

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.

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[8] The defence position is that this claim clearly falls into Category (iv), and recovery in that category is further limited, as above indicated, to the cost of repair of defects that can potentially cause injury to persons or property.

[9] The Plaintiffs' position is that the defendants are looking at the law too narrowly. Plaintiffs' counsel points out that even in *Winnipeg Condominium*, the court noted progress and change in the law of torts and argue that in this case the Plaintiffs and proposed class members, rather than being strangers to a contract, such as the subsequent purchasers of the condominiums in Winnipeg, are in fact the persons that the Defendants attracted as purchasers through their representations. This argument, which is supported by the factual pleadings in the Statement of Claim, would tend to move this case into Category (ii) of negligent misrepresentation, or perhaps some new category, which was recognized by the Supreme Court as entirely possible, or indeed, in to consideration under the general negligence principles in *Anns v. Merton Borough Council* [1978], A.C. 728, adopted by our Supreme Court of Canada.

[10] Plaintiffs' counsels argue that our courts have repeatedly indicated that this list of five categories, and indeed the list of all possible torts, is never closed.

[11] The plaintiffs cited Mr. Justice Nordheimer in *Garipey v. Shell Oil Co.* (2002) 23 C.P.C. (5th) 360 at paragraphs 41 and 42 where he discussed *Winnipeg Condominium*, indicated that it is uncertain whether the Supreme Court would be prepared to extend the current limitations on pure economic loss and stated that, "it would seem therefore, that the possibility exists that claims for repairs in non-dangerous situations may yet be held to be recoverable. It is at least clear that the issue is not foreclosed."

He continues by indicating that the present principles in motions of this kind indicate that where causes of action have not been settled in the jurisprudence, they should be allowed to proceed. I agree completely with that.

DISCUSSION

[12] It is clear from the Supreme Court of Canada decisions and the appellate decisions, gathered by counsel, referred to in their factums and argued before me, as well as the discussions of the issue of pure economic loss both in *Canadian Tort Law*, (7th) Ed., by Mr. Justice Linden (Butterworths) and the *Law of Torts in Canada*, (2d) by Professor Fridman (Carswell) that developments in this area have been policy driven, that there are differences in the law among Canada, England, Australia and the United States, and that the law is evolving. Indeed, Linden J.A., in his text, at p. 601, argues that the fact that the court in *Winnipeg Condominium* did not deal with *Junior Books Ltd. v. The Veitchi Co. Ltd.* [1982] 3 All E.R. 201 (H.L.) could mean that *Junior Books*, which permitted an economic loss claim for poor workmanship without restriction, is "alive in Canada."

[13] While the parties disagree on some of the subtleties of the tests, the parties basically agree that a pleading should not be struck unless it is plain and obvious that it discloses no reasonable cause of action, and on such a motion the facts pleaded are to be taken as proven, the

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novelty of a proposed cause of action is no bar to it, and the Statement of Claim is to be read generously to accommodate drafting deficiencies.

[14] Plaintiffs' counsel quote Madam Justice Feldman in *Haskett v. Equifax Canada Inc.* (2003) 63 O.R. (3d) 577 (C.A.) [a negligence claim re preparing credit reports] at 587, 588 as follows:

On a Rule 21 motion, the court applies this two-stage analysis, [the Anns analysis], to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care will be recognized, but whether it is plain and obvious that no duty of care can be recognized. If it is not plain and obvious, then the action can proceed and the issue will be determined at a trial. (See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980). In that context, the court may well recognize potential policy concerns at the second stage but should be circumspect in using those policy concerns to determine, without a statement of defence and without any evidence, that it is plain and obvious that there is no cause of action.

CONCLUSION RE NEGLIGENCE

[15] My conclusion is that it is not plain and obvious to me that the claim of negligence in design and manufacture, particularly when combined with the alleged claim of negligent misrepresentation, and also combined with the claim of a direct relationship between the manufacturer and customer, cannot succeed. At this stage, without full pleadings and a factual basis, I can hardly be asked to determine if there are policy concerns that would block the claim. I decline to strike out that claim.

DUTY TO WARN

[16] The Defendants complain that the Plaintiffs allege that the Defendants "failed to warn" the class members about the alleged defects in the computers. The defence says a duty to warn only arises if the product is dangerous. One of the authorities cited by the Defendants was *Hughes v. Sunbeam Corp. (Canada)* [2000] O.J. No. 4595 (Sup. Ct.). At paragraph 58 of the motion decision, the motions judge noted that:

In alleging a failure with respect to a duty to warn, the pleading does not delineate this as an alternative, distinctive cause of action.

That was not dealt with in the appellate court. In my view the same thing applies here – the allegation of failure to warn is one of a whole litany of allegations of general negligence against Toshiba, rather than an alleged distinctive cause of action. I would let the allegation stand.

