COURT OF APPEAL FOR ONTARIO

CITATION: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2018 ONCA 407
Date: 20180430
DOCKET: C63107

Sharpe, Rouleau and Fairburn JJ.A.

BETWEEN

1688782 Ontario Inc.

Plaintiff (Respondent)

and

Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc.

Defendants (Appellants)

Steven Stieber and Elizabeth Bowker, for the appellants

Peter W. Kryworuk, Rebecca Case and Jacob Damstra, for the respondent

Heard: October 31, 2017

Additional Written Submissions: January 22 and February 8, 2018

On appeal from the judgment of Justice Lynne Leitch of the Superior Court of Justice, dated November 18, 2016.

Fairburn J.A.:

OVERVIEW

[1] In August 2008, certain Maple Leaf brand ready-to-eat ("RTE") meats became contaminated with listeria monocytogenes at dangerous levels.[1] Some people fell seriously ill and some died after eating the meat. Maple Leaf recalled meats that were produced at the production plant where the infected meat originated, and the plant was temporarily closed. The recall and plant closure affected the supply of two of the RTE meats used by the franchisees of Mr. Submarine Ltd. ("Mr. Sub").

[2] A class action was certified on behalf of Mr. Sub franchisees against Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc. (collectively "Maple Leaf"). The representative plaintiff, 1688782 Ontario Inc., claims damages on the basis that Maple Leaf: (a) negligently manufactured and supplied potentially contaminated meat; and (b) negligently represented that the supplied meats were fit for human consumption. There is no evidence that any Mr. Sub customer was harmed by any contaminated product. However, the representative plaintiff alleges that the franchisees suffered economic losses arising in large part from the reputational harm they say they experienced from being publicly associated with

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[1] The Canadian Food Inspection Agency ("CFIA") says that listeria monocytogenes often appear in food. Only when it reaches certain levels does it create a risk, particularly to certain segments of the population, such as the elderly, immunocompromised individuals and pregnant women. When I use the term "listeria" in this judgment, it should not be understood in the benign sense, but as a short form reference to the bacteria having reached dangerous levels, which may result in the illness listeriosis.

Maple Leaf in the aftermath of the listeria outbreak. In particular, the representative plaintiff claims damages for loss of past and future sales, past and future profits, and loss of capital value and goodwill. It also claims damages for clean-up costs and other costs related to the disposal, destruction and replacement of RTE meats.

[3] After certification of the class action, Maple Leaf brought a summary judgment motion seeking dismissal of certain claims on the basis that Maple Leaf owed no duty of care to the class. The representative plaintiff, in turn, asked that summary judgment be granted in its favour.

[4] This appeal arises from the motion judge's decision concluding that Maple Leaf owed a duty of care to the franchisees "in relation to the production, processing, sale and distribution of the RTE 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."

[5] The Supreme Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63, [2017] 2 S.C.R. 855, was released after this appeal was heard. The judgment has direct application to this case as it clarifies the analytical approach to identifying a duty of care, especially in the context of negligent misrepresentation claims. Accordingly, the parties were provided with the opportunity to file additional written submissions focused on the application of *Livent* to this case.

[6] For the reasons that follow, I would allow the appeal.

BACKGROUND

(1) Facts

[7] A franchise agreement governs the relationship between the franchisor, Mr. Sub, and its franchisees. The agreement requires the franchisees to purchase products exclusively from Mr. Sub or sources or suppliers approved by it. Although franchisees may purchase products not previously authorized by Mr. Sub, this may only be done with Mr. Sub's approval.

[8] At the time of the listeria outbreak in 2008, Maple Leaf was in a contractual relationship with Mr. Sub. The agreement involved an exclusive supplier arrangement, whereby Mr. Sub contracted for 14 core menu items, including the two RTE meats relevant to this appeal, to be supplied only by Maple Leaf. However, under the terms of the agreement, Maple Leaf had no corresponding obligation to supply the RTE meats to Mr. Sub or its franchisees. At any time, Maple Leaf could have stopped supplying any or all of the 14 core menu items.

