

Business

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

By Andrew Yolles



Andrew Yolles

(November 18, 2020, 2:16 PM EST) -- As we discussed in the first article in this series, while both the majority and dissenting opinions in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* 2020 SCC 35 agreed that the Mr. Sub franchisors' claim did not fall within the ambit of an established duty of care, the court was split 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 previous article looked at the majority opinion. Here we look at the dissent and our conclusion.

In a strong dissenting opinion authored by Justice Andromache Karakatsanis, the minority of the court agreed with the majority that this claim did not fall within any of the recognized categories of claims in which pure economic loss would generally be recoverable. However, the minority felt that the requisite proximity and foreseeability were present between the parties, such that Maple Leaf did owe the franchisees a duty

of care with respect to their economic interests.

The minority noted that Maple Leaf knew that its products were central to the franchisees' business, and that the quality of the meats it supplied were essential to maintaining the franchisees' goodwill and reputation. It was accordingly foreseeable to Maple Leaf that its negligence in producing the meats would inflict economic harm on the franchisees, who were required to exclusively use those meats for their businesses.

The minority further felt that by contracting with Mr. Sub, Maple Leaf entered into a relationship with the franchisees, given that the primary purpose of the agreement with Mr. Sub was to supply meat to the franchisees. Maple Leaf knew that the franchisees were required to use Maple Leaf's products exclusively in a business centred on those products.

The minority held that this relationship created sufficient proximity between the parties such that Maple Leaf ought to be responsible for the franchisees' economic interests as they relate to the supply of Maple Leaf's meats.

With respect to the potential for allocating risk contractually, the minority agreed that this is an important consideration for determining the presence of a duty of care in cases of pure economic loss, but felt that in this case there was no real opportunity for the franchisees to allocate this particular risk, due to the inherent imbalance in bargaining power between franchisees and franchisors.

Ultimately, the minority held that as the arrangement between Maple Leaf and the franchisees focused on the provision of safe products, so did the scope of Maple Leaf's duty, and so Maple Leaf should be held responsible for the direct economic consequences to the plaintiffs of being associated with unsafe Maple Leaf products.

Conclusion

In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, the Supreme Court of Canada has clarified and perhaps broadened the boundaries of when claims for pure economic loss may be recoverable in tort.

While claims for pure economic loss have historically been limited to a few specific categories of such losses, both the majority and dissenting views confirmed that whether a claim in negligence for pure economic loss can succeed will depend on whether the parties are sufficiently proximate, for the purposes of the loss sustained, that a duty of care can be found to rest with the defendant that would include in its scope the economic interests of the plaintiff.

A relationship of sufficient proximity may be found where the defendant gives an undertaking to the plaintiff that induces the plaintiff to rely on the defendant, to the plaintiff's detriment.

Proximity may also be found based on the specific nature of the relationship between the parties. However, the courts will be reluctant to impose a duty of care where the parties did or could have addressed the risk of the defendant's negligence contractually, as to do so may be to permit the plaintiff to circumvent through tort the contractual arrangements of the parties.

The recoverability in tort of pure economic loss remains limited. However, with this decision, the court has provided a clarified analytical framework for the recoverability of such damages, couched in the familiar and well-established duty of care analysis.

This is the second in a two-part series. Read the first article: [SCC decision roadmap to damages in tort for pure economic loss: Part one](#).

Andrew Yolles is a senior associate at Rogers Partners LLP. He has a broad civil litigation practice focusing on the defence of personal injury, property damage, product liability and contractual and insurance coverage disputes.

Photo credit / Mykyta Dolmatov ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437- 828-6772.