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## How to Prove a Claim for Economic Loss

By Marco P. Falco

In Canada, actions for pure economic loss in tort law pose a unique set of challenges.

These are claims in which the plaintiff seeks damages for economic loss that is unconnected to the plaintiff's property or to a physical or mental injury to the plaintiff. An action for potential lost profit is one example.

But where there is no physical damage to the plaintiff, how is a successful action for economic loss advanced?

A recent decision of the Ontario Court of Appeal, *2460907 Ontario Inc. v. 1521476 Ontario Inc.*, 2021 ONCA 682, highlights that in order for a plaintiff to be successful in a tortious claim for pure economic loss, the burden lies on the plaintiff to show sufficient "proximity" between itself and the defendant so as to give rise to a duty of care.

### Restaurant Wars

The action in *2460907 Ontario* arose out of a lease dispute involving restaurant premises.

The defendant, 1521476 Ontario Inc. ("152"), entered into a lease with 2456787 Ontario Inc. ("245"). Before the lease started, 245 purchased the chattels and assets of a restaurant that was already operating on the premises. 245 then operated its restaurant on the premises for about a year.

152 and 245 then executed an amendment to the lease in which 152 agreed to renovate the premises and obtain the necessary building permit to do so. A delay in obtaining the building permit occurred, 245 could not pay the rent, and 152 declined to reduce it.

245 then advised 152 that a new restaurant would be run from the leased premises, operated by the plaintiff 2460907 Ontario Inc. ("246"). 245 asked that the original lease be changed to reflect 246 as the new tenant.

152 refused, re-entered the premises, and retained 245's chattels. 245 then started an action for wrongful distraint against 152 (the "Wrongful Distraint Action"). 246 was not a party to the Wrongful Distraint Action.

One year later, 246 started an action against 152 for pure economic loss, claiming damages for the profits it would have earned had it operated a restaurant on the premises that were once occupied by 245 (the "Loss Action").

152 brought a motion to have 246's claim in the Loss Action struck.

The motion judge allowed 152's motion and struck the Loss Action.

The motion judge held that 246 failed to prove it belonged within the class of cases in which Courts grant damages for pure economic loss where the plaintiff has a "possessory or proprietary interest" in the property. Because 246 could not show that 152 owed it a duty of care in this regard, 246's claim for pure economic loss failed.

The Court of Appeal affirmed.

### **When Can a Plaintiff Claim Pure Economic Loss in Tort?**

As the Motion Judge observed, Canadian Courts are generally circumspect about holding defendants liable in tort for pure economic loss.

In *2460907 Ontario Inc.*, 246's claim against the defendant was based in tort law, rather than contract, since there was no contract between 152 and 246.

Specifically, 246's claim was grounded in negligence which required, among other things, that 246 prove that 152, among other things, owed 246 a duty of care.

This requires that the plaintiff establish sufficient "proximity" between itself and the defendant so as to give rise to a *prima facie* duty of care: *see Cooper v. Hobart*, 2001 SCC 79.

In tort claims for pure economic loss, however, Canadian Courts have expressed concern about the "spectre of indeterminate liability" - that is, claims for pure economic loss could be overly broad in scope, holding the defendant liable for actions that it could not have reasonably foreseen: *see, for example, 1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35.

As such, the Courts have only recognized that pure economic loss can give rise to a duty of care in specific circumstances, such as:

- Where the claimant has possessory or proprietary interest in the property;
- General average cases; and
- Where the relationship between the claimant and the property owner amounts to a joint venture: *see Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021.

### **No Proprietary Interest, No Duty of Care, No Claim for Economic Loss**

In *2460907 Ontario Inc.*, 246 claimed that 152 owed it a duty of care in its claim for pure economic loss on the basis of the first category above, i.e. that 246 had a possessory or proprietary interest in the restaurant premises.

The motion judge rejected this argument, noting that 152 had never consented to an assignment of the lease from 245 to 246 and never entered into a new lease with 246. As such, 246 had no possessory or proprietary right in the leased property.

The Court of Appeal affirmed this ruling, distinguishing this case from the Supreme Court of Canada's decision in *Norsk Pacific Steamship*, where the Court held that the plaintiff had a sufficient proprietary interest in the defendant's property so as to give rise to a duty of care and a claim for economic loss:

...there is no merit to [246's] argument that 152 owed it a duty of care arising from its possessory or proprietary interest in 152's property. Without such an interest there could not be an entitlement on the part of 246 to claim possessory or proprietary interest in 152's property and thus a duty of care that could entitle it to economic loss. This was not a case like...*Norsk Pacific Steamship*...In that case, a barge owned by Norsk Pacific Steamship collided with a bridge owned by Public Works Canada. Although [the plaintiff Canadian National Railway] did not have any leasehold estate or interest in the bridge, it was, *pursuant to a contract* with Public Works Canada, its primary user. Nothing about this case is analogous to *Norsk*. 246 did not have any relationship with 152, contractual or otherwise, that would entitle it to claim possessory or proprietary interest in 152's property...[emphasis added]

## The Necessary Connection

*2460907 Ontario Inc.* illustrates that claims for pure economic loss in tort depend almost entirely on the plaintiff proving the necessary proximity between itself and the defendant so as to give rise to a duty of care.

Whether that proximity is shown by a "possessory or proprietary" interest in the defendant's property, or by the other two categories identified in the *Norsk Pacific Steamship* decision, the point is that there must be a fundamental connection between the plaintiff and defendant to impose liability for pure economic loss in tort. The absence of that connection is fatal to the claim.

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