

The Ontario Court of Appeal Refuses to Strike a Claim in Negligence for Premature Commercialization

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The principles set out in the decision of the Supreme Court of Canada in *Deloitte & Touche v Livent Inc. (Receiver of)* ("**Livent**")^[1] are frequently relied upon in motions to strike for the purpose of defeating claims in negligence or negligent misrepresentation on the basis that the plaintiff has no reasonable prospect of establishing a duty of care. The Court of Appeal recently dealt with such a case in *Darmar Farms Inc. v Syngenta Canada Inc.*,^[2] with mixed results for the parties. While the Court of Appeal struck a claim in negligent misrepresentation, it allowed a factually similar claim for negligent premature commercialization to proceed.

Background

The representative plaintiff, Darmar Farms Inc. ("**Darmar**"), commenced a proposed class action against Syngenta Canada Inc. and Syngenta AG (collectively, "**Syngenta**") on behalf of itself and other corn growers in Canada. The action was related to the commercialization by Syngenta of Agrisure, a type of corn seed that contained a genetically modified trait. While Agrisure had been approved for sale in North America at the time of its commercialization, it had not been approved by regulatory authorities in China, a large and growing export market for North American corn. This led to all North American corn being barred from the Chinese market because it had intermingled with Agrisure.

Even though Darmar had not itself purchased products from Agrisure, it alleged losses as a result of, among others, Syngenta's negligence in prematurely commercializing Agrisure, and Syngenta's negligent misrepresentations about the timing and substance of its application for approval of Agrisure in China.

At first instance, Darmar's claim was dismissed on a motion to strike on the basis that the statement of claim did not disclose a reasonable cause of action. The Court of Appeal allowed the appeal in part.

Clarification of Principles Applicable on a Motion to Strike

The Court of Appeal reiterated that, on a motion to strike, the adequacy of the statement of claim must be assessed from the standpoint of whether it discloses that the representative plaintiff has a reasonable cause of action. The fact that other potential class members may have a reasonable cause of action is irrelevant.

The Court of Appeal also clarified that if a document is incorporated by reference into a response to a demand for particulars, it can be treated as part of the particulars and, therefore, as part of the pleading for the purpose of a motion to strike. However, the Court cautioned that this was not necessarily the case when: (a) a party picks out one statement, but not others, in a document referred to in particulars, and treats that statement as a fact alleged in the particulars (and therefore in the pleading) while not treating other statements in the same document the same way; and (b) a statement in a document is subject to interpretive issues that cannot be resolved on a motion to strike.

Application of Duty of Care Principles to Negligent Misrepresentation and Premature Commercialization Claims

The Court of Appeal reviewed the principles set out in *Livent* with respect to the existence and extent of a duty of care in a claim for economic loss. It stressed that, in a misrepresentation case, the scope of proximity and of reasonable foreseeability is defined by the purpose for which the representation was made, even where the representation is not the result of a specific prior undertaking to provide it. According to the Court, “[a]s long as the purpose for which the representation is given is clear, that purpose defines what is within and what is outside the scope of responsibility, that is, the duty of care relating to the representation.”^[3]

With respect to its claim in negligent misrepresentation, Darmar alleged that: (a) Syngenta made the representations in issue for the purpose of selling its own product, and (b) it relied on Syngenta’s representations to plant corn, but not to purchase corn from Syngenta. Because Darmar’s alleged reliance was for a purpose beyond the purpose of Syngenta’s representations, the Court of Appeal found that Darmar’s reliance was beyond the scope of any relationship of proximity, and any injury resulting from such reliance could not be reasonably foreseeable. As a result, the Court concluded that Darmar had no reasonable prospect of establishing a duty of care to support its claim in negligent misrepresentation.

However, the Court of Appeal reached a different result with respect to Darmar’s premature commercialization claim. It disagreed with the motion judge’s characterization of this claim as a “misnomer”, and stated that it was not determinative that the claim did not fall within a category of claim for pure economic loss which had been previously recognized. The Court noted that there were factors pleaded by Darmar that could arguably support a relationship of proximity, including: (a) the allegation that Syngenta gave an undertaking not to cause harm to the corn market by commercializing a product without global approvals in response to concerns from industry associations; and (b) the allegation that, because of the interconnectedness and interdependency of the corn market, Syngenta knew that upon commercialization, its product would impart its characteristics on all corn, making all corn vulnerable to be treated by export markets in the same way as Syngenta’s product.

The Court of Appeal also relied on its prior decision in *Sauer v Canada*.^[4] In that case, an Ontario farmer brought a claim against a manufacturer who was alleged to have supplied seed contaminated with “mad cow disease” to an Alberta farmer, resulting in the closing of foreign markets to all Canadian cattle and beef products. The claim was allowed to proceed even though the Ontario farmer had not purchased the manufacturer’s feed. Applying the same analysis, the Court reasoned that because Syngenta’s product contained and imparted an attribute that would affect Darmar and its product in the same fashion by causing the closing of an important foreign market with consequential economic effects, Darmar would arguably fall within the range of persons to whom a duty was owed. Therefore, it could not be concluded at this stage that there was no reasonable prospect that Darmar could succeed in establishing that it would be just and fair to impose a duty of care on Syngenta.

The Court reiterated that courts should be reluctant to determine at the pleadings phase of an action that indeterminate liability concerns justify negating a duty of care. It stated that at the pleading phase of this action, Darmar had a reasonable prospect of showing that a duty care arose that did not give rise to indeterminacy concerns, or that even if it did, any indeterminacy arose from the risk which Syngenta undertook to protect the industry against and, thus, may justly and fairly result in liability.

Conclusion

The decision of the Court of Appeal in *Darmar Farms Inc. v Syngenta Canada Inc.* shows that the door is not closed to new categories of claim for pure economic loss, and that it is important to undertake a separate duty of care analysis for each cause of action that is pleaded because such analysis may yield different results based on how the cause of action is articulated. It also shows that in order to successfully plead a duty of care in a negligent misrepresentation claim, care must be taken to ensure that the extent of the alleged duty of care does not go beyond the purpose of the alleged negligent misrepresentations.

[1] *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63.

[2] *Darmar Farms Inc. v Syngenta Canada Inc.*, 2019 ONCA 789.

[3] *Ibid.* at para. 65.

[4] *Sauer v Canada*, 2007 ONCA 454.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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