[9] The franchisees did not buy the RTE meats directly from Maple Leaf. Instead, Maple Leaf dealt with distributors who, in turn, dealt with the franchisees. The franchisees would place their orders with, and be invoiced by, the distributors. Similarly, the distributors would place their orders with Maple Leaf and, in turn, be invoiced by Maple Leaf.

[10] On August 7, 2008, the CFIA warned Maple Leaf that there might be an issue with some meats produced at one of its production plants. The CFIA's warning did not relate to any of the products used by the franchisees.

[11] More than a week later, on August 16, 2008 at 10:00 p.m., Maple Leaf was informed that one of its products had tested positive for listeria. Within hours of notification, at 3:30 a.m. on August 17, 2008, Maple Leaf issued a nationwide press release and notice of recall of two products. Neither of these were products used by the franchisees.

[12] On August 19, 2008, additional test results identified a potentially broader problem at the production plant where the infected meat had been produced. Maple Leaf expanded the voluntary recall to include two of the core menu items used by the franchisees - roast beef and corned beef. As tests continued to come back, Maple Leaf voluntarily decided to expand the recall, ultimately to 191 products, and then shut down the plant until the problem could be resolved.

[13] It is not in dispute that media reports dealing with the listeria outbreak drew an association between Maple Leaf and certain food sellers, including Mr. Sub and McDonalds. The CFIA's "Health Hazard Alerts" also included reference to food brands and food sellers who used Maple Leaf products, including Mr. Sub, Boston Pizza, Compliments, Kirkland Signature, McDonalds, No Name, Pizza Nova, Safeway, Shopsy's, and Tim Hortons.

[14] Maple Leaf communicated with Mr. Sub about the recall and sent communications to Mr. Sub intended for its franchisees. Maple Leaf set up a hotline to answer any questions that the franchisees may have had about the recall.

[15] Maple Leaf also paid the distributors to attend at the franchisees' restaurants to retrieve the two core menu items affected by the recall. Maple Leaf then credited the distributors for the retrieved products. Maple Leaf believed that the distributors then issued credits to the franchisees, although the representative plaintiff in this case maintains that it received no such credit.

[16] After the plant was closed, Maple Leaf assisted Mr. Sub in finding a new supplier for the two recalled products. The new supplier was located by mid-September. By October, Maple Leaf was again producing the RTE meat products.

[17] Mr. Sub sued Maple Leaf. The claim was settled when Maple Leaf paid Mr. Sub $250,000 and the parties entered into a Supply and Settlement Agreement, whereby Maple Leaf agreed to reduce the cost of the RTE meats sold to Mr. Sub and relieved Mr. Sub of the exclusive supply arrangement in certain circumstances. Maple Leaf believed that the price reductions would be passed on to Mr. Sub franchisees.

[18] The representative plaintiff maintains that Mr. Sub was the sole submarine sandwich restaurant identified by the media as a purveyor of Maple Leaf RTE

meats. This association with Maple Leaf is said to have hurt the franchisees' reputations and given their competitors a significant competitive advantage.

[19] The representative plaintiff suggests that customers did not want to come to Mr. Sub as a consequence of the listeria outbreak, or they would come in but then leave. In addition, in the affidavit evidence filed, it is suggested that it was not possible to purchase replacement products for the two recalled meats for six to eight weeks. In the meantime, the representative plaintiff had to explain to its customers why it did not have the requested product. It maintains that Maple Leaf's negligence ultimately led to its demise as a viable business.

[20] In its Amended Statement of Claim, the representative plaintiff pleads that "it was foreseeable that negligence on the part of [Maple Leaf] would result in a recall of all contaminated or potentially contaminated RTE Meats distributed to the [franchisees], and that such recall would be widely publicized and result in a loss of sales, profits and goodwill for the [franchisees]." It was also pleaded that the franchisees would be required "to take remedial measures including disposing or destroying of any contaminated or potentially contaminated RTE Meats to prevent harm to their customers or employees."

