Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [1991] 3 S.C.R. 3

Supreme Court Reports

Supreme Court of Canada

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson and Iacobucci JJ.

1991: May 8 / 1991: September 26.

File No.: 21873.

[1991] 3 S.C.R. 3 | *[1991] 3 R.C.S. 3* | *[1991] S.C.J. No. 67* | *[1991] A.C.S. no 67* | 1991 SCC 27

Canadian National Railway Company, appellant; v. Rainbow Industrial Caterers Ltd. and MacCormac Camp Caterers Ltd., respondents, and Michael Doroshenko (defendant).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (47 paras.)

Case Summary

Torts — Negligence — Misrepresentation — Damages — Calculation of damages.

Trial — Court of Appeal referring matter back for trial — Court of Appeal finding party would have entered contract on less favourable existing terms rather than on terms as stated — Whether stating the issue or stating fact — Whether trial judge on the rehearing was bound by a finding in the first judgment of the Court of Appeal.

Respondents were industrial caterers operating as a single entity (Rainbow). They increased their bid per meal when CN indicated that the number of meals required would be less than previously estimated and ultimately won the contract. About 30% fewer meals were actually required and Rainbow suffered a loss of over $1,000,000 when they terminated the contract on notice as permitted by its terms.

Rainbow sued in the British Columbia Supreme Court for fraud, breach of contract, negligent misrepresentation [page4] and interference with contract. The trial judge awarded damages for Rainbow's whole loss on the contract but denied a claim for loss of profits on other potential contracts as too speculative. CN and Doroshenko appealed, and Rainbow cross-appealed the disallowance of its claim on certain invoices. The Court of Appeal allowed Doroshenko's and CN's appeals in respect of the finding of fraud, and allowed Doroshenko's appeal in respect of the finding of negligence against him. It dismissed the cross-appeal. The Court remitted the matter to the trial judge for the determination of the breach of contract claim and for the reassessment of damages for the misrepresentation claim.

The judge on the reassessment concluded that the Court of Appeal had merely identified an issue to be determined as to whether Rainbow would have entered into the contract even had the misrepresentation not been made. No finding was made binding on him. In the result, he made the same award but added the unpaid invoices. On further appeal, the Court of Appeal did not interfere with the decision of the trial judge with respect to his interpretation and application of the judgment of the Court of Appeal. Furthermore, submissions that the trial judge had not applied the correct measure of damages were dismissed.

At issue here were whether the trial judge on the rehearing was bound by a finding in the first judgment of the Court of Appeal that Rainbow would have bid, notwithstanding the misrepresentation, but at a higher price and alternatively whether the courts below erred in the way that damages have been calculated.

Held (McLachlin J. dissenting): The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Stevenson and Iacobucci JJ.: The Court of Appeal's decision on the first appeal was not intended to be binding on the rehearing in respect of the factual question of what Rainbow would have done had it not been misled. This was a finding to be made which required an assessment of disputed fact and is almost invariably referred [page5] back to the trial judge. No issue of res judicata therefore arose.

The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made. Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue which requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence.

Although the legal burden generally rests with the plaintiff, it is not immutable. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. There is good reason for such reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. A tortfeasor who asks a court to find a transaction whose terms are hypothetical and speculative should bear the burden of displacing the plaintiff's assertion of the status quo ante.

Rainbow established that they were the victims of a negligent misrepresentation, that they would not have entered into this contract on these terms but for this representation, and that this contract resulted in the loss. To assert that the loss was not all attributable to the misrepresentation because Rainbow would have entered into a different contract on other terms which would have resulted in at least some of the loss requires a great deal of speculation and is a matter that must be proved by the appellant. CN did not prove that Rainbow would have bid even if the estimate had been accurate, and so it is taken as a fact that Rainbow would not have contracted had the estimate been accurate. The losses claimed are causally and directly connected to the contract and the contract is causally connected to the negligent misrepresentation. Finally, these damages were foreseeable and therefore were not remote.

Per McLachlin J. (dissenting): The court will draw an inference of causation of loss through reliance where the [page6] misleading conduct is of such a nature as to be likely to induce a representee to act on it. The inference is capable of being rebutted. The plaintiff may contend that all its losses on the contract were caused by the negligent misrepresentation. But if it is shown that the loss was caused by factors other than the misrepresentation, then the chain of causation is broken. Finally the loss found to be caused by the negligent misstatement must be a reasonably foreseeable consequence of the misrepresentation when the misrepresentation was made.

