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Courts pave the way for damages in consumer class actions

Defendants in consumer class actions should be on notice, following two recent decisions that used consumer protection legislation as a basis to award damages.

The decisions of the Supreme Court in *Marcotte v Banque de Montreal*, 2014 SCC 55, and of the Superior Court in *Ramdath v. George Brown College*, 2014 ONSC 3066, both show the courts drawing on consumer protection legislation as a means to award damages in the class action context.

If *Marcotte* and *Ramdath* are any indication, the traditional view that class actions rarely reach the damages stage may be endangered. Generally, the certification stage has acted as a substantial barrier for plaintiffs to advance their actions; if an action is certified, settlement pressures loom large; and, if an action actually proceeds to a common issues trial, liability tends to take center stage. Meanwhile, damages are treated as an individualized exercise.

Ramdath dealt with a college falsely stating in its course calendars that completion of one of its certificate programs would lead students to obtain three industry designations. The college was found liable for engaging in an "unfair practice", which Ontario's *Consumer Protection Act* defines as making a "false, misleading or deceptive representation". In *Marcotte*, credit card-issuing banks were found similarly liable under Quebec's *Consumer Protection Act* for, effectively, hiding certain currency conversion charges related to foreign purchase transactions.

In both cases, the Courts drew its authority to award damages from consumer protection legislation. In *Ramdath*, the Plaintiffs pursued aggregate damages under section 24 of Ontario's *Class Proceedings Act*. In particular, the plaintiffs relied on section 18(2) of the *Ontario Consumer Protection Act*, which provides a damages remedy for misrepresentation without establishing the common law requirement of reliance. In the result, class members who never relied on the course calendar would still be entitled to damages. Although reliance wasn't required, some causal connection was still necessary, and was found to exist in *Ramdath.*

In *Marcotte,* the Plaintiffs pursued punitive damages, pursuant to section 272 of Quebec's *Consumer Protection Act*. The

Supreme Court relied heavily on its decision in *Richard v. Time* , 2012 SCC 8, which articulated the criteria for awarding punitive damages under that legislation. In that decision, the Supreme Court noted that the civil law system did not have a unified set of principles for determining when to award punitive damages as the common law system has through decisions like ***Whiten v. Pilot Insurance Co,*** 2002 SCC 18. Without it, the Supreme Court was only left with the *CPA* for guidance.

In the result, as affirmed in *Marcotte*, the stringent test under *Whiten* which requires a finding of reprehensible conduct was eschewed in favour of something considerably lower: behaviour that is "lax, passive or ignorant with respect to consumers' rights and to their own obligations", or conduct that displays "ignorance, carelessness or serious negligence."

As to *Ramdath*, the insights may be even broader, as others have suggested [1]. The thrust of Justice Belobaba's decision was that aggregate damages should be the norm, more than the exception. To treat them otherwise, would be to frustrate the legislature's intent with the *Class Proceedings Act* to "tilt the balance in favour of access to justice".

Together, the decisions suggest that the days of downplaying damages as a live issue in class proceedings are numbered.

[1] Aggregate damages: doing the math