(2) Decision Below

[21] Maple Leaf moved for summary judgment on the basis that Maple Leaf owed the representative plaintiff no duty of care. In the alternative, Maple Leaf

sought a dismissal of the claims for damages arising out of pure economic loss, namely alleged loss of past and future sales, past and future profits, loss of capital value of the representative plaintiff's franchise and business, and loss of goodwill.

[22] The representative plaintiff requested an order for summary judgment on all of the issues on the defendant's motion and was largely successful.

[23] At para. 4 of her order, the motion judge ordered that Maple Leaf "owed a duty of care to [the franchisees] in relation to the production, processing, sale and distribution of the RTE Meats". In her reasons, she described the duty as "a duty to supply a product fit for human consumption": para. 40. She noted that her conclusion was consistent with three cases, which I will discuss in some detail below.

[24] In support of her conclusion that Maple Leaf owed a duty to supply a product fit for human consumption, the motion judge found that Maple Leaf was "under an obligation to be mindful of the [representative] plaintiff's legitimate interests in conducting its affairs": para. 41.

[25] In considering proximity, she noted that Maple Leaf was the exclusive supplier of RTE meats and the various dealings between Maple Leaf and the franchisees during the recall. She also noted that "RTE products were an integral and essential part of the business of the franchisees without which their business could not operate": para. 42. "The quality and safety of the RTE meats", she found,

"were essential to the maintenance of the franchisee's good will and reputation … and if the RTE meats were contaminated they were potentially dangerous to consumers": para. 42.

[26] She further found that the alleged harm was a reasonably foreseeable consequence of Maple Leaf's conduct: para. 43.

[27] The motion judge went on to deal with the negligent misrepresentation claim. At para. 5 of her order, she ordered that Maple Leaf "owed 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". She discussed the negligent misrepresentation claim, at para. 49 of her reasons:

> In relation to the defendants alleged representations that the RTE meats were fit for human consumption and posed no risk of harm, I find there was a "special relationship" between the plaintiff and [Maple Leaf] of the nature described in [*R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45] because [Maple Leaf] ought reasonably to have foreseen that the plaintiff would rely on their representations and its reliance was reasonable in the circumstances.

[28] She continued, at para. 50, as follows:

> The plaintiff is within a known and readily identifiable category of persons. [Maple Leaf] supplied the plaintiff, an entity it had a close and direct relationship with as its exclusive supplier, a defective product dangerous to public health, knowing that the product would be offered for sale to consumers who could be injured from consuming the product thereby causing economic losses to the plaintiff. There are no policy concerns arising from

> imposing a duty of care on the defendants in favour of the plaintiff and the class it represents. Rather, policy considerations weigh in favour of imposing a duty in these circumstances to heighten accountability. I disagree with the defendants that indeterminate liability is a concern here considering my findings in relation to the proximity requirement.

[29] Success on the motion was divided in that the representative plaintiff also claimed that Maple Leaf owed a duty to warn of the presence of listeria in its plant and the motion judge dismissed that claim. The representative plaintiff does not challenge that aspect of the motion judge's order.

[30] I note that, in her reasons at para. 54, the motion judge declined to strike the claim for damages to cover disposal, destruction and clean-up costs as the "fact that the plaintiff does not have a claim for [these damages] does not entitle the defendants to an order striking these claims which the plaintiff makes on behalf of the class it represents". On appeal, Maple Leaf does not challenge that aspect of the decision.[2] Rather, the focus of this appeal is the damages claimed for loss of past and future sales, past and future profits, and loss of capital value and goodwill.

