

Mr. Sub Franchisees Meat Disappointment in Supreme Court of Canada Decision; Product Manufacturers Do Not Owe a Duty of Care to Commercial Intermediaries

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Introduction

In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the Supreme Court of Canada rendered its long-awaited judgement on whether a product manufacturer owes a duty of care to commercial intermediaries, in the absence of a direct contractual relationship. In this case, the Supreme Court considered the duty of care owed by Maple Leaf Foods to franchisees of the Mr. Sub franchise system in the context of the 2008 listeria outbreak involving Maple Leaf Foods meats.

In a close 5:4 decision, the Supreme Court held that a manufacturer's breach of its duty to supply products safe for human consumption does not entitle commercial intermediaries, in this case third-party Mr. Sub franchisees, to recover damages from the manufacturer for pure economic loss or reputational injury.

The Principles of the Duty of Care

The basic legal principles applicable to this case stem from the British case *Anns v. Merton London Borough Council*, 1978 A.C. 728 (“*Anns*”), which was adapted in Canada in *Cooper v. Hobart*, 2001 SCC 79 (“*Cooper*”). *Anns/Cooper* recognize that in certain relationships, there is a duty of care, including between lawyers and their clients, doctors and their patients, manufacturers and their consumers, etc.

However, if the plaintiff is alleging a novel duty of care, the *Anns/Cooper* test lays out factors to consider in determining whether a duty of care exists. The *Anns/Cooper* test is:

- Step 1 - Was the harm that occurred the reasonably foreseeable consequence of the defendant's act? Do the parties also share a proximate relationship?
- Step 2 - Are there any policy reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

Background Facts

Mr. Sub was in a contractual relationship with Maple Leaf Foods and required all of its franchisees to purchase deli meats exclusively from Maple Leaf Foods. However, Mr. Sub franchisees did not directly purchase products from Maple Leaf Foods. Instead, franchisees placed their orders through distributors, who would provide them with Maple Leaf Foods products.

Listeria is a foodborne bacteria found in improperly processed deli meats. It can cause serious harm when consumed, including death. In August 2008, Maple Leaf Foods announced that some of their meats might have been exposed to Listeria and recalled two of its deli meat products due to Listeria. Neither of these two products were purchased by the franchisees. A few weeks later, Maple Leaf Foods expanded the scope of its recall to cover over 191 products, including two products which were purchased by the franchisees. The products recalled did not involve any confirmed cases of Listeria.

Neither Mr. Sub, nor any of its customers, reported any confirmed Listeria cases at any time. However, due to the wide-spread publicity received by the Maple Leaf Foods recall, customers drew an association between Maple Leaf Foods and restaurants such as Mr. Sub. Moreover, as a result of the recall, Mr. Sub franchisees were left without the two recalled products for a period between six and eight weeks.

The franchisees launched a class action. The franchisees highlighted Maple Leaf's negligence, asserted that they were owed a duty of care, and claimed that the widely-publicized recall resulted in a loss of sales, profits, and goodwill for the franchisees. They alleged that the Listeria outbreak caused a negative impact on customer perception of Mr. Sub and that customers stopped frequenting Mr. Sub as a result of Maple Leaf Foods' actions. The franchisees claimed damages for economic losses arising from the reputational harm they allegedly experienced from being publicly associated with Maple Leaf Foods in the aftermath of the Listeria outbreak.

When the claim was commenced, there was no established duty of care between manufacturers and retailers. As such, the court was forced to consider whether there was an analogous duty of care, and if not, whether this was a relationship where a novel duty of care could be founded.

Motions Judge's Decision

At first instance, the motions judge found that the parties were in a proximate relationship, and that it was reasonably foreseeable that the sale of a product that could injure a consumer would harm the franchisees' reputation and cause economic harm. Maple Leaf appealed the ruling.

The Ontario Court of Appeal

In contrast to the motions judge, the Ontario Court of Appeal found that there were no analogous duties of care and, further, that the *Anns-Cooper* test did not provide for one. The appeal was allowed, and the lower court's decision was overturned. The Ontario Court of Appeal held that the motions judge was correct to find a duty of care for manufacturers supplying safe products to customers, but was incorrect to extend its scope as covering subsequent reputational loss and damages for the retailers.