The trial judge found a negligent misrepresentation likely to induce a representee to act on it and was entitled to infer that the plaintiffs relied on the misrepresentation leading them to enter into the contract. If the trial judge found that a portion of the plaintiffs' loss was caused by factors other than the negligent misrepresentation, then the chain of causation would have been broken and there would have been no recovery for losses caused by these factors. The trial judge, however, made no finding as to the effect on the total contract loss of acts of the plaintiffs, third parties, or other factors unrelated to the defendant's tortious act, apparently because he considered them irrelevant. In fact, they were relevant on the issue of causation of the loss. The matter accordingly had to be remitted to trial to permit the necessary findings on this issue.

The rule of remoteness did not need to be considered.

Cases Cited

By Sopinka J.

Referred to: Friesen v. Berta *(1979), 100 D.L.R. (3d) 91*; Irving Oil Ltd. v. Adams *(1984), 46 Nfld. & P.E.I.R. 234*, 135 A.P.R. 234; H.B. Nickerson & Sons Ltd. v. Wooldridge *(1980), 40 N.S.R. (2d) 388*, 73 A.P.R. 388; Steer v. Aerovox Inc. *(1984), 65 N.S.R. (2d) 91*, 147 A.P.R. 91; National Trust Co. v. Wong Aviation Ltd., *[1969] S.C.R. 481*; Snell v. Farrell, *[1990] 2 S.C.R. 311*; National Bank of Canada v. Corbeil, *[1991] 1 S.C.R. 117*; Provincial Bank of Canada v. Gagnon, *[1981] 2 S.C.R. 98*.

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By McLachlin J. (dissenting)

Esso Petroleum Co. v. Mardon, [1976] 2 All E.R. 5; Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158.

Authors Cited

Fridman, G.H.L. The Law of Torts in Canada, vol. 2. Toronto: Carswells, 1990.
McLauchlan, D.W. "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 Otago L.R. 370.
Treitel, G.H. The Law of Contract, 7th ed. London: Stevens & Sons: Sweet & Maxwell, 1987.

APPEAL from a judgment of the British Columbia Court of Appeal *(1990), 43 B.C.L.R. (2d) 1*, *67 D.L.R. (4th) 348*, *[1990] 3 W.W.R. 413*, affirming a judgment of Gibbs J., *[1989] 1 W.W.R. 714*. Appeal dismissed, McLachlin J. dissenting.

Edward C. Chiasson, Q.C., and Patrick G. Foy, for the appellant. Darrell W. Roberts, Q.C., and Leslie J. Muir, for the respondents.

Solicitors for the appellant: Ladner, Downs, Vancouver. Solicitors for the respondents: Roberts, Muir & Griffin, Vancouver.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Stevenson and Iacobucci JJ. was delivered by

SOPINKA J.

1 This is an appeal from the Court of Appeal of British Columbia dismissing an appeal from a trial judge's second attempt to assess the damages. It raises issues as to the assessment of damages for negligent misrepresentation which have been vetted in two trials and two appeals before reaching here with leave of this Court.

1. Facts

2 The Canadian National Railway Company ("CN") called for tenders for the catering of meals nationwide for its track crews, from March 15, 1985 to March 14, 1986. It was estimated that 1,092,500 meals would be required.

[page8]

3 The respondents are industrial caterers which operate as a single entity. I will refer to them together as "Rainbow". They bid $4.94 per meal. Then CN stated that the number of meals required would be only 85% of the previous estimate. Rainbow submitted a new bid of $5.02 per meal, and this was successful. It turned out that far fewer meals were required; there was something like a 30% reduction. The contract was not a financial success for Rainbow. They suffered a loss of over $1,000,000 by the time they terminated the contract on September 21, 1985, on thirty days' notice as permitted by its terms.

2. Judgments Below

(a) British Columbia Supreme Court (Gibbs J.)