[31] I also note that the parties agree that the motion judge's reasons on the summary judgment motion must be read together with her reasons on the

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[2] In its factum Maple Leaf acknowledges that "there is also a *de minimus* claim for the cost of disposing or cleaning up for RTE Meats that actually reached the restaurant and for the costs of the RTE Meats themselves" but says that the evidence on the motion was that "Maple Leaf provided full credits to the Distributors for the costs of the destroyed cases of RTE Meats and that the plaintiff itself did not incur any disposal or cleaning costs."

certification motion: 2016 ONSC 4233. In her certification decision, the motion judge dealt with duty of care at some length in assessing whether the pleadings disclosed a cause of action.

[32] With that background, I turn now to the grounds of appeal raised by Maple Leaf.

ANALYSIS

[33] Maple Leaf advances numerous grounds of appeal that can be distilled into four broad objections. Maple Leaf maintains that the motion judge erred in:

1. Finding that Maple Leaf supplied the representative plaintiff with a defective product dangerous to public health;
2. Concluding that this case falls within a recognized duty of care;
3. Failing to consider and properly apply the *Anns/Cooper* test; and
4. Finding that damages for pure economic loss are recoverable in this case.

[34] I will first address the factual issue and then turn to the duty of care analysis.

(1) Factual Finding

[35] Maple Leaf maintains that the motion judge made a key finding of fact that was unsupported by the evidence and that this error led to her erroneous conclusion that a duty of care was owed. In particular, Maple Leaf points to the motion judge's comment, at para. 50, that Maple Leaf "supplied the plaintiff ... a

defective product dangerous to public health". Maple Leaf emphasizes that there is no evidence that any RTE meats contaminated with listeria reached the representative plaintiff's store or that either of the two core menu items that were recalled ever tested positive for listeria.

[36] The representative plaintiff says that the motion judge did not commit a palpable and overriding error. She did not find, says that representative plaintiff, that any meats provided to or recalled from the franchisees were contaminated. Rather, she properly found that the RTE meats that were provided to the franchisees were at risk of contamination and thus posed a risk to public health and safety.

[37] In my view, the impugned comment must be read in the context of the motion judge's reasons on the summary judgment motion and her related reasons on the certification motion. In particular, I note the comment at para. 40 of the motion judge's certification reasons where she refers to "the risk of danger ... that could occur from consumption of the product."

[38] I am satisfied, reading the impugned comment in context, that the motion judge was saying that there was a *risk* that the two core menu items *could* compromise human health, given that they had been produced at the same plant as the tainted products. This is how the representative plaintiff encourages this

court to read the impugned comment and, particularly in light of the high level of deference owed to the motion judge on findings of fact, I am prepared to do so.

(2) Duty of Care

(a) Introduction

[39] This appeal turns on whether the motion judge erred in her duty of care analysis, which brings us to the *Anns/Cooper* framework: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

[40] At the first stage of the *Anns/Cooper* framework, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 39, citing *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

[41] However, a full *Anns/Cooper* analysis is not required in every case. If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown. So long, then, as a risk of reasonably foreseeable injury can also be shown, or has already been shown

through an analogous precedent, the first stage of the analysis will be complete and a duty of care exists: *Livent*, at para. 26.

[42] In this case, there is some controversy as to exactly what the motion judge decided on the established/analogous category point.

[43] Maple Leaf submits that the motion judge improperly relied on three decisions to conclude that Maple Leaf's relationship with the representative plaintiff fell within a recognized duty to supply a product fit for human consumption: *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650, leave to appeal refused [2004] S.C.C.A. No. 542; *376599 Alberta Inc. v. Tanshaw Products Inc.,* 2005 ABQB 300, 379 A.R. 1; *Country Style Food Services Inc. v. 1304271 Ontario Ltd.* (2005), 200 O.A.C. 172.

[44] The representative plaintiff, on the other hand, submits that the motion judge conducted an *Anns/Cooper* analysis as well as stating that her conclusion was consistent with the reasoning and findings in *Plas-Tex*, *Tanshaw* and *Country Style*. *Plas-Tex* and *Tanshaw* are said to support the conclusion that a manufacturer has a recognized duty of care to those in its supply chain not to manufacture and provide a product that has become dangerous as a result of negligence.

