Alberta Judge won't strike out meat producer's Third-Party Claim against CFIA

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In this recent summary judgment ruling, Alberta's Court of Queen's Bench in *Harrison v. XL Foods Inc.* permitted meat processor XL Foods Inc. (the Company) to third-party the Canadian Food Inspection Agency (CFIA) with respect to a class action negligence claim over an *E. coli* outbreak. Applying the test for summary dismissal, Associate Chief Justice John Rooke decided that it is not "plain and obvious" that CFIA owes no private law duty to members of the plaintiff class (primarily consumers and distributors of the contaminated meat). Thus the CFIA's application to strike the third-party claim was dismissed.

It is important to remember that no legal principles were established by the ruling: whether such a private law duty actually does exist remains an open question. However, even the possibility that it might be recognized should be of considerable interest to the food industry and other heavily regulated industries.

Background

After the representative plaintiff began the class proceeding, the Company (which denied liability) filed a third party claim against CFIA alleging that the federal agency owed a duty of care to individual consumers and commercial purchasers (customers) and that that duty had been breached by the following allegedly negligent acts:

- Failure to establish adequate operating standards;
- Failure to properly inspect or test beef products; and
- Failure to hold or recall beef products.

In reply, counsel for CFIA argued that the agency did not owe a duty of care to the Company's customers, citing the lack of a proximate relationship with them, as well as policy reasons that, in the agency's view, precluded a finding of a duty of care.

Duty of Care

The principal issue was whether CFIA owed a duty of care to the plaintiff class. A duty of care is a necessary condition of a finding of negligence. This question is resolved in Canada's common law provinces through the application of the ***Anns-Cooper*** test, which applies where the relationship between the parties has not previously been held to create a duty of care. Where that is the case, *Anns-Cooper* requires the court to consider foreseeability of harm, proximity and policy in order to determine whether a "new" duty of care ought to be recognized

The court accordingly began with the threshold question: *Has this type of duty of care already been accepted or rejected by the courts?* The most nearly analogous case brought to the court's attention was ***Los Angeles Salad Co. v. Canadian Food Inspection Agency*** (*L.A. Salad*). In that case, CFIA had been found not liable to certain food producers even though it had negligently inspected imported carrots, concluding incorrectly that they were contaminated. That conclusion necessitated the recall and destruction of the carrots, which allegedly caused losses to the affected carrot growers. However, given the clear distinction between potential liability to "upstream" producers versus "'downstream" consumers, Rooke A.C.J. was unable to accept *L.A. Salad* as settling the duty of care issue at the threshold stage.

We should note that the court also rejected CFIA's more general argument that economic loss is not a recognized legal basis for an injury claim and, in particular, that it had no duty to prevent economic losses to middlemen in the food industry even if it had an obligation to compensate the general public for injury. Rooke A.C.J. remarked that there is no generally recognized prohibition against recovery of economic loss in a tort injury scenario such as would have permitted him to conclude, at this stage, that the plaintiffs could not succeed against the Company, or the Company against CFIA.

Given that the degree of similarity between *L.A. Salad* and the present case did not meet the high threshold required to strike the application, and given the plausible economic loss argument, the court found that this was a novel case and proceeded to the proximity and policy analyses required by *Anns-Cooper.*

Proximity

CFIA argued that it lacked proximity to the plaintiffs, who were downstream users and distributors of the Company's products. Citing the Company's submissions, the court disagreed:

Proximity in such cases is founded on the inspectors' proximity to the processes and products that give rise to the risk, and upon their ability to exercise a significant degree of control over those risks

This analysis suggests that it may prove important, in future disputes of this type, to establish the degree to which government inspectors influence industrial processes and the risks that attend them. It appears to follow from this that, where governments have decided to subject sensitive industries to close and constant inspection, the potential for a finding of proximity (and liability) may rise [4]

Here, CFIA's participation in the Company's plant operations created potential proximity between it and the plaintiffs. Although CFIA argued that it had only a discretionary power to inspect and enforce standards, Rooke A.C.J. found that its actions (as alleged in the Company's submissions, which were accepted as true for the purposes of the application) amounted to a "systematic process" evidencing "full operational integration", rather than merely "periodic or random inspections". While the court rejected the argument that the relationship was literally a partnership or joint enterprise, it was willing to accept as true the Company's argument that the facility was "micromanaged by CFIA down to a handbook … the Bible. As the Company's submissions stated, CFIA's inspectors were embedded in the Company's operations. They were involved at various stages of the Company's operations – from inspecting and testing products throughout the production process to approving the shipping of finished products from the plant.