4 Rainbow sued in the British Columbia Supreme Court for fraud, breach of contract, negligent misrepresentation and interference with contract. This decision is unreported but is digested at [1987] B.C.W.L.D. 2838. Gibbs J., as he then was, found that Rainbow had been induced to enter into the contract by representations made on behalf of CN by its employee Michael Doroshenko, as to the number of meals required; and, that Doroshenko ought to have known that the representations were substantially wrong, and took no steps to inform Rainbow. This led to a finding of negligence and fraudulent misrepresentation against both Doroshenko and CN. The judge dismissed the claim for interference with contract, and found it unnecessary to address the breach of contract claim.

5 Gibbs J. awarded damages of $1,194,525 (plus interest and costs) for the loss suffered by Rainbow. This was the whole loss that Rainbow made on the contract. A claim for loss of profits on other potential contracts was denied as too speculative. The judge noted that certain of Rainbow's invoices had been [page9] approved but not paid, and left the matter for counsel to resolve by agreement.

(b) British Columbia Court of Appeal (Craig, Esson and Wallace JJ.A.)

6 CN and Doroshenko appealed, and Rainbow cross-appealed the disallowance of its claim on the invoices. The decision is reported at *(1988), 30 B.C.L.R. (2d) 273*. The Court of Appeal allowed Doroshenko's and CN's appeals in respect of the finding of fraud, and allowed Doroshenko's appeal in respect of the finding of negligence against him. It dismissed the cross-appeal. The Court remitted the matter to the trial judge for the determination of the breach of contract claim and for the reassessment of damages for the misrepresentation claim.

7 Esson J.A. found that Doroshenko's failure to provide accurate information was due to poor information flow within CN. This supported liability for negligent misrepresentation on the part of CN, but Doroshenko could not be held personally negligent for this poor information flow. Moreover, the fraud claim could not be supported against either defendant. CN's slow response to the emerging problems could not be characterized as its remaining silent when it knew that false information had been given earlier. There was no deliberate misleading of Rainbow, only poor communications.

8 With respect to damages, Esson J.A. stated that accepting the applicability of the tort measure, there would still have to be a finding that but for the misrepresentation, Rainbow would not have entered into any contract with CN. There was no such finding. Esson J.A. said at p. 308:

> The evidence does not, in my view, provide any reasonable support for the view that [Rainbow], had it been presented with an accurate estimate, would have followed any different course except to bid a higher price per meal as, it is reasonable to assume, would all other [page10] bidders. What the plaintiff was "tricked out of" was not its whole investment in the contract but the additional remuneration per meal for which it would have stipulated had the estimate been given with reasonable care.

He therefore remitted the matter to the trial judge for the determination of damages. It is not clear whether the reassessment of damages by the trial judge was to be on the basis that Rainbow would have rebid or whether this was a matter left to the trial judge. Also, other allegations of breach of contract which had not been dealt with at trial were required to be considered at the new hearing. As to Rainbow's cross-appeal on the invoices, Esson J.A. said that damages were now at large on the rehearing and the matter could be addressed there.

9 Wallace J.A. agreed with Esson J.A. but wrote his own judgement as to the liability issues. On damages, he expressed a concurrence with Esson J.A.

10 Craig J.A. dissented. He thought that all findings of the trial judge were supportable, and he would have dismissed CN's appeal. He would have allowed the cross-appeal on the invoices.

(c) British Columbia Supreme Court (Gibbs J.)

11 This decision is reported at *[1989] 1 W.W.R. 714*. Gibbs J. first considered the reasons of Esson J.A. to decide whether the Court of Appeal had made a finding that Rainbow would have entered into the contract even had the misrepresentation not been made, in which case the assessment of damages would merely reflect how much more the contract price would have been under an accurate estimate; or, whether Esson J.A. merely identified this as an issue which had to be resolved before the correct measure of damages could be determined. He concluded that the latter was correct.