[45] The motion judge's summary judgment reasons are not entirely clear on this point. While she does refer to the *Anns/Cooper* analysis, she states, at para. 40,

that there was "a duty to supply a product fit for human consumption – in other words, a product that has not become dangerous as a result of the defendants' negligence." That conclusion was said to be "consistent with the reasoning and findings in" *Plas-Tex*, *Tanshaw,* and *Country Style*, decisions which she discussed at some length in her certification reasons. However, the motion judge also went on to discuss proximity and reasonable foreseeability at paras. 41 - 48. As outlined above, she made findings in support of her conclusion on proximity. She also dealt with Maple Leaf's arguments on foreseeability, concluding at para. 48 that "it was reasonable, appropriate, and foreseeable" for consumers to avoid buying food from Mr. Sub franchisees in the circumstances.

[46] In my view, any ambiguity as to whether the motion judge determined that the relationship between the parties fell within an established category is resolved by the motion judge's costs ruling. The motion judge concluded that the certification and summary judgment motions did not raise a novel issue of law, noting that "the relationship between the parties fell within a recognized duty of care": at para. 44.

[47] As I read her reasons, the motion judge relied on the three decisions to conclude that Maple Leaf's relationship with the representative plaintiff fell within a recognized duty to supply a product fit for human consumption, although she went on to discuss proximity and foreseeability, perhaps out of an abundance of caution.

[48] I now turn to whether there is an error in finding that the relationship fell within a recognized duty of care to supply a product fit for human consumption and, if so, whether under a full *Anns/Cooper* analysis, Maple Leaf owed such a duty. I will then turn to whether the motion judge erred in concluding that Maple Leaf owed a separate duty of care to franchisees "with respect to any representations made that the RTE Meats were fit for human consumption and posed no risk of harm".

(b) Duty to Supply a Product Fit for Human Consumption

(i) Established/Analogous Category

[49] In my view, the motion judge, who did not have the benefit of *Livent* when she decided this case, improperly relied on *Plas-Tex*, *Tanshaw* and *Country Style* to conclude that Maple Leaf's relationship with the representative plaintiff fell within a recognized duty of care to supply a product fit for human consumption.

[50] The majority in *Livent* warned, at para. 28, that courts should be cautious in finding proximity based upon a previously established or analogous category:

> ... [W]here a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is

> found on the basis of an established category (*Cooper*, at para. 39). ... When, therefore, a court relies on an established category of proximity, it follows "that there are no overriding policy considerations that would [negate] the duty of care" (*ibid.*). A consequence of this approach, however, is that a finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case. [Emphasis added.]

[51] Similarly, at para. 52, the majority warned against "an overly broad characterization of an established category of proximity which fails to consider the scope of the activity in respect of which proximity was previously recognized".

[52] In my view, there are fundamental differences between this case and *Plas-Tex*, *Tanshaw* and *Country Style*.

[53] In *Plas-Tex*, the plaintiffs provided pipeline systems to carry natural gas. The defendant sold a defective polyethylene resin to the plaintiffs for use in the pipes. The pipes cracked, natural gas escaped and an explosion occurred. The plaintiffs suffered financial hardship as a result and the defendant was held liable for damages for economic losses, including loss of profits due to the subsequent failure of the plaintiffs' business.

[54] In that case, the defendant supplied a product that it knew was defective. Use of the product caused property damage and business losses. In these circumstances, policy considerations favoured imposing liability to deter manufacturers from engaging in such behaviour. Here, in contrast to the

manufacturer in *Plas-Tex*, which put a product into the marketplace that it knew to be dangerous, as soon as Maple Leaf knew its meat may be dangerous, it voluntarily recalled the products in order to safeguard human health. To the extent people were harmed by Maple Leaf meats, none of them were harmed by eating Maple Leaf meats at a Mr. Sub restaurant.

