintiff's property rights, and held that the fiction of a quasi-contract was just that: a fiction on the facts of a tort. Ultimately, their Lordships held that the technicalities of procedure must once again be sidestepped in order to give effect to the plaintiff's manifest rights.

The current argument advanced by class counsel, that waiver of tort should permit disgorgement of a defendant's profits as opposed to a compensatory remedy, has a basis in history and precedent only to the extent that a plaintiff has long been entitled to the return of his property or the converted value thereof. The more expansive normative argument made by proponents of an expanded theory is that *any* wrongdoing should compel the defendant to disgorge any profits obtained as a result of that wrongdoing. This is not consistent with the development of waiver of tort, and actually promotes a re-imagining of compensation for tort generally. It has undoubtedly occurred to many observers that if a restitutionary remedy had always been available for any wrongdoing, there would have been a much more pronounced jurisprudence on the subject. The very obscurity of waiver of tort speaks to the fact that this has never been the law. This formulation of waiver of tort is incompatible with the compensatory theory of tort damages in such a way that one would expect it would have been remarked upon at the very least during the great unifying projects of the 19th-century legal academy.

On an individual application of this theory, entirely unfamiliar results obtain. Consider a party guest that avoids damage to a $1,500 suit by jumping away from a spilled bottle of wine, but who knocks over a $30 vase in the process. The "any wrongful act" formulation of waiver of tort would hold that the defendant owes the owner of the vase not $30, but $1,500 — he may as well have saved the energy and refused to move. The fact that the defendant profits by saving a cost is not fatal to the example; it is frequently claimed in the class actions jurisprudence that a saving of costs through failure to recall is actionable and that those cost savings are a form of claimable profit. If this had ever been the law, it is strange to think that the profession somehow lost sight of that fact, and let that formulation pass into disuse without comment.

The history of waiver of tort and action in *assumpsit* provides no basis to believe that courts have ever considered a disgorgement of profits an appropriate award for plaintiffs that were not entitled to those profits in the first place. There is similarly no basis for belief that courts have ever developed the doctrine as a punitive one to be

deployed against high-handed or reckless defendants. The court has fashioned legal fictions and amended the doctrine of waiver of tort and action in *assumpsit* only in order to get out of its own way: to prevent the court's own procedural strictures from standing between a plaintiff and what are already understood to be his rights.

It might be argued, finally, that the very origin of *assumpsit*, which saw the extension of standing in tort to those that were in privity with tortfeasors, was a groundbreaking normative decision concerning what was rightly due to a plaintiff. To the extent that this was true, it must be noted that this development was not entirely revolutionary; it was an extension of well-understood tort principles to those barred from claiming it due to the technical legal concept of privity. It was not a decision that my ferryman owes me compensation for drowning my horse; it was a decision that my ferryman owes me the *same compensation a stranger does* for drowning my horse. It was not an establishment of a new measure of damages, but an extension of the class of persons to whom those damages may be owed as a matter of standing. An argument that disgorgement is an appropriate remedy for *any* wrongful act is a challenge to a much more fundamental principle of compensatory justice, predating the law of England altogether and fixing on the common law's inheritance of the first precepts of the Roman law of delict from the *Lex Aquilia* in the third century B.C.[194] It is quite literally an argument from first principles.

8. Is Loss a Necessary Element in a Waiver of Tort Claim?

Probably not. Generally loss is shown, even if damages are merely nominal or the injury to the plaintiff is dwarfed by the benefits accruing to the defendant, though there have been aberrant cases holding that loss is a necessary element that were subsequently criticized.[195] Authority on this point is scant, likely because the proof of a plaintiff's property being wrongfully in the hands of a wrongdoer typically demonstrates some form of loss or deprivation. Even in cases of trespass — historically a common underlying wrong in waiver of tort cases — it will usually be the case that the plaintiff's property being in the hands of a tortfeasor will connote some loss to the plaintiff, even if the loss is said to be a loss of opportunity to bargain with the defendant for the

194. See generally Bruce Frier, *A Casebook on the Roman Law of Delict* (Atlanta, Georgia, Scholars Press, 1989).

195. Keener, *supra*, footnote 77, at pp. 225-227.

property's user. As the basis for restitution in *indebitatus assumpsit* is the wrongful possession of the plaintiff's property or profits derived therefrom, however, it is not clear that demonstration of loss must be necessary in order to bring such a claim.

This supposition would apply to cases in which a defendant profits from the wrongful use of the plaintiff's intellectual property. In such cases, even conservative and expository authorities such as Goff and Jones can see no reason why loss need be proven in order to ground a claim in waiver of tort and to vindicate a plaintiff's proprietary rights against such trespassers.[196] Neither, for that matter, can I. If the plaintiff can make out a tort and title to property held or disposed of by the defendant, the law has permitted the plaintiff to claim that property or the profits resulting therefrom for centuries. While the demonstration of the defendant's possession of property belonging to the plaintiff almost always demonstrated the plaintiff's loss of that property, there seems to be no thread in the historical cases suggesting that the loss is somehow central to making out the quasi-contractual claim. Indeed, the original legal fiction was predicated on the imputation of a promise to pay over the proceeds of the plaintiff's property to the plaintiff; that imputed agency relationship would not have required a loss element.

