

# Supreme Court Clarifies the Law on the Duty of Care for Pure Economic Loss

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A recent Supreme Court of Canada decision is a cautionary tale on the Court's reluctance to award recovery in tort where parties fail to mitigate risks through contract. In [1688782 Ontario Inc v Maple Leaf Foods Inc, 2020 SCC 35](#), the Supreme Court has ruled that Maple Leaf does not owe a duty of care for pure economic loss to Mr. Sub franchisees. In the Court's 5-4 decision, the majority upheld the decision of the Court of Appeal and found that the duty of care between Maple Leaf and its customers did not extend to Mr. Sub franchisees.

## Background

This case arises from a listeria outbreak that occurred in 2008 at a Maple Leaf Foods plant.

As a result of the outbreak, Maple Leaf recalled some of its products, including two meat products it supplied to Mr. Sub franchisees. The franchisees experienced a shortage of product for six to eight weeks. Due to this, the franchisees claimed that their sales were negatively affected during the outbreak as well as afterwards and that they suffered reputational harm because they were associated with the contaminated meat products.

At the time, the relationship between Mr. Sub and Maple Leaf was governed by an exclusive supply agreement, which made Maple Leaf the exclusive supplier for ready-to-eat meats served in all Mr. Sub restaurants. The franchise agreement between Mr. Sub and its franchisees required them to purchase ready-to-eat meats produced exclusively by Maple Leaf. However, there was no contractual relationship between the franchisees and Maple Leaf.

The franchisees commenced a class action against Maple Leaf to claim damages for reputational and economic loss, among other things. They claimed that Maple Leaf owed a duty to the franchisees to supply a product fit for human consumption and that Maple Leaf was negligent in its duty.

## Decisions of the Lower Courts

Maple Leaf brought a motion for summary judgement and claimed that it owed no duty of care to the franchisees. The motion judge held that Maple Leaf owed a duty of care to the franchisees to supply a product fit for human consumption. This decision was overturned by the Ontario Court of Appeal. The Court of Appeal found that no duty of care was owed by Maple Leaf as there was no proximity between the franchisees and Maple Leaf. For more details about the Ontario Court of Appeal decision, please click [here](#) to read our blog post about this decision.

## Decision of the Supreme Court

The Supreme Court's decision builds upon the court's jurisprudence on the law of duty of care. The situations that give rise to a duty of care are limited where a claim relates to a pure economic loss. A pure economic loss refers to a situation where a harm is only economic in nature as opposed to a situation where economic loss is a consequence of physical or mental injury to a person or physical damage to property. Since the harm in this case was purely economic, at issue was whether a duty of care for economic loss existed in the circumstances.

Central to the issue of whether a duty of care exists is whether there is sufficient proximity between the parties. The franchisees argued that their claim fell within two categories of proximity that have been recognized in the context of pure economic loss. These two categories are negligent misrepresentation or performance of service and the negligent supply of shoddy goods or structures. Alternatively, they argued that a novel duty of care should be recognized. The majority held that the established categories do not automatically result in a right to recovery. Rather, the established categories are analytical tools to assess whether a set of circumstances gives rise to a duty of care.

In cases of negligent misrepresentation or performance of service, a relationship of proximity has two key components: (1) conduct that demonstrates an undertaking by the defendant to safeguard the plaintiff's interest; and (2) reasonable reliance by the plaintiff on that undertaking. These concepts of undertaking and reliance were central to the Supreme Court's analysis on proximity in the context of pure economic loss.

The majority found no proximity between Maple Leaf and the franchisees. According to the majority, the Maple Leaf's undertaking to provide meat fit for human consumption was made to the consumers, not to commercial intermediaries such as the franchisees. The majority also found that the franchisees had not relied on the undertaking.

Consistent with the Court's earlier jurisprudence, the majority found that the duty of care for economic loss arising from negligent supply of shoddy goods and structures was not applicable to this case. The Court found that this narrow category of duty is limited to a defect posing real and substantial danger to the plaintiff's personal or property rights. This category does not apply where the goods only result in a pure economic loss, as what occurred in this case. A duty of care did not arise in this case because any danger arising from the potentially contaminated meat supplied by Maple Leaf posed a danger to the customers, not to franchisees.

Since no proximity was found based on established or analogous categories, the Court conducted a full proximity analysis to assess whether a duty of care could be imposed on Maple Leaf. In doing so, the Court considered the expectations between the parties, among other things. A key factor was that the franchisees could have protected their interests by entering into a contract with Maple Leaf. As commercial parties, they chose to enter into a contract with Mr. Sub and accepted the supply arrangement with Maple Leaf. While contractual silence will not automatically foreclose the imposition of a duty of care, the majority emphasized that courts must be careful not to disrupt the allocations of risk reflected in contractual arrangements.

In contrast with the majority's analysis, which focused on the proximity of the relationship between the parties, the minority's analysis focused on foreseeability to support the franchisee's right to recovery. According to the minority, the franchisees were entitled to recover because Maple Leaf could foresee that its actions could directly harm the economic interests of the franchisees. For the minority, foreseeability was the determining factor.

### **Significance of the Decision**

This decision highlights that a duty of care owed by a manufacturer/supplier to its customer does not extend to a commercial intermediary unless there is evidence that such duty was intended by the parties. The contractual arrangements between parties in a supply chain are an important indication of the way risk is allocated. Those who are part of such arrangements should ensure that their contractual agreements comprehensively outline the obligations of each parties and allocate risk appropriately to the extent that it is possible.

***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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