[55] In *Tanshaw*, the plaintiff nightclub owner threw a "foam party", where large quantities of bubbles were poured from a machine onto club patrons who were mingling about. Unfortunately, patrons exposed to the foam suffered serious skin and eye irritation. The nightclub owner sued various parties involved in the manufacture and/or supply of the foam to the nightclub. The nightclub claimed that it suffered economic loss as a result of the defendants' negligence. The trial judge described the claim as a claim "about lost drink sales, expenses associated with maintaining drink sales, and the loss of the opportunity to raise drink prices": para. 225.

[56] The trial judge found that there was a *prima facie* duty of care. Then he went on to consider residual policy considerations, noting that they "weigh[ed] in favour of confirming a duty on the part of distributors and suppliers to the users of their product to ensure that the product is suitable and fit for its purpose and, to the extent that it carries hazards, adequate warnings are conveyed": para. 153. The court did not differentiate between the duty of care owed to the end users of the

product, not to cause them physical harm, and a duty owed to an intermediary in the supply chain for pure economic losses arising from such harm.

[57] The situation here is different than in *Tanshaw* for a number of reasons, including that in that case the plaintiff's patrons were harmed by the product that was unfit for its intended purpose whereas here no one was harmed by eating Maple Leaf meats at a Mr. Sub restaurant. In *Tanshaw*, the defendants were aware of the potential harm and failed to act, whereas here the alleged damages arose in the context of a product recall.

[58] Finally, *Country Style* involved, among other things, a claim for damages for negligent misrepresentation arising out of the redesign of a shopping mall after a lease had been signed. Despite the lease being between the landlord and franchisor, the landlord was found to owe the franchisee a duty of care. This duty was breached when the landlord provided inaccurate site plans when the lease was negotiated. Unlike this case, *Country Style* had nothing to do with the supply of a product and its fitness for human consumption.

[59] In my view, these three cases are readily distinguishable from this case where it is alleged that Maple Leaf should be held liable for damages for the reputational harm to the franchisees as a result of a recall and their public association with Maple Leaf. As a result, it is necessary to assess whether the motion judge's conclusion that the relationship between Maple Leaf and the

franchisees was such that a duty of care to supply fit meat extends to the damage at issue on this appeal is sustainable under a full *Anns/Cooper* analysis.

(ii) *Anns/Cooper* Analysis

[60] In addition to relying on *Plas-Tex*, *Tanshaw* and *Country Style*, the motion judge provided an alternative analysis in that she went on to discuss proximity and foreseeability. In concluding that Maple Leaf owed a duty to supply a product fit for human consumption to the representative plaintiff, the motion judge found that the circumstances of the relationship between the representative plaintiff and Maple Leaf were such that Maple Leaf was under an obligation to be mindful of the plaintiff's legitimate interests in conducting its affairs.

[61] In considering the relationship between the parties, she focused on the fact that Maple Leaf:

- knew the names, addresses and contact information of the franchisees;
- was the exclusive supplier of the 14 core menu items;
- had direct dealings and communications with the franchisees around the recall and in its aftermath;
- sent communications addressed to the franchisor and franchisee;

- directed and paid the distributors to retrieve the recalled products from the franchisees; and
- was aware that their products were an integral and essential part of the franchisees' business.

[62] I do not take any issue with the motion judge's factual findings. In my view, however, the motion judge erred in failing to consider the *scope* of the proximate relationship or scope of any such duty arising from it. As noted in *Livent,* at para. 31, "the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship" (emphasis in original).

[63] To the extent there may be a duty to supply meat fit for human consumption,[3] it does not extend to the franchisees' damages for pure economic loss at issue here.

[64] As I see it, Maple Leaf's duty of care in tort to supply meat fit for human consumption, a duty which is aimed at protecting human health, was owed to the franchisees' customers, not the franchisees. The claim advanced against Maple Leaf in this action rests upon an alleged additional and quite different duty owed

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[3] Again, I note that the damages related to the disposal, destruction and replacement of RTE meats are not at issue on this appeal.

to franchisees to protect their reputation and pay for any consequent damages for pure economic losses.