[page11]

12 After reviewing the authorities, he said that there was no rule that the plaintiff has to make a statement in evidence to the effect that he would not have entered the contract had he known the true facts. The plaintiff must prove negligent misstatement, reliance upon it, inducement and detriment; and then he is entitled to all damage suffered. He said at pp. 721-22:

> Accordingly ... it is not necessary to assume a willingness to contract at a higher price or to speculate upon what that higher price might have been.
>
> ...
>
> The plaintiff sought damages in tort and, secondarily, for breach of contract. It proved the dollar amounts for the two different measures in evidence. It did not attempt to calculate what the per meal tender might have been, taking into account all of the different variables, as if it had been asked to bid upon what ultimately turned out to be the actual number of gangs, and sizes and locations, and assuming it would have been prepared to accept the risk associated with smaller meal volumes. The court is in no position to do so. And it seems to me that if I awarded the breach of contract dollar figure on the assumption that it represented the difference between actual contract price and the "would have been demanded" contract price I would be compensating on the breach of contract measure whereas, on the authority of Doyle [v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 (C.A.)] and [Esso Petroleum v.] Mardon [[1976] Q.B. 801 (C.A.)], the plaintiff is entitled to the tort measure for negligent misstatement.

In the result, he made the same award, but added thereto those of the invoices which remained unpaid. The new award was $1,232,141 plus interest and the costs of both trial level decisions.

(d) British Columbia Court of Appeal (Hinkson, Lambert, Toy, Southin and Cumming JJ.A.)

13 CN appealed again, but the appeal was dismissed. The decision is reported at *(1990), 43 B.C.L.R. (2d) 1*.

[page12] Lambert J.A. wrote for himself and Hinkson, Toy and Cumming JJ.A. Lambert J.A. held that Gibbs J. was correct that Esson J.A. had not made a positive finding with respect to whether Rainbow would have rebid had it known the true facts.

14 The second issue was whether Gibbs J. should have proceeded to determine that had Rainbow known the facts, it would have entered into the contract at some higher price. Lambert J.A. said at p. 12 that it may be possible in some cases for a defendant to show that the victim of the misrepresentation would have entered the contract even had the facts been known; and it may even be possible for the defendant to show what the terms of that contract would have been. In such a case:

> ... the measure of the loss flowing from the negligent misstatement, on the usual tort standard of placing the plaintiff in the position he would have been in if the tort had not occurred, would be the difference between the generally foreseeable financial consequences of the contract that was made and the generally foreseeable financial consequences of the contract that would have been made if the true facts had been known to the plaintiff.
>
> It is not clear from Mr. Justice Gibbs' reasons, following the second trial, that he accepted that proposition of law from the reasons of Mr. Justice Esson. But what is clear is that even if he had accepted it he would not have found in this case that [Rainbow] would have entered into the contract at a different price if it had known the true facts about the number of meals. [Emphasis added.]

Accordingly, the Court of Appeal did not interfere with the decision of Gibbs J. that it was not necessary to make a finding that the plaintiff would have contracted at some higher price. Submissions were made by CN that the trial judge had not applied the correct measure of damages but these were dismissed.

15 Southin J.A. dissented. While she accepted the majority view that Gibbs J. was not bound by the previous decision on the question of Rainbow's rebid, [page13] she would have assessed the damages on the basis of breach of contract, by looking at what position the plaintiff would have been in had CN bought as many meals as it said it would. She did not consider that the measure of damages in this case would be different whether one applied the tort or contract measure. She would have allowed the appeal and remitted the case for a new trial to determine the damages for negligent misrepresentation and to adjudicate upon the breach of contract claims.

3. Issues

16 The appellant CN raised two main issues. The first is whether Gibbs J. was bound on the rehearing by a finding in the first judgment of the Court of Appeal. CN said that the Court of Appeal in the first appeal found as a fact that but for the misrepresentation, Rainbow would still have bid, but at a higher price. It was argued that damages had to be assessed on that basis, and not by simply awarding all of the loss that Rainbow made. The binding effect of the judgment of the Court of Appeal was supported both on the basis that it was the decision of a higher court in the same case and that the matter was res judicata.

17 The second issue, in the alternative, is whether the courts below have erred in the way that damages have been calculated.

4. Was the Finding in the First Appeal Binding?

18 I accept the decision made by Gibbs J. on the rehearing and by the Court of Appeal on the second appeal, which was unanimous on this point, that the decision of the Court of Appeal on the first appeal was not intended to be binding on Gibbs J. in respect of the factual question of what Rainbow would have done had it not been misled. As Lambert J.A. said at p. 11:

[page14]

> If a finding of fact becomes relevant, if it is closely disputed between the parties, if it turns on an assessment of the evidence, and if no finding has been made on that question of fact by the trial judge, then we almost invariably refer the matter back to the trial judge for a decision on the disputed question of fact.