The Supreme Court's Decision

Writing on behalf of a narrow majority, Martin and Brown JJ. emphasized that it is difficult, but not impossible, to assert the protection of pure economic interests. The court questioned whether the nature of the relationship between the parties was one where it would be just and fair to impose a duty of care.

The franchisees relied on two categories of claims for economic losses in which the requisite qualities of closeness and directness were recognized by the Supreme Court: negligent misrepresentation or negligent performance of a service, and negligent supply of shoddy goods or structures.

In regards to the claim of negligent misrepresentation or performance of a service, the majority held that Maple Leaf Foods' representations were made to consumers of their food products, "with the purpose of assuring [consumers] that their interests were being kept in mind", and that the representations were not made to protect the commercial interests of intermediaries such as Mr. Sub or its franchisees. Maple Leaf Foods had warned, and the majority seemed to concur, that if there was a duty of care in this relationship, Maple Leaf Foods would be exposed to the spectre of unlimited liability.

Regarding the claim of negligent supply of shoddy goods, the majority found that the food products did not present any real danger to the franchisees. Moreover, once Maple Leaf Foods prematurely recalled the deli meats, it removed any real danger that could have been posed to consumers.

In arriving at this decision, the majority emphasized that the parties could have opted to protect themselves against this type of loss through contract. The franchisees chose to operate as a franchise, and as a result, they were not contractually linked to Maple Leaf Foods directly. The court recognized that the franchise model has strategic advantages and disadvantages, and that this was one of the potential disadvantages. If the franchisees wished to mitigate the potential losses, franchisees should have purchased commercial liability insurance that pays for unforeseen losses of business. Moreover, the majority stated that it is not the court's place to intervene in a contractual relationship that two independent actors with legal advice had

chosen to enter into, and to reconfigure that relationship. A finding of a duty of care in this case would undermine the contractual framework that the parties chose.

The Dissent

Karakatsanis J., writing for the minority, would have found that Maple Leaf Foods owed a duty of care to the franchisees, as they relied on Maple Leaf Foods to supply safe products for their businesses. The minority's analysis concluded that in this case, while there is no prior established duty of care or an analogous duty of care, it would have been appropriate to create a new category of claim.

The minority wrote that the loss incurred by the franchisees was in fact a reasonably foreseeable loss, as Mr. Sub is primarily a deli meat restaurant and had an exclusive supply agreement with Maple Leaf Foods.

The minority believed that the plaintiffs were not actually able to account for this risk and enter into contractual agreements to protect themselves. The dissent emphasized a power imbalance that existed in this relationship, where franchisees could only contract with their franchisor. Moreover, franchisees generally cannot negotiate their agreements with the franchisor. As such, the franchisees were vulnerable throughout their business dealings. They were also dependent on Maple Leaf Foods, due to Maple Leaf Foods' exclusive supplier agreements with Mr. Sub, which the franchisees could not renegotiate or re-write. Moreover, there was a proximate relationship in this case, as Mr. Sub provided the franchisees with their own customer service hotline.

As such, the dissent would have held that Maple Leaf Foods owed the franchisees a duty to supply them products safe for consumption.

Implications for Franchise Systems

Overall, this decision will significantly impact product liability laws in Canada. In franchise law, this decision will be welcomed by franchisors and their suppliers, as it makes it more likely that franchisors may enter into favourable supply contracts, as there will be no direct liability by the suppliers to franchisees.

However, in many franchise systems, franchisees' suppliers may in fact be related corporations of the franchisor, and in those relationships, it is unclear whether this analysis would still apply.

Moreover, if franchisees suffer reputational or economic losses, those losses would ultimately affect the franchisor's finances and business policies as well. As such, it would be prudent for franchisors to ensure all suppliers they contract with are adequately vetted.

Franchisees, on the other hand, will likely be more cautious when entering into new agreements with a franchisor. New franchisees may seek more protections when negotiating contracts with franchisors or might have to find new insurance for unforeseen business losses. In line with a franchisor's duty of good faith, franchisees may also ask for more flexible supply arrangements, especially in situations where the franchisor's preferred supplier cannot deliver the products required in a timely manner.