[65] As noted by the motion judge, at para. 58, the alleged damages are, in large part, a consequence of the public announcement of the recall and resulting publicity. The alleged reputational damages are said to arise from publicity related to the illness and death of people who did not eat tainted meat at a Mr. Sub, and the recall of meat.

[66] To conclude that Maple Leaf owed a duty of care in tort to the franchisees to protect them against the kinds of damages at issue on this appeal would be to enlarge the duty to safeguard the health and safety of customers by supplying fit meat to include a quite different and added duty to franchisees to protect against reputational harm. In my view, to do so would constitute an unwarranted expansion of a duty owed to one class of plaintiffs and extend it to the fundamentally different claim advanced by the franchisees. In other words, the franchisees cannot bootstrap their claim for damages for reputational loss to the different duty owed by Maple Leaf to their customers.

[67] The motion judge found that it was "reasonable, appropriate, and foreseeable for consumers to avoid buying food from a restaurant where there had been a food recall arising from problems in the plant of its meat supplier that were not 'resolved' for a relatively significant period of time": para. 48. However, this

finding of reasonable foreseeability is not enough to give rise to a duty of care in tort to the franchisees which can only arise where the foreseeable harm falls within the scope of a proximate relationship.

[68] Simply put, the type of injury claimed – economic losses arising from reputational harm – did not fall within the scope of any duty owed to the franchisees.

[69] In light of these conclusions, it is unnecessary to address the issue of whether there are any residual policy considerations that would negate the imposition of a duty of care. However, one point warrants brief mention.

[70] The motion judge was of the view that imposing a duty in the circumstances of this case would heighten accountability. I agree that accountability is important but question whether imposing a duty in the circumstances of this case would achieve that end or be consistent with concerns about safeguarding public health.

[71] To the extent that the franchisees' alleged damages relate to the recall itself, policy considerations call into question imposing liability. There is a strong public interest in encouraging manufacturers to act expeditiously in recalling products from the marketplace to avoid potential danger to consumers.

[72] In summary, I conclude that the motion judge erred in finding that the duty to supply a product fit for human consumption encompassed a duty of care to protect against the economic losses at issue on this appeal.

(c) Duty of Care - Negligent Misrepresentation

[73] In concluding that there was a "special relationship" between the representative plaintiff and Maple Leaf, the motion judge referred to *Imperial Tobacco* in which the Supreme Court discussed the duty of care in the negligent misrepresentation context, at para. 42:

> Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation... In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

[74] Maple Leaf maintains that the motion judge erred in her *Anns/Cooper* analysis on this issue. In particular, it argues that the claim falls outside the scope of the proximate relationship and the losses claimed are not reasonably foreseeable. It also argues that there are serious residual policy concerns, including indeterminacy.

[75] In the context of negligent misrepresentation cases, proximity is most usefully considered before foreseeability because "[w]hat the defendant

reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff, and specifically ... the purpose of the defendant's undertaking": *Livent,* at para. 24.

[76] While *Livent* affirms that when undertaking a full proximity analysis the court must examine all relevant factors arising out of the relationship between the plaintiff and the defendant, two factors are determinative in the case of negligent misrepresentation - the defendant's undertaking and the plaintiff's reliance: *Livent*, at para. 30. "Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care": *Livent* at para. 30.

[77] According to *Livent* at para. 31, "[a]ny reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility – that is, of the purpose for which the representation was made or the service was undertaken – necessarily falls outside the scope of the proximate relationship and, therefore of the defendant's duty of care". A defendant "cannot be liable for a risk of injury against which he did not undertake to protect": *Livent,* at para. 31.

[78] In cases of negligent misrepresentation, the proximate relationship informs the foreseeability inquiry in that "the purpose underlying [the] undertaking and [the] corresponding reliance limits the type of injury which could be reasonably foreseen to result from the defendant's negligence": *Livent*, at para. 34.

