

COURT FILE NO.: 03-CV-1679

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY CHARLES BONDY and
NICHOLAS JOHN McPHERSON

Plaintiffs

- and -

TOSHIBA OF CANADA LIMITED AND
TOSHIBA CORPORATION

Defendants

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) William Sasso
) Jasminka Kalajdzic for the Plaintiffs
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) David F. O'Connor
) J. Adam Dewar, for the Defendants
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) HEARD: February 27 & 28, 2006

Reasons for Decisions

John H. Brockenshire

[1] This was basically a motion under Rule 21.01(1)(b) to strike out the Statement of Claim in this intended action, and alternatively for further particulars.

[2] The essence of the claim (from the amended Statement of Claim) is that the Defendants designed, manufactured, distributed and marketed the "Satellite 5000 Series Consumer Computer Notebook" described by the Defendants as "the ultimate media machine" and as providing 1.1 GHz Pentium III Processing Power. The Plaintiffs claim these notebooks would overheat, shut down, and fail to perform at 1.1GHz processing speed, and that Toshiba's only response to complaints was to post alleged "fixes" on its Website which "fixes" did not solve the basic problem, but simply slowed down the computer so that it would run, but not at its purported 1.1GHz processor speed capacity.

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PLAINTIFFS' ALLEGATIONS

[3] The Plaintiffs allege the Defendants were negligent in many ways, from their initial business plan through responding to purchasers complaints, and further that the Defendants negligently misrepresented the computers, both in common law and under s.52 (1) of *the Competition Act (Canada)*. The Plaintiffs also claim for breach of the manufacturer's warranty. There is no suggestion that any of the alleged acts of negligence created a risk of, let alone actual personal injury or property damage.

DEFENCE POSITION

[4] This motion was brought before any of the usual affidavits, cross-examinations, or examinations usual in preparation for a certification motion had taken place, and of course before the defence had been filed.

[5] However, the Defendants' factum indicates the principal argument against the Plaintiffs' alleged principal cause of action is that the damage claims are for "pure economic loss" and therefore the Plaintiffs have no cause of action against these Defendants, and their claims if any for these alleged "shoddy goods" would be against the merchants who sold the goods to the plaintiffs.

[6] The defence bases its argument on a series of decisions commencing with *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* [1995] 1 S.C.R. 85, and running through to *Mariani v. Lemstra* [2004] O.J. No. 4283 (C.A.). Winnipeg Condominium laid down the oft repeated limitation that in cases of shoddy goods or shoddy construction, where there is no direct contact between the builder or manufacturer and the plaintiff, there is no negligence claim possible for pure economic loss except where the defects pose a substantial danger of damage to persons or property, and then limits such damages to the cost of remedying the defect to remove the danger. The series of cases are listed in Paragraph 34 of the plaintiff's factum.

[7] In *Martel Building v. Canada* [2000] 2 S.C.R. 860, the Supreme Court helpfully reproduced a list of separate types of tort cases that give rise to compensable economic loss as follows:

- (i) The independent liability of statutory public authorities.
- (ii) Negligent misrepresentation.
- (iii) Negligent performance of a service.
- (iv) Negligent supply of shoddy goods or structures.
- (v) Relational economic loss.