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Commercial Litigation Insights: Restrictions on Liability for Pure Economic Loss Put the Brakes on Class Action Against BMW

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By Gregory Richards

Tort law in Canada narrowly restricts liability in negligence for pure economic loss. This is demonstrated in the recent decision of the Court of Appeal for Ontario in *North v. Bayerische Motoren Werke AG*, 2025 ONCA 340 ("***BMW***").

The class action plaintiffs sought to represent over sixty-six thousand current and former owners and lessees of BMW vehicles, model years 2012 to 2015, with allegedly defective engines said to make the vehicles dangerous. The alleged cause was a timing chain assembly that, upon failure, caused catastrophic damage to the engine.

The judge below certified the class action on a narrower basis than the plaintiffs proposed. While in their pleading the plaintiffs sought the cost of replacing the vehicles, the certification judge limited the class to those who incurred the cost of repairing the engine damage or the cost of repair to avert imminent damage to persons or property.

The Court of Appeal dismissed the plaintiffs' appeal and allowed BMW's cross-appeal. It narrowed the claim even further, holding that only repair costs to avert a real and substantial danger of personal injury or damage to other property were recoverable. The Court concluded that the named plaintiffs were not suitable representatives as they suffered no recoverable losses. The Court set aside the certification order and, in its decision, discussed the significant restrictions on claims in negligence for pure economic loss.

Claims in Tort for Pure Economic Loss

The Court in *BMW* notes that the law makes a distinction between a traditional negligence claim and a claim for pure economic loss. In the standard negligence claim, a plaintiff suffers a physical or mental injury to their person or damage to their property. In a claim for pure economic loss, there is no such injury or damage. Rather, such a claim may involve an inherently flawed product likely to suffer damage in the future that could pose a safety risk to users of the product (*BMW*, paras. 23-25).

For example, in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC), [1995] 1 SCR 85, a contractor was held liable to the subsequent owner of a high-rise condominium for the cost to repair defective cladding (a large slab had fallen off) that posed a real and substantial danger to the inhabitants of the building. Recovery in such a case is allowed for the cost of averting the danger of "personal injury or damage to other property" (*Winnipeg Condominium,* paras. 35-36).

In contrast, no claim for pure economic loss was available in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 (CanLII), [2020] 3 SCR 504. The majority held that Maple Leaf's contract for supply was with the franchisor, not the individual restaurant franchisees, and the franchisees lacked the essential element of proximity to claim in tort for losses they suffered from a product shortage when Maple Leaf recalled meat products processed at a contaminated plant. Tort law affords no general right for protection

against the negligent or intentional infliction of pure economic loss.

As the Court in the *BMW* case notes, to establish a claim in negligence for pure economic loss, a plaintiff must prove all the elements of the tort. Recovery is the exception rather than the rule, but the law will allow recovery incurred to avert a real and substantial danger. A pure economic loss of this sort is deemed analogous to physical injury to a plaintiff's person or property, although recoverable damages are limited to the costs of repair or disposal to avert the danger (*BMW*, paras. 28-32).

No Damage to "Other Property" or Personal Injury

The plaintiffs in the *BMW* case argued that their case was a traditional negligence claim rather than merely a case of pure economic loss. Their argument was that the failure of the timing chain system caused damage to their vehicle engines and that this comprised actual property damage. They argued that, with such damage pleaded, their claim belonged in the category of a traditional negligence action (*BMW*, para. 39).

This argument failed to persuade the Court, just as it failed to persuade the certification judge. Underlying the plaintiffs' theory was the view that the timing chain system and the car engine are distinct items of property. Both the Court and the certification judge considered the "complex structure theory" that Lord Bridge mused about in *obiter* in one English case but subsequently rejected in another. Under this theory, damage to one part of a complex structure caused by a defect in another part of the same structure could arguably qualify as damage to "other property" for the purpose of applying traditional negligence principles. However, this theory has never been accepted in Canadian tort law (*BMW*, paras. 33-36).

The Court agreed with the certification judge that the class action in *BMW* failed to plead damage to "other property" or a personal injury. Accordingly, the action was a claim for pure economic loss, not a traditional negligence claim, and its viability fell to be determined on the restrictive principles applied to claims for pure economic loss (*BMW*, paras. 39-53).