19 In view of this finding, the issue of res judicata does not arise.

5. Assessment of Damages

20 The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made. In Fridman, The Law of Torts in Canada, vol. 2, the author says at p. 136:

> What sort of economic loss is recoverable in an action for negligent misrepresentation is still to be resolved conclusively, although the accepted test seems to be restoration of the plaintiff to the position in which he would have been if the negligent misrepresentation had never been made. Some cases suggest that what the plaintiff can recover is what might be termed "out of pocket expenses". In other words, he is entitled to be reimbursed for those costs and expenses which he has incurred and has expended in reliance on the misrepresentation.

21 To the same effect is the statement in "Assessment of Damages for Misrepresentations Inducing Contracts" by D. W. McLauchlan (1987), 6 Otago L.R. 370, at p. 388:

> It is axiomatic that the object of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Therefore, in a tort action the object is to put the plaintiff in the position he would have been in if the tort had not been committed.

22 What that position would have been is a matter that the plaintiff must establish on a balance of probabilities. In a case in which a material negligent misrepresentation has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, [page15] absent the misrepresentation, the plaintiff would not have entered into the transaction. The plaintiff was restored to the position he would have occupied had he never entered the transaction in the following cases: Friesen v. Berta *(1979), 100 D.L.R. (3d) 91* (B.C.S.C.); Irving Oil Ltd. v. Adams *(1984) 46 Nfld. & P.E.I.R. 234*, 135 A.P.R. 234 (Nfld. C.A.); H.B. Nickerson & Sons Ltd. v. Wooldridge *(1980), 40 N.S.R. (2d) 388*, 73 A.P.R. 388 (N.S.S.C.A.D.), and Steer v. Aerovox Inc. *(1984), 65 N.S.R. (2d) 91*, 147 A.P.R. 91 (N.S.S.C.T.D.).

23 Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negative all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

24 Although the legal burden generally rests with the plaintiff, it is not immutable. See National Trust Co. v. Wong Aviation Ltd., *[1969] S.C.R. 481*, and Snell v. Farrell, *[1990] 2 S.C.R. 311*. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says "Yes, but you would have assumed a position other than the status quo ante", and

thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear [page16] the burden of displacing the plaintiff's assertion of the status quo ante.

25 The operation of a similar principle can be found in cases in which a secured creditor unlawfully disposes of the debtor's goods. The loss to the debtor is the market value of the goods. A creditor who alleges that in the debtor's hands they would have less value must prove it. See National Bank of Canada v. Corbeil, *[1991] 1 S.C.R. 117*, and Provincial Bank of Canada v. Gagnon, *[1981] 2 S.C.R. 98*.

26 Applying the foregoing to this I observe that Rainbow established the following:

(a) it was the victim of a negligent misrepresentation;

(b) but for this misrepresentation it would not have entered into this contract on these terms; and,

(c) this contract resulted in the loss that was awarded by the trial judge.

The appellant CN alleged that the loss was not all attributable to the misrepresentation because Rainbow would have entered into a different contract on other terms which would have resulted in at least some of the loss. What the respondent would have done had it not been for the tortious act requires a great deal of speculation, and, on the basis of the principles which I have reviewed above, I would apply the legal burden of proof against the appellant. The trial judge declined to make a finding in favour of the appellant on this issue. The judgment of the majority of the Court of Appeal found no error on the part of the trial judge in this regard. Indeed, they seem to have expressly approved it. Alternatively, the passage to which I made reference above suggests that it was implicit in the findings of the trial judge that he found in favour of the plaintiff on this issue.

[page17]

27 It was argued by CN that much of the loss was not caused by the misrepresentation and would have been suffered even had the estimate been accurate. CN pointed out that Rainbow itself, in para. 49 of its statement of claim, alleged that losses were caused by certain conduct of CN and its employees during the performance of the contract, such as taking too much food. Those claims were in breach of contract, and have never been adjudicated. But CN's position is that the losses caused by such conduct cannot be recoverable in the misrepresentation claim.

