

Civil Litigation

SCC decision roadmap to damages in tort for pure economic loss: Part one

By Andrew Yolles



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(November 17, 2020, 8:25 AM EST) -- In its recent decision in 1688782 *Ontario Inc. v. Maple Leaf Foods Inc.* 2020 SCC 35, the Supreme Court of Canada was divided on whether Mr. Sub franchisees could claim damages in negligence for pure economic loss resulting from contaminated meat products supplied by Maple Leaf Foods.

Although the majority of the court held that the plaintiff class could not pursue their claims for pure economic loss in this case, this decision provides a roadmap for future tort claims for pure economic loss, and it perhaps eases the historical restrictions on such claims.

Facts of the case

This decision arose from a summary judgment motion brought by the defendants, Maple Leaf Foods, to dismiss a class action brought by franchisees of the Mr. Sub restaurant chain.

In the class action, the franchisees alleged that a recall of potentially tainted deli meats, resulting from a listeria outbreak at a Maple Leaf Foods factory, had resulted in reduced sales and profits for the franchisees, as well as a reduction in the capital value and the public goodwill associated with the Mr. Sub franchises.

Notably, the plaintiff class did not claim that the defendants' negligence had caused actual damage to their persons or property. The plaintiff class' claim was only for economic losses resulting from the defendants' negligence, and as such it is a claim for pure economic loss.

There was no privity of contract between the plaintiff franchisees and the defendant Maple Leaf Foods. However, both sides stood in a contractual relationship with the franchisor, Mr. Sub. Mr. Sub had contracted with Maple Leaf for supply of a minimum of five million pounds of meat annually, and in turn Mr. Sub required its franchisees to purchase meat from Maple Leaf.

The majority view

While both the majority and dissenting opinions agreed that the franchisors' claim did not fall within the ambit of an established duty of care, the court was split 5-4 over whether the franchisees stood in a sufficiently proximate relationship to Maple Leaf such that a novel duty of care and responsibility for the franchisees' pure economic interests should be found to rest with Maple Leaf.

The majority opinion, authored by Justices Russell Brown and Sheilah Martin, held that the franchisees did not have a cause of action in negligence to pursue their pure economic losses as against Maple Leaf.

The court noted that while Canadian law protects against a person's right to be free of negligent interference with and injury to the persons' bodily integrity, mental health and property, there is no general right protecting against the infliction of pure economic loss.

Historically, our courts have recognized three categories of pure economic loss that could be

recoverable in tort: negligent misrepresentation of performance of a service; negligent supply of shoddy goods or structures; and relational economic loss.

However, the majority felt that this case did not fall within the ambit of any of these categories. They discussed that the only category that could potentially apply would be the negligent supply of shoddy goods, but that the recoverable economic losses under this category were typically limited to the cost of disposing of or remediating the shoddy goods, which is not what the plaintiff class was claiming for.

In any event, the majority explained that the application of these categories of economic loss is merely an analytical tool for identifying certain kinds of proximate relationships that may give rise to duty of care such that pure economic losses might be recoverable. Falling within one of these categories does not guarantee that economic losses will be recoverable, nor is it necessary that a case fall within one of these categories in order for economic losses to be recoverable.

Rather, the court explained, whether pure economic losses will be recoverable in a given case depends entirely on whether the parties stand in a sufficiently proximate relationship such that the defendant has effectively undertaken responsibility for economic losses to the plaintiff resulting from the defendant's negligence.

Applying the *Anns/Cooper* test (outlined in *Cooper v. Hobart* 2001 SCC 79) for determining whether a duty of care exists between two parties, the court noted that a duty of care is established by combining the proximity of the relationship between the parties and the foreseeability of the injury sustained.

The majority noted that in cases of negligent misrepresentation or performance of a service, whether proximity is established depends on two factors: the defendant's undertaking to provide a representation or service, and the plaintiff's reasonable reliance on that undertaking.

These factors also outline the scope of the duty of care that arises from this relationship. The defendant will only be liable for the consequences flowing from the plaintiff's reliance on that representation or service, to the extent that it was negligently provided by the defendant.

In this case, the majority felt that neither of these requirements for a proximate relationship were present. While Maple Leaf may have made an undertaking to the consumers of their product (i.e. Mr. Sub's customers) that it would be safe for consumption, no such undertaking was provided to the franchisees.

Further, the majority felt that it was unclear that the franchisees had relied on any such undertaking, in the sense that they altered their position in response to it. The franchisees could not be said to have decided to purchase meat from Maple Leaf, instead of another supplier, because of a reliance on any undertaking given by Maple Leaf, since the franchisees were contractually obligated to Mr. Sub to purchase meat from Maple Leaf exclusively.

The majority further felt that courts should be cautious in imposing a duty of care where the parties could have protected their economic interests by contract.

Although there was no direct privity of contract between the parties, the parties were linked by their contracts with Mr. Sub. As there was an opportunity amongst the parties to allocate risk by way of contractual indemnification or insurance, finding a duty of care in these circumstances could permit the parties to use tort to circumvent the implied or explicit allocation of risk within their contractual arrangements.

As a result, the majority held that the franchisees and Maple Leaf did not stand in a sufficiently proximate relationship such that Maple Leaf should be responsible for the franchisees' economic losses.

This is the first of a two-part series. Part two will look at the dissenting view of the decision.

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