

Too close for comfort: Motion to strike bystander's claim fails

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In [*Bustin v. Quaranto*, 2023 ONSC 5732](#), the Court denied a defendant's motion to strike a bystander's claim that they suffered physical and mental injuries after witnessing a double-fatality motor vehicle collision. The Plaintiff was not involved in the collision and did not have any relationship with the victims, however, the Court found that their physical proximity was enough to succeed against the motion to strike.

Facts

The incident arose out of a fatal motor vehicle collision that occurred on King Vaughan Road in Vaughan, Ontario. The Defendant, who was alone, was driving one of the vehicles while the second vehicle had two occupants, who were both killed in the collision. The Plaintiff was not directly involved in the collision, rather he witnessed the collision from a near-by property.

The Plaintiff sued the Defendant alleging that, "as a result of witnessing the double-fatality motor vehicle collision, he suffered physical and mental injuries akin to or notionally equivalent to being struck by the Defendant's vehicle in the collision."

The Defendant pleaded that he did not owe a duty of care to the Plaintiff and that any injuries suffered by the Plaintiff were not foreseeable. The Defendant then brought a motion to strike the Plaintiff's statement of claim for disclosing no reasonable cause of action under Rule 21.01(1)(b) of the *Rules of Civil Procedure*.

Law on a motion to strike

Rule 21.01(1) and (2) provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. Notably, the motion is decided on the face of the pleadings alone with the facts pleaded in the statement of claim assumed to be true unless they are manifest incapable of being proven.

The burden on the moving party on a motion to strike is a stringent one. The court will only strike a claim under Rule 21.01(1)(b) if it is "plain and obvious" that the claim has

no reasonable prospect of success. Novel claims present a particular challenge on a motion to strike. It is not determinative that the law has not yet recognized the claim. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

Analysis of the plaintiff's claim

To succeed, a negligence claim requires proof of a duty of care, a breach of the standard of care, compensable damage, and causation. In this case, the Court was satisfied that the Plaintiff had an arguable basis to claim that the Defendant owed him a duty of care. Canadian jurisprudence has recognized the case of *Alcock v. Chief Constable of Yorkshire Police*, [1991] UKHL 5 in which United Kingdom House of Lords found a duty of care towards bystanders and others physically present at an accident who suffer nervous shock. While the Court in *Alcock* acknowledged the case of a bystander unrelated to the victims of an accident may be a difficult one, there is a reasonable foreseeability that bystanders may suffer psychiatric injury when there is particularly horrific catastrophe occurring in close proximity. In the statement of claim the Plaintiff alleged that he was close enough to see and hear the fatal collision as it occurred. This brought the Plaintiff within the physical proximity recognized in *Alcock*. While the Plaintiff's claim was relatively novel, the Court recognized that a trial may be needed to properly consider the duty and its application to the Plaintiff in the circumstances. As such, the Court concluded that it was neither plain nor obvious that the Plaintiff's claim had no reasonable prospect of success or was otherwise certain to fail.

Considerations for other cases

The *Bustin* decision is a reminder to not to be too quick to dismiss the viability of an unrelated bystander's claim. The acknowledgement, even at the stage of a motion to strike, that bystanders may be able to claim damages for incidents they have witnessed expands the potential range of liability for all parties. There are numerous circumstances, beyond just motor vehicle collisions, that may rise to the level of severity to trigger a potential duty of care to a bystander. While each bystander claim will have to be considered on its particular facts, the acknowledgment of such a duty creates more expansive liability exposure for any such public incident.

By

[Sarah Sweet](#), [Jonathan Thoburn](#)

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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