28 But I have concluded that CN bore the burden of proving that Rainbow would have bid even if the estimate had been accurate. That was not proved, and so it is taken as a fact that Rainbow would not have contracted had the estimate been accurate. The conduct referred to in para. 49 would not have occurred if there had been no contract, and therefore the loss caused thereby, like all other losses in the proper execution of the contract by Rainbow, is directly related to the negligent misrepresentation. The entering into of the contract is a link in the chain with respect to the para. 49 losses. These losses are causally and directly connected to the contract and the contract is causally connected to the negligent misrepresentation. Finally, in my view these damages were foreseeable and therefore are not remote. For these reasons, I conclude that the trial judge correctly assessed the damages and the Court of Appeal was right to affirm his judgment.

29 In the result, the appeal is dismissed with costs.

The following are the reasons delivered by

McLACHLIN J. (dissenting)

30 The plaintiffs (respondents) sued in contract and tort. The torts alleged were negligent misrepresentation and fraudulent misrepresentation. The trial judge based his judgment on negligent and fraudulent misrepresentation and

did not consider the contractual claim. On the first appeal, it was held that the claim for fraudulent misrepresentation could not be sustained. No appeal [page18] has been taken from this ruling. Therefore, the only action which falls for consideration on this appeal is that of negligent misrepresentation. The issue is what measure of damages flow from the defendant's (appellant's) negligent misrepresentation that the number of meals to be provided by the plaintiff was greater than it in fact was.

31 The applicable principles are simply stated.

32 An action for negligent misrepresentation is made out where there is: (a) a negligent misrepresentation; (b) made carelessly and in breach of a duty owed by the representor to the representee to take reasonable care to ensure that the representation is adequate; which (c) causes loss which was the foreseeable consequence of the misrepresentation at the time it was made to the representee. This appeal concerns the third requirement of the action for negligent misrepresentation.

33 The loss recoverable is the loss which is established to have been caused by the negligent misrepresentation. The causal link between the representation and the loss is an act of reliance by the plaintiff. In this case, the act of reliance was the plaintiffs' entry into the contract with the defendant. The question is not what the total loss on the contract is, but what loss is shown to have been caused by the tortious act, the negligent misrepresentation.

34 I turn from general principles to matters of proof. The plaintiff bears the burden of establishing the elements of its action. However, it is not incumbent on the plaintiff to actually adduce evidence that the misrepresentation caused it to enter into the contract, or to put it conversely, that "but for" the misrepresentation it would not have entered into the contract. The [page19] court will draw an inference of causation of loss through reliance where the misleading conduct is of such a nature as to be likely to induce a representee to act on it. That inference is capable of being rebutted. See Esso Petroleum Co. v. Mardon, [1976] 2 All E.R. 5 (C.A.), Treitel, The Law of Contract, 7th ed. (1987), at pp. 263-64.

35 The plaintiff may contend that all its losses on the contract were caused by the negligent misrepresentation. But if it is shown that the loss was caused by factors other than the misrepresentation, then the chain of causation is broken. Generally, the plaintiff establishes a prima facie case by proving losses resulting from the contract. But the defendant may show that the chain of causation was broken by, for example, the plaintiff's own acts, the acts of third parties, or other factors unrelated to the tortious misrepresentation. Tort liability is based on fault, and losses not caused by the defendant's fault cannot be charged to it. It is for the plaintiff in contracting to make proper allowance for contingencies such as weather. The plaintiff may also have claim against third parties who cause it loss.

36 The final question is whether the loss found to be caused by the negligent misstatement was a reasonably foreseeable consequence of the misrepresentation when the misrepresentation was made, i.e., that it is not too remote.

Application of Principles

37 The trial judge found a negligent misrepresentation likely to induce a representee to act on it. This entitled him to infer that the plaintiffs relied on the misrepresentation leading them to enter into the contract.

38 This brings us to the next question: what portion of the plaintiffs' losses on the contract were caused by the negligent misrepresentation? The defendant led evidence that some of the loss had been caused by [page20] factors other than its negligent misrepresentation. If the trial judge had found that a portion of the plaintiffs' loss was caused by factors other than the negligent misrepresentation, then the chain of causation would have been broken and there would have been no recovery for losses caused by these factors. The trial judge, however, made no finding as to the effect on the total contract loss of acts of the plaintiffs, third parties, or other factors unrelated to the defendant's tortious act. He apparently took the view that these matters were irrelevant. In fact, they were relevant

on the issue of causation of the loss. The matter must be remitted to trial to permit the necessary findings on this issue.

