

Mr. Sub Franchisees' Claims Don't Cut the Mustard as Supreme Court of Canada Narrowly Affirms Restrictive View of Pure Economic Loss

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In its recent decision in *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, the Supreme Court of Canada underscored the difficulty faced by plaintiffs seeking damages for purely economic losses in product liability cases.¹ The decision affirmed the dismissal of a proposed class action on behalf of Mr. Sub franchisees against Maple Leaf Foods seeking damages arising from a listeria outbreak linked to Maple Leaf cold cuts. Thankfully, the affected products were recalled and there was no evidence of any Mr. Sub customers suffering harm from their consumption. As such, the franchisees' claims were limited to business losses due to reputational harm and an interruption in product supply.

In upholding the Ontario Court of Appeal's dismissal of the franchisees' claims (covered previously in this newsletter), the Court found that Maple Leaf lacked the requisite proximity to the franchisees to give rise to a duty of care. In doing so, the Supreme Court confirmed that Maple Leaf would have owed a duty of care to the franchisees' customers but stopped short of extending the duty to require Maple Leaf to be mindful of the franchisees' economic interests, reinforcing the notion that claims based in negligence are intended to compensate plaintiffs' consequential economic loss, not pure economic loss.

Background to the Case: Exclusive Supply and Listeria Recall

In 2005, Mr. Sub entered into an exclusive supply agreement for the purchase of meat products sold at their sandwich outlets. While there was no direct agreement between Mr. Sub's franchisees and Maple Leaf, franchisees were required by virtue of their franchise agreements to purchase "ready to eat" (RTE) meat products from Mr. Sub's distributor. In practice, franchisees placed orders with the chain's distributor, who placed orders with Maple Leaf, who in turn supplied the meat products to the franchisees.

In August 2008, Maple Leaf became aware a listeria outbreak arising from a meat plant in Toronto and conducted a national recall of affected products, including the meats sold by Mr. Sub franchisees. The recall resulted in an interruption in the franchisees' supply of meat for a period of six to eight weeks.

The franchisees launched a class action against Maple Leaf seeking damages for economic losses arising in large part from reputational harm they sustained as a result of being affiliated with Maple Leaf in the

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aftermath of the outbreak. Specifically, they claimed damages for loss of past and future sales and profits, loss of capital value and good will and the costs they incurred in disposing and destroying Maple Leaf's recalled meats. Importantly, there was no evidence that any of the franchisees' customers was harmed by eating the contaminated meats.

Duty or No Duty: Summary Judgment and Appeal Decisions

Maple Leaf brought a summary judgment motion seeking dismissal of the franchisees' proposed class action on the basis that it did not owe the franchisees a duty of care. In response, the franchisees brought a cross-motion seeking summary judgment in their favour. At first instance, the motion's judge's decision concluded that Maple Leaf owed a duty of care to the franchisees "in relation to the production, processing, sale and distribution" of the meats and a duty of care "with respect to any representations made that the RTE Meats were fit for human consumption and posed no risk of harm."²

On appeal, the Ontario Court of Appeal overturned the motion judge's decision and granted summary judgment in favour of Maple Leaf. *The Court of Appeal* found that the motion judge failed to consider the scope of the relationship between Mr. Sub's franchisees and Maple Leaf and any duty arising therefrom. While the Court recognized that Maple Leaf owed a duty of care to supply a product fit for human consumption by the franchisees' customers, such duty did not extend to protecting the franchisees' financial and reputational losses.

A Lack of Proximity: Supreme Court of Canada Narrowly Affirms Court of Appeal

In upholding the Court of Appeal's decision by a 5-4 margin, a narrow majority of the Court confirmed that Maple Leaf did not owe a duty of care to franchisees but would have owed a duty to their customers had they become ill from eating tainted meat.

The majority decision is consistent with existing jurisprudence on the law of negligence, which imposes liability for injury to body, mental health and real property, but has been reluctant to protect against negligent or intentional infliction of purely economic losses. The franchisees' claims, which were purely related to economic loss and unconnected to a physical or mental injury to person or physical property, were therefore distinct from consequential economic loss; damages that the law of negligence has historically been intended to compensate.

In order to recover for a negligently caused loss, a plaintiff is required to prove all elements of the tort of negligence, the first of which is establishing that the defendant owed the plaintiff a duty of care. The majority

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found that a duty of care cannot be established when a claim fits within the category of pure economic loss and it is therefore necessary to determine whether a plaintiff's alleged loss is an injury to a right that can be recovered under tort law and meet the legal threshold of proximity.

The Court then went on to review two established categories of tort law where pure economic loss has been found to be recoverable: "negligent representation" and "negligent supply of shoddy goods." With respect to negligent supply of shoddy goods, the Court reiterated that such a claim must be founded upon a defendant's negligent interference with the right to be free from injury to one's person or property. The court noted that previous cases recognizing the breach of such a duty involved liability for exposing the plaintiff to danger, and not simply repairing a defect. The Court then noted that there was no evidence that any of the franchisees' customers became ill from eating the contaminated products and that, while a plaintiff may be entitled to the cost of fixing a dangerous product, if the remedy or "fix" is throwing such products away there are really no damages recoverable in negligence. Further, the contaminated meat did not pose a danger to the franchisees, it posed a danger to their customers.

A Novel Duty? A Strong Dissent and Potential Future Expansion of the Law

Although not legally binding, the dissenting opinion of four justices of the Supreme Court highlights the importance of this case to Canadian product liability law. The dissenting justices agreed with the majority that the franchisees' losses did not fit within any existing category of losses recognized as being recoverable in negligence. However, they would have recognized a novel duty of care in the circumstances of the case.

In the dissenting justices' view, the fact that the franchisees were bound by their franchise agreements to use Maple Leaf's products exclusively and were in a business that centred on the sale of such meats gave rise to a sufficiently close relationship of dependence and vulnerability with Maple Leaf to impose a duty for Maple Leaf to be mindful of the franchisees' interests and to not place unsafe products into the market that could cause economic loss to the franchisees as a result of the reasonable consumer response to the health risk imposed by those products. While the dissent's view did not ultimately carry the day, the closeness of the decision suggests a potential willingness of the Supreme Court to extend the reaches of negligence in ways previously not recognized by the common law. Manufacturers should be mindful of these potential new areas of liability for purely economic losses.

Key Takeaway Principles

Canadian tort law remains reluctant to impose liability for claims based on pure economic loss. On a

practical level, this decision means that absent a contract between parties to the contrary, a manufacturer that moves swiftly to remove its potentially dangerous products from the market may effectively reduce or eliminate their potential liability in tort law for the collateral economic damage sustained by a vendor of its products. In effect, this decision encourages manufacturers to shield themselves from liability in tort law by removing potentially dangerous products from the marketplace as soon as possible given that the lack of any evidence of harm suffered by customers figured prominently in the majority opinion. The decision also serves as a cautionary reminder that parties who are heavily reliant on their suppliers' goods, should take steps to insulate themselves contractually from being out-of-pocket in the event of a recall.

1 1688782 *Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 (CanLII), <<http://canlii.ca/t/jbg4h>>

2 1688782 *Ontario Inc. v Maple Leaf Foods Inc.*, 2018 ONCA 407, <<http://canlii.ca/t/hv65n>>, at para. 4.

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