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## Mr. Sub franchisees order a large class action, but the Supreme Court is fresh out of duty of care

The concept of a duty of care is foundational to the common law concept of negligence. Whether a duty of care exists and, if so, the scope of that duty of care are hotly contested issues that have made their way to the Supreme Court of Canada many times over the last few decades. Today, the Supreme Court of Canada released its long-anticipated decision in *1688782 Ontario Inc v Maple Leaf Foods Inc*, in which a narrow majority of the Supreme Court found that Maple Leaf Foods owed no duty of care to Mr. Sub franchisees in connection with a listeria outbreak and product recall. While the principles set out in *Maple Leaf Foods* are not fundamentally new, the majority's decision provides insight into the application of the duty of care analysis in cases involving pure economic loss.

The background of this case is as follows. In 2008, a number of people became ill, and some died, after eating Maple Leaf Foods ready-to-eat meats. The cause was determined to be a listeria outbreak at a particular Maple Leaf plant. Maple Leaf conducted a recall and closed the plant where those originated.

Maple Leaf had been the supplier of certain ready-to-eat meats to the franchisees of Mr. Sub. The recall was said to have adversely affected Mr. Sub franchisees. The media reported that Maple Leaf was a supplier to Mr. Sub franchisees, so franchisees apparently suffered economic losses following that incident.

A proposed class action was commenced on behalf of the franchisees of Mr. Sub against Maple Leaf. The case was certified as a class action in October 2016. After certification, Maple Leaf brought a motion for summary judgment seeking a dismissal of the claim on the basis that they did not owe a duty of care. The Plaintiffs moved at the same time for summary judgment in its favour.

The motions judge held that Maple Leaf owed a duty of care to franchisees “in relation to production, processing, sale, and distribution” of ready-to-eat meats, as well as a duty of care with respect to any representations made that the ready-to-eat meats were fit for human consumption and posed no risk of harm.

Maple Leaf appealed to the Ontario Court of Appeal, which allowed the decision.

Central to the Court of Appeal’s decision was the Supreme Court of Canada’s decision in *Deloitte Touche v Livent Inc (Receiver of)*, which was released after the appeal was argued, but before the decision was released. On that basis, the Ontario Court of Appeal held that no duty of care was owed.

Fundamentally, the Court of Appeal held that while Maple Leaf may have owed duties to consumers in relation to the supply of meat, the motions judge had erred in failing to consider the scope of duty owed. The Court of Appeal held that any duty that existed did not extend so far as to include a duty to franchisees to protect their reputation and pay for any damages for pure economic losses.

Maple Leaf sought and was granted leave to appeal to the Supreme Court of Canada. In a 5-4 decision released on November 6, 2020, the majority of the Court held that Maple Leaf owed no duty of care to the franchisee class members.

The majority decision in *Maple Leaf Foods* is the culmination of a long journey of Canadian common law courts through the thicket of policy issues raised by claims for recovery of purely economic losses in negligence. The decision of the House of Lords in *Anns v Merton London Borough Council*, [1978] A.C. 728 introduced significant uncertainty into the law of negligence in its suggestion that recovery of purely economic losses is available whenever a plaintiff can establish foreseeability of harm, and the absence of policy considerations that could defeat such a duty. Courts in England very quickly appreciated that this broad understanding of negligence would radically upset a system of private law that relies on contracts as the primary mechanism for private parties to order their affairs. *Anns* was effectively overruled very shortly after it was decided.

For a number of years, however, Canadian common law Courts clung to the *Anns* framework, presuming that duties of care to protect others from economic harm existed whenever such harm was foreseeable. It was only after the decision of the Supreme Court of Canada in *Cooper v Hobart* that Canadian law again recognized that mere foreseeability of harm is not enough to impose on one person’s responsibility to safeguard

the economic interests of others. Since *Cooper v Hobart*, "something more" than mere foreseeability of harm is required before recovery in negligence will be allowed for purely economic losses.

The Supreme Court's decision in *Maple Leaf Foods* builds upon the Court's post-*Cooper* jurisprudence, typified by its decision in *Livent*. Duties of care depend on establishing a meaningful relationship of proximity, consisting of some conduct evidencing an express or implied undertaking to safeguard the plaintiff's interest, coupled with reasonable reliance on that undertaking by the plaintiff. Critically, the Court in *Maple Leaf Foods* identified these undertaking and reliance concepts as the core of economic negligence analysis. The pre-existing categories of recognized economic negligence cases (negligent misrepresentation or performance of a service; negligent supply of shoddy goods or structures; and relational economic loss) are not automatic indicators of a right to recovery, but are to be approached categorically, as analytic tools to assess claims that duties of care exist in specific situations.

Applying this framework, the majority upheld the Court of Appeal's decision that a duty of care did not exist. The Court found that the franchisees were not analogous to consumers who are owed a duty to ensure the safe supply of a product. A duty of care in respect of the negligent supply of shoddy goods or structures is predicated upon a defect posing a real and substantial danger to the plaintiff's personal or property rights. Any danger posed by the supply of meats from Maple Leaf which arose from possible listeria contamination were a danger only to the ultimate consumer. No such danger was posed to the franchisees.

This latter aspect is crucial to the duty analysis and illustrates the wisdom of the functional approach to duty of care adopted by the majority in *Maple Leaf Foods*. The defendant in that case acted promptly in effecting a conservative recall of products based on the risk that they might be contaminated. Recognizing a duty of care to protect franchisees against purely economic harm because of their association with the recall would create perverse economic incentives that would work against the goals of negligence law. The enterprise-scale associational harm claimed by the franchisees in *Maple Leaf Foods* will in many, if not most cases, eclipse damages that may be occasioned by isolated impacts on consumers who are physically injured. Subjecting producers to a crushing risk of liability for purely economic losses borne by business owners where they act quickly and conservatively to mitigate physical harm is arguably inconsistent with sound policy that should

inform negligence law.

For this reason, the majority's principled approach to the identification of proximate relationships is to be preferred to that adopted by the dissenting judges, who placed far more emphasis on the importance of foreseeability and purely circumstantial aspects of the relationship between the plaintiff and the defendant supporting a right to recovery. While it may be the case that the defendant in *Maple Leaf Foods* could foresee that its actions could closely and directly harm the economic interests of the franchisees, this alone cannot determine questions of economic responsibility because, as we have observed, important questions of economic (dis)incentives and corresponding considerations of risk allocation escape this way of analyzing duties.