39 To amplify, the plaintiffs' losses may have been caused by: (a) the defendant's negligent misrepresentation; (b) other wrongful acts or omissions of the defendant, whether in negligence or breach of contract; (c) the plaintiffs' acts or omissions; (d) the acts of third parties; and/or (e) factors unrelated to the fault of either the plaintiffs or the defendant. The defendant is responsible for losses flowing from (a) or (b), but not for losses flowing from (c), (d), and (e). The trial judge wrongly assumed that all the plaintiffs' contract losses must be attributed to (a) and made no findings with respect to the other possibilities, notwithstanding the fact that the defendant CN led evidence on them. These findings must be made if justice is to be done.

40 Loss found to be caused by the defendant's misrepresentation must meet the further test of foreseeability; that is, it must not be too remote. The question is: was the loss caused by the misrepresentation the reasonably foreseeable consequence of the misrepresentation at the time it was made. This rule comes into play only after it has been established that the defendant's misrepresentation in fact caused the loss. Given that I would remit this case to trial for [page21] proper determination of the issue of causation, the rule of remoteness need not be considered at this stage. However, were it necessary to consider it, I would find that losses caused by factors other that the tortious misstatement would not have been foreseeable at the time the representation was made, given that the defendant was entitled to assume that the plaintiffs in bidding would make allowance for all factors relevant to the cost of executing the contract (excluding the defendant's wrongful acts), and that the plaintiff would not exacerbate the loss by its own acts.

41 I conclude the matter must be remitted to trial.

Additional Observations

42 The appeal as presented focused on whether the trial judge should have considered whether the plaintiffs had adduced evidence that they would not have contracted but for the representation. It will be apparent from the foregoing that I agree with the trial judge that, in the absence of rebutting evidence, he was entitled to infer reliance inducing the contract. While I agree with Justice Sopinka that such an inference may be drawn, in my view this flows from the authorities, and is not dependent upon the policy dictates of a particular case.

43 I also share the trial judge's view that speculation about what the plaintiffs would have bid had they known the truth is not necessary in a tort action for negligent misrepresentation. The aim in tort is simply to restore the plaintiff to the position it would have been in had the tortious act not been committed. The only question is whether it can be found (or inferred) that the plaintiffs would not have contracted but for the misrepresentation.

44 In contract the matter is otherwise. In contract the aim of damages is to put the plaintiff in the position it [page22] would have been in had the representation been true; i.e., to compensate the plaintiff for its contractual expectation. It therefore becomes necessary to determine what would have happened had the representation made as to the number of meals been true. Even this inquiry, however, does not require the court to speculate on what the plaintiff would have bid had it known the true facts (the test proposed by Sopinka J.).

45 In short, I conclude that the trial judge applied the appropriate general test for damages, given that he was considering the action in tort and not in contract. He also properly inferred reliance, notwithstanding the absence of a statement by the plaintiffs that they would not have contracted had they known the truth. The trial judge's only error was that identified by Southin J.A. in her reasons below: he failed to consider whether all the losses on the contract were caused by the defendant's tortious misrepresentation, or whether, on the contrary, some of the losses were caused by other factors.

46 The authorities do not suggest that all contractual losses are inevitably recoverable in an action for negligent or fraudulent misrepresentation inducing a contract. In Esso Petroleum Co. v. Mardon, supra, and Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158, general contractual losses were recoverable. However, as Southin J.A.

pointed out, there was no allegation in those cases that part of the loss had been caused by the plaintiffs' acts. The defendant is obliged to compensate the plaintiffs for losses caused by the defendant's wrongful act, but not for losses caused by the acts of others. Were it otherwise, the measure of damages in tort might significantly exceed the measure in contract. I agree with Southin J.A. that as a matter of practical justice, the damages awarded for a given wrongful act should be the same, [page23] whether the act is seen as a tort or a breach of contract.

Disposition

47 I would remit the matter to trial for determination of whether any part of the loss was caused by factors unrelated to the defendant's misrepresentation.

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