

BEWARE OF BYSTANDERS: ONTARIO COURT EXPANDS THE SCOPE OF NEGLIGENCE CLAIMS

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Despite the backlog of cases waiting to be heard, the court remains reluctant to exercise its gatekeeping function to weed out claims that are of dubious merit. In *Bustin v. Quaranto*, 2023 ONSC 5732 ("*Bustin*"), Justice Doi refused to grant the defence motion to strike a claim by an innocent bystander who was not related to or involved with an incident.

Facts

On October 13, 2019, the plaintiff in *Bustin* witnessed a double-fatality motor vehicle collision while standing outside a relative's home on King Vaughan Road. He claimed he heard the sounds of the initial catastrophic impact of the two vehicles, felt the ground shake, and observed the accident play out "with the vehicles rolling and being torn apart in front of him."^[1]

As a result of witnessing the collision, the plaintiff brought a claim against the defendant driver, alleging he suffered physical and mental injuries akin to or notionally equivalent to being struck by the defendant's vehicle in the collision. The plaintiff did not have a relationship to anyone involved in the collision, nor did he try to rescue anyone in the incident.^[2]

The defendant brought a preliminary motion to strike the statement of claim for disclosing no reasonable cause of action, arguing that he did not owe a duty of care to the plaintiff and that the injuries claimed were not a reasonably foreseeable consequence of his actions.

Analysis

The key issue on a motion to strike is whether it is "plain and obvious" that the plaintiff's claim has no reasonable prospect of success and is certain to fail. In this case, the defendant's main argument was that the plaintiff would be unable to establish the legal principles for a negligence claim – specifically, that the defendant owed a duty of care.

In its analysis, the Court found that the plaintiff had an arguable basis to claim the defendant owed him a duty of care. The Court noted that the first part of the analysis turned on the relationship between the parties and

whether the relationship was so close that it could reasonably be said that there existed a duty of care not to injure the other.

While Justice Doi cited the Supreme Court of Canada decisions in *Mustapha and Cooper* to suggest that the law has recognized the type of relationship between the parties to ground a duty of care: the existing case law does not support such a finding. Moreover, the recognition of a duty of care in these circumstances has the potential to create the spectre of unlimited liability to an unlimited class.

The decision of *Alcock v. Chief Constable of Yorkshire Police* ("*Alcock*") was cited by Justice Doi in support of not striking the claim. The *Alcock* case arose from a tragic incident at a football stadium where 96 victims lost their lives in a stampede. The plaintiffs were all family members of the victims who had perished in the incident.

While the court held that the police owed no duty of care to the families, it recognized that nervous shock as opposed to physical injury might give rise to a claim for negligence.

Justice Doi held that the required physical proximity had been established by the plaintiff to implicate a duty of care. On a motion to strike, a judge must take a plaintiff's allegations as truth. In this case, this meant that the plaintiff's allegation that he had been witness to the motor vehicle was enough to satisfy the judge that the factors in *Alcock* had been satisfied. While the Court noted the required relational proximity had not been established, the Court found this was not necessary as the plaintiff had established a duty of care under the "bystander category" in *Alcock*.^[3]

In reaching this conclusion, the Court held that any uncertainty or novelty arising from unsettled jurisprudence should not cause a claim to be struck. On a motion to strike, a Court should adopt a "generous approach that errs on the side of allowing a novel but arguable claim to proceed to trial."^[4]

The Aftermath

This decision has already triggered several plaintiff firms to create marketing materials offering free consultations to those who suffered personal damages as bystanders to accidents. The preliminary recognition of innocent bystander liability does not only apply to motor vehicle claims but any claim grounded in negligence, including product liability. As seen in this case, the "bystander" category may include individuals who have no relation to anyone in the accident and have no involvement in the aftermath of the accident insofar as attempting to aid or rescue those involved.

The decision also sends a clear signal that motions to strike novel claims are unlikely to succeed. In this context, motions to strike are onerous to defend as courts do not consider the merits of the claim, but rather whether the claim has a reasonable prospect of success. This is just another deterrent for defendants to obtain efficient outcomes from the civil system in Ontario (along with an overburdened judicial system and a cooling of

availability of summary judgement motions).

As the action has not yet been tried, it is unclear how the Superior Court will approach the motion judge's reasoning. However, it is unlikely that the matter will be tried since the cost of litigating the case relative to the potential exposure may deter the defendant from taking the action to trial. Further, on a motion to strike, it is not determinative that the law has not yet recognized a particular claim. All is not lost for parties defending a bystander claim, however – as with all mental anguish claims, plaintiffs will still need to prove their damages in order to make out a claim. For more on this type of damages claim, see our previous [bulletin](#).

[1] *Bustin v. Quaranto*, 2023 ONSC 5732 at para. 5 (“*Bustin*”).

[2] *Bustin* at para. 27.

[3] *Bustin* at paras. 26-27.

[4] *Bustin* at para. 27.

By: [Lindsay Lorimer](#), [Rachel Cooper](#) and [Rachel Wong](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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