[79] Here, the motion judge found that Maple Leaf ought reasonably to have foreseen that the representative plaintiff would rely on its representation – namely, that the RTE meats were fit for human consumption and posed no risk of harm – and its reliance was reasonable in the circumstances. She noted that the representative plaintiff was within a known and readily identifiable category of persons and that Maple Leaf was the representative plaintiff's exclusive supplier. Maple Leaf was aware that the RTE meats would be offered for sale to consumers who could be injured if it was unfit.

[80] In my view, there was an error in failing to consider the *scope* of the proximate relationship between the parties, which in turn affected the foreseeability analysis. Maple Leaf undoubtedly undertook – in the context of its contractual relationship with the franchisor – to supply meat safe for human consumption by Mr. Sub customers. The nature or purpose of such an undertaking was to ensure that Mr. Sub customers who ate RTE meats would not become ill or die as result of eating the meats. The purpose of the undertaking was not, however, to protect the reputational interests of the franchisees.

[81] The representative plaintiff maintains that it was reasonably foreseeable that the media would connect Mr. Sub to Maple Leaf's listeria outbreak, causing reputational harm. As the motion judge put it at para. 37 of her reasons, the plaintiff alleged it was "tagged" as a place where dangerous products might have been sold prior to the recall.

[82] The question is whether, in light of Maple Leaf's undertaking, the representative plaintiff's alleged reputational injury was reasonably foreseeable. In *Livent*, the majority discussed reasonable foreseeability in the context of negligent misrepresentation, at para. 35:

> … [A] plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.

[83] Here, the plaintiff essentially says that, based on Maple Leaf's representation, the franchisees relied on Maple Leaf to protect their reputations even in circumstances where the alleged reputational damage did not flow from the supply of tainted meat to Mr. Sub franchisees and harm to their customers, but rather from: (a) the supply of tainted meat *to others*; and (b) the *recall* of *potentially tainted* meat from Mr. Sub franchisees.

[84] I disagree. The reputational damage said to be sustained by the plaintiff, arising from Maple Leaf's supply to others and from the recall – aimed at safeguarding health and safety – falls outside the scope of Maple Leaf's undertaking to the franchisees. Accordingly, the alleged injury was not reasonably foreseeable.

[85] In light of my conclusions on stage one of the *Anns/Cooper* analysis, it is unnecessary to address residual policy considerations other than to note that the concern about encouraging effective recalls is equally applicable in this context.

[86] In conclusion, Maple Leaf's duty of care with respect to any representations made that the RTE meats were fit for human consumption and posed no risk of harm does not extend to the damages for pure economic loss claimed here.

(3) Availability of Damages in Negligence for Pure Economic Loss

[87] Finally, Maple Leaf argues that the motion judge erred in determining that the damages claimed as arising out of economic losses were recoverable. In particular, it says that there can be no claim in negligence for a defective but non-dangerous good, where no personal injury or damage to property was incurred. Given my conclusion that the motion judge erred in her duty of care analysis, it is unnecessary to consider this argument on appeal and I decline to do so.

DISPOSITION

[88] I would allow the appeal and set aside paras. 4 and 5 of the motion judge's order except as they relate to the claim for the clean-up costs and other costs related to the disposal, destruction and replacement of RTE meats, which is not at issue on this appeal.

[89] The parties are agreed on costs for the appeal. The representative plaintiff shall pay costs to Maple Leaf of $30,000, inclusive of applicable taxes and disbursements.

[90] As for the costs on the summary judgment motion, we will accept written costs submissions of no more than five pages in length. Maple Leaf shall file its submissions within 15 days of release of this judgment and the franchisee will file within seven days of receiving those submissions.

Released:

APR 30 2018

Fairburn J.A.

I agree K. Feldman J.A.

I agree Paul Rouleau J.A.