THE DUTY OF CARE

[17] The defence alleges that the Plaintiffs describe the duty of care in negligence, in paragraph 16 as a duty to produce notebooks that were of merchantable quality and fit for their intended

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purpose, namely to perform in accordance with their stated performance specifications. This, the defence says, is the contractual obligation between a buyer and seller in the absence of any other warranty, and does not apply at all as between a manufacturer and an ultimate buyer from a retailer. Firstly, as I read the Statement of Claim, and as I heard Plaintiffs' counsels' submissions, it is not at all clear at this stage whether we are talking of merchandising as it was in the nineteenth century, when a manufacturer sold to a retailer and this "merchant" dealt independently with individual buyers, or the twenty-first century reality of an international manufacturer advertising to buyers that its goods could be obtained from "authorized dealers" who would be national sales organizations where sales clerks would hand over sealed boxes containing the merchandise in exchange for the advertised price. The court would require evidence to know whether it was in fact dealing with a direct sale by the manufacturer or a sale through the manufacturer's agent to the purchaser. In any event, the words about "merchantable quality" and "fit for their intended purpose" have long described what has been expected by the purchasers, and I see no problem in the Plaintiffs using those words to describe the particulars of the duty of care expected in negligence of the manufacturer.

BREACH OF WARRANTY

[18] The defence complains that the Plaintiffs did not clearly state which of the two Defendants provided the warranty. The Plaintiffs reply that is because the warranty documents refer sometimes to one company and sometimes to another. The defence raises the time limitation under the warranties. The applicability of such time limits, generally or individually, are matters to be determined later in the lawsuit. The defence also quibbles that the notebooks provided did contain the processor referred to in the specifications, and that the notebooks did not "fail". Plaintiffs respond that the processor may have been there, but it could not work because of the design problems, the notebooks of the two named Plaintiffs were submitted to Toshiba representatives for repair or replacement, they were not repaired so as to function as advertised and therefore had "failed" and were not replaced. In my view the allegations now in the Statement of Claim, plus, if deemed advisable by the Plaintiffs, the submissions made and summarized above, adequately put the issue forward to the defence and to the court. I would not strike the pleading but would permit the defence to further amend.

MISREPRESENTATION

[19] The defence argues that an allegation of misrepresentation must be pleaded with full particulars, both under s. 52 of the *Competition Act* and in a claim for negligent misrepresentation. Plaintiffs' counsels argue that the pleading is sufficient as it stands. The allegation is that "Toshiba and Toshiba Canada repeatedly stated on the packaging and other materials that the notebooks had 1.1 GHZ processing power and was the "ultimate multimedia machine". I accept the Plaintiffs' submissions that the documentation was such that it is difficult for the Plaintiffs to tell which of the two Defendants actually made the representations, and perhaps they both did. However, I think it is fair to ask for further particulars, which would be within the knowledge of the two representative Plaintiffs, as to where and when each of them first read, or read of or heard of these representations, where and when the representations were repeated, and a direct statement, rather than the indirect one in paragraph 25 of the amended claim, that each of the representative Plaintiffs relied upon the

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representations in purchasing the notebook. If further representations were made after purchase, the particulars of those should also be provided. I gathered during submissions that there may well have been things that these Plaintiffs saw on the Internet, or were told by service representatives when they complained. The plaintiffs are permitted to amend to provide such further particulars.

COMPETITION ACT LIMITATION

[20] That would be a statutory defence, which should be up to the defence to plead. When pled, the Plaintiffs can reply thereto.

THE MODEL Z59 NOTEBOOK

[21] The defence complains that neither of the representative Plaintiffs purchased a Z59 Notebook and do not have any cause of action relating to a computer they do not own. As I commented in the beginning, the cause of action related to the Satellite 5000 Series Consumer Computer Notebooks. The Statement of Claim alleges in paragraph 9 that two models of the Satellite 5000 Series, the X1Z and the Z59 were offered in Canada and in the United States the same Notebook was sold as Series 5005. The defence has not yet filed any material showing that the Z59 is materially different from the X1Z or that it is not part of the Satellite 5000 Series. The allegation against the Z59 model is allowed to stand.

OTHER ISSUES

[22] The defence raised several other very minor issues in the pleading, which in my view do not even call for an amendment, much less a striking of the pleading or any part thereof. An order shall go in accordance with the reasons, dismissing the motion, but directing or permitting amendments and particulars in restricted areas. The Plaintiffs have had substantial success on this motion and are entitled to their costs. Written submissions on costs should be sent to me within 30 days.



John H. Brockenshire
Justice

Released: April 21, 2006

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Brockenshire J.

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