Proximity is paramount: Supreme Court weighs in on duty of care for pure economic loss

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In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, the Supreme Court of Canada upheld a judgment that dismissed the claims of a class of Mr. Sub franchisees.

The issue was whether Maple Leaf Foods owed the franchisees a duty of care, as their exclusive supplier of meat products. In a five to four decision, the Supreme Court held that, although pure economic loss may be recoverable in certain circumstances, there is no general right in tort protecting against the negligent (or intentional) infliction of pure economic loss. As a reminder, pure economic loss is economic loss unconnected to personal injury or physical damage to property.

Background

In 2008, Maple Leaf recalled meat products processed at a factory where a listeria outbreak had occurred. Mr. Sub franchisees were impacted by the recall because their franchisor and Maple Leaf had entered into an exclusive supply agreement for ready-to-eat meats served in all Mr. Sub restaurants. While there was no contractual relationship between the franchisees and Maple Leaf, the franchise agreements required franchisees to purchase meats exclusively from Maple Leaf.

The Ontario Superior Court of Justice certified a class action against Maple Leaf on behalf of all Mr. Sub franchisees. The action advanced claims in negligence for alleged economic losses and reputational injuries, including lost past and future sales, past and future profits, capital value of the franchises and goodwill. Maple Leaf brought a motion for summary judgment on the basis that it did not owe the franchisees a duty of care.

Maple Leaf's motion was initially unsuccessful, but was granted by the Court of Appeal for Ontario on appeal. (Read our past article about the Ontario Court of Appeal's decision). The Supreme Court of Canada granted the franchisees leave to appeal.

Outcome

A five-justice majority of the Supreme Court dismissed the franchisees' appeal, determining that Maple Leaf Foods did not owe the franchisees a duty of care.

At the outset, the majority noted that while the common law readily imposes liability for negligent injury or interference with bodily integrity, mental health and property, there is no general protection in tort law against negligent infliction of pure economic losses. To recover for any type of negligently caused loss, a plaintiff must still must prove all the elements of the tort of negligence.

In that respect, the majority emphasized that a duty of care cannot be established simply by showing that a claim fits within one of the "current categories" where pure economic loss may be recoverable: negligent misrepresentation or performance of a service, negligent supply of shoddy goods or structures and relational economic loss. Rather, these categories are only analytical tools that "provide greater structure to a diverse range of factual situations … that raise similar … concerns." Proximity remains the "controlling concept" and the franchisees would have to demonstrate that at the time of their losses, they were in a sufficiently proximate relationship with Maple Leaf.

The franchisees argued that their circumstances fell within two of the categories of recoverable pure economic loss: negligent misrepresentation or performance of a service and the negligent supply of shoddy goods or structures.

With respect to negligent misrepresentation or performance of a service, the majority emphasized that two factors determine whether the plaintiffs have established sufficient proximity: the defendant's undertaking and the plaintiff's reliance.

Although the majority accepted that Maple Leaf undertook to provide ready-to-eat meats fit for human consumption, the intended effect of that undertaking is determinative of whether a relationship of proximity exists. The majority explained that reliance, which exceeds the purpose of a defendant's undertaking, is not reasonable, and therefore not foreseeable. In the circumstances, the majority concluded that Maple Leaf's undertaking was made to and for the purpose of assuring the ultimate consumers of its products and not to commercial intermediaries like the franchisees.

With respect to the negligent supply of shoddy goods or structures, the majority (citing the seminal Supreme Court of Canada decision of *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*) noted that the presence of a real and substantial danger to persons or property is the "linchpin" of the analysis.

While the liability rule may apply to products other than building structures, the duty in such cases is narrow and confined by the concern for averting danger. The majority concluded that any danger posed by the supply of ready-to-eat meat was only to the ultimate consumer and not the franchisees. The majority further noted that any danger posed to consumers when the meat was manufactured, "evaporated" when they were recalled and destroyed.

The majority concluded that a duty of care could not be established by reference to a recognized category. Importantly, it emphasized that the established or analogous category inquiry still demanded scrutiny of the factors that justified the recognition of the category, because "as between parties to a relationship, some acts or omissions might amount to a breach of duty, while other acts or omissions within that same relationship will not."

In undertaking a full proximity analysis, the majority stressed that the analysis required an examination of all factors present in the relationship including any contractual relationship or lack thereof. The majority did not dispute that the arrangement between Mr. Sub and Maple Leaf operated to bind the franchisees to obtain and sell only ready-to-eat meats produced by Maple Leaf.

However, any vulnerability in that regard was not a basis for tort liability but, rather, was an "unremarkable incident of the franchise model of business in which the franchisees operated." The majority felt that a finding of proximity between the franchisees and Maple Leaf would "sit uneasily" within this state of affairs, and a chain of contracts that reflected a typical arrangement between a franchisee, a franchisor, and an exclusive supplier. Accordingly, while the franchise agreement made the franchisees vulnerable, it did not have the effect of placing them in a proximate relationship to Maple Leaf. It is noteworthy that the majority stated at several points in its reasons that the franchisees did have means, although conditional upon obtaining the franchisor's permission, to seek out alternative sources of supply, but did not do so.

The Dissent agreed that the franchisees' claims did not fall within an existing category of economic loss or relationship of proximity. However, they concluded that the circumstances of the relationship between the franchisees and Maple Leaf supported the imposition of a novel duty of care. The Dissent emphasized that Canadian courts have become more accepting of recovery of economic loss in negligence over time and that the scope of allowable economic loss is not limited to existing categories. In their view, the franchisees' action engaged a different set of policy considerations. With respect to foreseeability, the Dissent concluded that someone in Maple Leaf's position would have reasonably foreseen economic loss to the franchisees, as the public-facing retailer of their product.

In assessing proximity, the Dissent distinguished the franchisees from other retailers of Maple Leaf products because they were bound to use Maple Leaf meats exclusively and were in a business that centred on such products. This high degree of dependency put Maple Leaf in a close relationship with the franchisees, such that they ought to have been mindful of the franchisees' interests. In stark contrast to the majority, the Dissent found that the contractual matrix strengthened the proximity between Maple Leaf and the franchisees.

Takeaway

This decision is significant in terms of its discussion of the operative principles in considering the potential recovery of pure economic loss for negligence. While the entire court agreed that proximity continues to be the "controlling concept," the majority and dissenting opinions exemplify how an analysis of the matrix of relevant factors can result in two very different characterizations of the relationship between two parties for the purposes of potential recovery in tort.

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