Post-Engine Failure Repair Costs Unrecoverable

The certification judge allowed the action to proceed on a considerably narrower basis than what the plaintiffs had proposed. On appeal, the Court held that the action should have been narrowed even further (*BMW*, paras. 63-65).

The Court held that the certification judge erred in certifying claims of class members who incurred repair costs *after* they had experienced the engine damage. This is because, as we have seen, tort law in Canada limits recovery for repairs to the cost of averting a danger of personal injury or damage to other property. Once the engine failure occurred, any potential danger was removed. The purpose of tort law is not to preserve a plaintiff's continued use of a vehicle by allowing recovery for post-failure repair costs to restore the use or functionality of the vehicle (*BMW*, paras. 68-69, and 72).

While the Court noted that this logic may be confounding, the legal distinction lies in the ability of parties to allocate risk among themselves by contract (*BMW*, paras. 70-71). Parties are free to specify in a contract the length and price of product warranties. On the other hand, tort law has a much narrower purpose. Claims in negligence for pure economic loss are restricted to recovering repair costs to avert a real and substantial danger of personal injury or damage to other property.

No Viable Claim for a Failure to Warn

The representative plaintiffs also claimed that BMW had breached a duty to warn of the negligent design or manufacture of the class members' vehicles. The Court upheld the certification judge's finding that the plaintiffs had no viable claim on this basis.

Citing *Hollis v. Dow Corning Corp*., 1995 CanLII 55 (SCC), [1995] 4 SCR 634, at para. 20, the Court noted that Canadian tort law imposes a duty on manufacturers to warn consumers of dangers inherent in the use of their products. This is a continuing duty that also requires manufacturers to warn of dangers discovered after a product has been sold.

The Court found that the certification judge had correctly recognized that the class members were not alleging that had they been warned they would have averted actual physical harm or actual property damage. Rather, their allegation was that had they been warned they would not have bought a defective vehicle. In essence, their claim was for the diminished value of unrepaired cars. This did not form the basis for a viable cause of action (*BMW*, paras. 80-88).

No Suitable Representative Plaintiff

There were two representative plaintiffs named in the action: Ms. North and Mr. Rego. Both had sold their vehicles "as is" instead of repairing them, given the estimated repair costs (*BMW*, para. 2).

The certification judge held that Ms. North was not a suitable representative plaintiff. The Court agreed, finding that she had not pleaded actual property damage or personal injury, had not claimed repair or disposal costs to avert real and substantial danger, and could establish no duty to warn. Accordingly, she had no valid claim (*BMW*, para. 90).

The circumstances of Mr. Rego were somewhat different. He had incurred a service charge of $185.89 for the initial inspection and diagnosis of his engine problem. He was told that it would cost between $1,800 and $2,500 for a full diagnosis, and if the problem was what the mechanic suspected it to be, involve repair costs of $10,000 to $20,000. Mr. Rego declined to incur these large repair costs (*BMW*, para. 95).

The certification judge found that Mr. Rego's service charge of $185.89 constituted a "reasonably foreseeable cost in discarding the product," and this out-of-pocket loss related to a repair expense that could sustain a cause of action (*BMW*, para. 91).

The Court disagreed with the certification judge. From the Court's review of the *Maple Leaf Foods* case, disposal costs, like repair costs, are recoverable only if they are incurred to avert real and substantial danger. Because Mr. Rego claimed that his engine had already failed and that his car was no longer driveable, any safety threat had been removed. The diagnostic fee he paid was not recoverable as a "cost of removing the danger." With no recoverable loss, Mr. Rego could sustain no claim in negligence and the Court held that he too was not a suitable representative plaintiff (*BMW*, paras. 96-98).

The Court's determination that there was no suitable representative plaintiff was fatal to the certification of the action. The Court allowed BMW's appeal and set aside the order below certifying the action as a class proceeding (*BMW*, paras. 99, 112).

Takeaway

A tort claim for a pure economic loss arising from shoddy or defective goods provides only a narrow basis for compensation. If a party wishes to have a broad legal right for the continued use of a product, they must look to contract law rather than tort law. The Court in *BMW* reinforces the rule that in an action for the tort of negligence, recovery for pure economic loss is narrowly restricted to the cost of averting a real and substantial danger of personal injury or damage to other property.

For more information or inquiries:

Gregory Richards

Toronto
416.947.5031

Email:
grichards@weirfoulds.com

Greg Richards is a skilled and experienced courtroom lawyer.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035