Pleading Alternative Theories

Involves Bringing Litigation With Allegations Containing Various Causes of Action

Helpful Guide to Understanding the Importance of Pleading Alternative Theories of Law Within Claims

While pleading alternatives may involve legal theories and causes of action beyond breach of contract and negligence, this article will focus on such for the purpose of providing clarity to the concept; however, it is important to remain aware that pleading alternative causes of action can involve numerous factual alternatives as well as legal theories. For example, when a retaining wall located upon the premises of a neighbour fails, and damage to neighbouring property occurs, alternative causes of action may be pleaded that suggest negligence by failure in maintaining the retaining wall as well as nuisance, resulting in interference with the reasonable use or enjoyment of property. Of course, to plead alternatives, it is necessary to understand the various causes of action that may apply to the factual circumstances within the case at bar.

Concurrent Liability or Alternate Liability

Until the case of ***Central Trust Co. v. Rafuse***, [1986] 2 SCR 147, there was much debate and conflicting decisions as to whether concurrent or alterative liability could arise from a negligence claim brought in combination with a breach of contract claim (see ***Central Trust Co.*** at paragraph 24 to paragraph 47); however, this question was answered decisively by the Supreme Court in ***Central Trust Co.*** where it was said:

> 48. I must now attempt to draw conclusions from what I fear has been a much too lengthy survey of judicial opinion on the question of concurrent liability. My conclusions as to what I conceive, with great respect, to be the opinion with which I am in agreement on the various issues underlying this question may be summarized as follows.

49. 1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in Donoghue v. Stevenson, Hedley Byrne and Anns were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. Indeed, the dictum of Lord Macmillan in *Donoghue v. Stevenson* concerning concurrent liability, which I have quoted earlier, would clearly suggest the contrary. I also find this conclusion to be persuasively demonstrated, with particular reference to *Hedley Byrne*, by the judgment of Oliver J. in *Midland Bank Trust*. As he suggests, the question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one. See *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C. 405, per Lord Simon of Glaisdale at p. 417. *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 521, in which an owner sued flooring subcontractors directly in tort, is authority for the proposition that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

50. 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

51. 3. A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

52. 4. The above principles apply to the liability of a solicitor to a client for negligence in the performance of the professional services for which he has been retained. There is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.

> 53. 5. The basis of the solicitor's liability in tort for negligence and the client's right in such case to recover for purely financial loss is the principle affirmed in *Hedley Byrne* and treated in Anns as an application of a general principle of tortious liability for negligence based on the breach of a duty of care arising from a relationship of sufficient proximity. That principle is not confined to professional advice but applies to any act or omission in the performance of the services for which a solicitor has been retained. See *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, at p. 416; *Tracy v. Atkins (1979)*, 1979 CanLII 760 (BC CA), 105 D.L.R. (3d) 632, at p. 638.

> 54. Applying these conclusions to the facts of the case at bar, I am of the opinion that if the respondent solicitors were negligent in the performance of the professional services for which they were retained they would be liable in tort as well as contract to the appellant, subject, of course, to the other defences which they have raised.

Subsequent to the decision in ***Central Trust Co.***, which was a case alleging causes of action in both breach of contract (retainer with lawyers) and professional negligence (failure to do what a reasonable lawyer would do in a similar situation), the ***Central Trust Co.*** case was, and remains, commonly cited to show that concurrent liability and alternative liability may exist and in circumstances far beyond disputes with lawyers. As of September 2019, the ***Central Trust Co.*** case is cited by more than 1,000 cases available via CanLII.org and is certainly cited within many more.

Reasoning for Pleading Alternatives

Broader Damages

Circumstances may arise in which proving certain causes of action may be more fruitful than other causes of action. For example, whereas, generally, damages in a breach of contract case are limited to putting the Plaintiff into the same position as would be the result if the contract was without breach, this may limit claims for certain types of damages such as aggravated general damages or punitive damages. As was said in ***Vorvis v. Insurance Corporation of British Columbia***, [1989] 1 SCR 1085, damages in breach of contract, generally, arise as those losses directly arising from failure to perform the contractual obligations; however, in the absence of an independently actionable wrong, such as tortious conduct, claims for

aggravated or punitive damages fail to arise. Essentially, the decision in ***Vorvis*** states that improper conduct, beyond simply the breach of contract, such as egregious tortious behaviour, is required to attract such further forms of damages.

Burden of Proof

Within different causes of action may exist a different burden of proof. For example, returning to the retaining wall failure mentioned earlier as above, proving a negligence claim, including breach of the standard of care required for the maintenance of a retaining wall, may be difficult; however, providing a strict liability nuisance claim, involving unreasonable interference with use or enjoyment of property, may be a much easier task.

Limitation Period Concerns

Certain causes of action may be subject to a different limitation period and thereby be of significant importance so to avoid an entire case being statute barred by expiry of a limitation period. For example, the ***Insurance Act***, R.S.O. 1990, c. I.8, contains certain limitation periods that statutorily bar claims against an insurance policy, such as allegations of breach of contract for denial of coverage benefits, beyond a one-year; and accordingly, a claim brought alleging only the cause of action arising from an alleged breach may be barred; however, by pleading an alternative, such as the separate and independent tort of bad faith dealing, whereas the occurrence and discovery of the bad faith dealing may occur beyond the one-year 'breach of contract' period within the ***Insurance Act***, may present an as opportunity to bringing an, "*in the alternative*" claim as a tort law matter where the applicable limitation period is two-years per the ***Limitations Act, 2002***, S.O. 2002, Chapter 24, Schedule B, and thereby use a potential avenue for success for claims that would otherwise be barred. Such a circumstance arose within the case of ***Whorpole v. Echelon General Insurance***, 2011 ONSC 2234 where the one-year 'breach of contract' cause of action limitation date expired; however, the two-year 'tortious bad faith dealing' cause of action remained alive.

Summary Comment

For many reasons, claims are often, and should be, brought with various causes of action pleaded as alternatives. When various causes of action are used within the same claim, such as said as brought 'concurrently' or 'alternatively'. The reasons for bringing various causes of action within the same case may include, among other things, a broader basis of damages for certain causes of action than what exists for

other causes of action, a lower burden of proof such as strict liability in a nuisance claim versus breach of standard of care within an negligence claim, as well as the difference in applicable limitation periods that may apply to certain causes of action such as one-year limits for breach of contract by failure to provide benefits per an insurance policy versus a two-year limit for bad faith dealing by an insurer.