Foreseeability

CFIA did not contest the argument that its negligent activity could foreseeably have led to bacterial meat contamination and subsequent injury to the Company's customers.

Policy considerations (emerging from the relationship of the parties)

The final element in the first stage of the *Anns-Cooper* analysis involves policy issues inherent in the relationship between the parties. While some previous cases may have cited "policy reasons" in rejecting a private duty of care by various government regulators to consumers and others, Rooke A.C.J. was not convinced that the same reasoning applied "when the regulatory oversight of the government body is significantly more involved", as was alleged by the Company. The "unusual degree of control" in this situation distinguished it from cases of more "passive" oversight, in the court's view.

Rooke A.C.J. also observed that CFIA's alleged role of standing *in conjunction with* the Company as an operator may have been inconsistent with the statutory intention. Furthermore, he rejected CFIA's policy arguments against the finding of a duty of care. Rooke A.C.J. disagreed that the proposed duty of care would create a spectre of unlimited liability and a taxpayer funded insurance scheme unintended by Parliament. Instead, he concluded that the range of injured parties, though potentially large, is in fact finite. In addition, CFIA's alleged negligence has an operational rather than a policy basis, and its statutory duty to protect the public health would align with a private law duty to prevent economic losses of customers affected by a recall order.

Policy considerations (residual)

The second stage of the *Anns-Cooper* requires the court to turn its attention to policy in another form – "residual policy considerations". Residual policy considerations are more general and not dependent on the particularities of the parties' relationship. Here, the court's analysis took an interesting turn. In the view of Rooke A.C.J., this second stage of *Anns-Cooper* should not generally be addressed at all on a motion to strike. That is because, at the second stage, the burden of proof is reversed, leaving the onus on the defendant to establish the residual policy reasons. While the reasons are not entirely clear, Rooke A.C.J.'s point appears to be that the court's analysis of a motion to strike is intended to be founded on the plaintiff's statement of the case.

As it happened, however, neither side had addressed this argument. Therefore, for the sake of completeness (and likely with a possible appeal in mind), Rooke A.C.J. considered CFIA's residual policy arguments, which included the prospect of "unlimited liability" and the problem of a conflict between the agency's statutory duty to promote public health and the putative duty of care with respect to the economic interests of downstream purchasers. With respect to these points, the court held (i) that the class was finite and (ii) that in the circumstances of the case the two duties align. On that basis, the court concluded that CFIA had failed to make its case on the residual policy issue, even supposing that it is permitted to make that case in a motion to strike.

Conclusion

In light of the arguments on proximity and the absence of conflicting policy considerations, the court concluded that it was not plain and obvious that the proposed duty of care could not be found. Therefore, the application to strike failed. While there may be more to come on this topic as the proceedings continue – the class action was certified on October 8, 2013 – this judgment will undoubtedly be referred to whenever a court is asked find a private law duty of care in industries such as food processing, in which the relevant regulator has a high level of involvement in the operations of industry participants.

Stay of Third Party Claim

Rooke A.C.J. dismissed the plaintiffs' application for a stay of the third party claim. Class counsel argued that the representative plaintiff had made a considered decision not to involve CFIA in the action and that, if it wanted, the Company could always seek contribution from CFIA later. To have CFIA in the mix from the beginning was unnecessary, according to the representative plaintiff. Ultimately, however, Rooke

A.C.J. decided, mainly on efficiency grounds, against a stay. Where the issues in connected claims are the same or similar, it may be prudent to combine the trials as any additional complexity, delay or expense can be addressed at the costs stage.

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