As an example of the utility of waiver of tort in the absence of loss, consider the case of a defendant employee that, without permission, takes over the plaintiff employer's car rental business while the plaintiff is ill. The defendant does extremely well, making twice as much money as the plaintiff ever has in a single day. The defendant's gain is not owing to any loss on the part of the plaintiff, who would not have had that money in any event, as he would not have earned anything at all that day. The profit is derived from trespass, however, and the right to profit from his business is the plaintiff's own. Rather than suing in trespass or conversion for the fair market value of that business for a day — half of what the defendant managed to acquire — waiver of tort entitles the plaintiff to claim the quasi-contractual remedy in *assumpsit*, treating the tortfeasor as agent and claiming the entirety of the benefit wrongfully derived from the defendant's use of his property.

Note the distinction between this case and the plaintiff class' failure to show losses in *Serhan*, where there was no proprietary connection between the class and the defendant whatsoever. As the

196. Goff and Jones, *supra*, footnote 58, at pp. 814-815.

defendant could not be said to have wrongfully taken possession of any property of the plaintiffs in that case (the provincial health insurers having been the ones that entered into the contract), and considering furthermore that the health insurers' money was paid over rightfully in performance of contract and vested legally in the defendant, there could be no claim against the defendant by *either* the plaintiffs or the insurers in waiver of tort. The defendant was not wrongfully in possession of the property of either party. While the insurers had a claim in breach of contract, the *Serhan* class' failure to establish loss would not have been fatal to their waiver of tort claim; ultimately the fact that they suffered no harm was little more than evidence that any claim of theirs in negligence was bound to fail.

VII. CONCLUSION

The doctrine of waiver of tort has always been a confounding one. It was developed over time to effect justice in a strict court system that preferred form over substance. Throughout the centuries, the doctrine grew to permit greater access to restitutionary remedies, not for their own sake, but because the form of the law itself stood between a plaintiff and his or her indisputable rights. The development of the doctrine was torturous, but authority on the doctrine was remarkably consistent for 400 years. Where there has been a proven tort and the defendant is wrongfully in possession of the plaintiff's property, money or labour (or the proceeds therefrom), the courts have recognized the right of the plaintiff to waive that tort and instead to impute an undertaking on the defendant's part to pay over the proceeds of his wrongful use of that property.

After the statutory reforms of the latter half of the 19th century, the forms of action that gave rise to the doctrine were abolished, but the precedent set in regards to that doctrine remained in effect, permitting plaintiffs to make good their proprietary rights despite the defendant's capacity to foil an imputed contract by pleading his own tort to show there was no agreement to return the goods. The *United Australia* case rejected the need for the court to recognize such an artificial contract, holding that on the facts of a proven tort, a plaintiff with clear title to the property in the hands of the defendant may merely elect his or her remedy in contract or tort, and until that election is satisfied, the tort has not been waived. That remains the present state of the law.

There has, since the 1990s, been great confusion in Canada as to the relationship between this doctrine and actions in unjust enrichment, as well as constructive trust. This confusion has been exacerbated by the tendency of courts and academics to state the doctrine too generally, or to quote authorities too narrowly, both of which are capable of giving the impression that *any* wrongdoing may be waived in order to recover a disgorgement of the defendant's profits. That is not the law, but there is a compelling debate between very well-esteemed authorities that perhaps it should be.

The use of slippery terms like "restitution" and "unjust enrichment" in reference to the effect of waiver of tort has led to the widespread conflation of equitable concepts and waiver of tort, both of which developed completely independently, in distinct court systems. Waiver of tort is not an action in unjust enrichment, and the jurisprudence of one does not apply to the jurisprudence of another. As the distinction between the two has not been fully comprehended in modern times, there has not been enough of a debate as to whether or not the two *should* be conflated under a single principle. To do so may bring equity and the common law closer to unity: possibly a great benefit, given the potentially unnecessary distinction between the two. On the other hand, perhaps the distinction should be maintained lest plaintiffs be given a substantially relaxed threshold for proving unjust enrichment, a greater measure of damages in tort, a step away from the compensatory nature of tort damages, or a more powerful route to successful claims in unjust enrichment as equitable principles do not apply to actions in waiver of tort. Or, perhaps, this confusion is an indication that the court should simply dissolve the doctrine once and for all. Perhaps the courts will determine that constructive trust and unjust enrichment now largely serve, though in quite a different procedural manner, to remedy the wrongs that waiver of tort was originally intended to address, and that the latter is now no more than a vestigial organ of 15th century civil procedure.

In any event, the ultimate decision on the fate of waiver of tort must be an informed one. It must be decided after an honest and passionate argument on the grounds of policy, rather than asserted as fact on the grounds of a patchwork and stuttering history.