

Bustin Outside the Traditional Limits of Liability? Court Declines to Strike Claim Brought by Bystander for Witnessing a Motor Vehicle Accident

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In the recent decision in *Bustin v Quaranto*, the Ontario Superior Court of Justice dismissed a defendant's motion to strike a claim brought by a bystander alleging personal injuries arising from merely witnessing a double-fatality motor vehicle accident.¹ The decision demonstrates that the Court is not willing to dismiss cases like this on their face, suggesting that manufacturers' potential liability arising from incidents involving their products could potentially expand further than originally thought.

The Facts

The plaintiff witnessed a motor vehicle accident involving two vehicles and three people. Two occupants of one vehicle died in the accident. The defendant, who survived the accident, was the driver and sole occupant of the other vehicle. The plaintiff, who was not an occupant of either of the involved vehicles, brought a claim in negligence for personal injuries arising from witnessing the accident as a bystander. The claim alleges that the plaintiff "suffered physical and mental injuries akin to or notionally equivalent to being struck by the [d]efendant's vehicle in the collision"² for which the defendant is alleged to be liable.

Motions to Strike Under Rule 21.01(1)(b)

This decision arises from the defendant's attempt to have the plaintiff's claim struck pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*.³ The Court will only strike a claim under this rule if it is "plain and obvious" that the claim has no reasonable prospect of success, and claims with a reasonable prospect of success will typically be allowed to proceed to trial.⁴ On a motion to strike, the Court will not consider whether or not a type of claim has been recognized. However, if a claim is certain to fail based on a "radical defect", it should be struck down for not disclosing a reasonable cause of action.⁵

The Duty of Care

In order to succeed in a claim for negligence, a plaintiff needs to establish the existence of a duty of care

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owed by the defendant, a breach of the standard of care by the defendant, compensable damage, and causation.⁶ Whether or not a duty of care exists is determined by applying a two-part test. The first portion of the test requires the Court to assess whether there is sufficient proximity between the parties that the defendant would reasonably contemplate that carelessness on his part may likely cause damage to the plaintiff. If the answer to this is yes, then a duty of care has been established.⁷ The second portion of the test involves assessing whether there are any considerations which ought to negate or limit the duty of care.⁸ In applying the first part of the test, the Court will take notice of relationships that have already been recognized by courts as establishing a duty of care and will not typically proceed with further analysis.⁹

The Court's Decision

The defendant moved to strike the claim under Rule 21.01(1)(b) on the basis that he did not owe a duty of care to the plaintiff. Given the plaintiff was merely a bystander who witnessed the accident and had neither claimed to have a relationship with anyone involved in the accident nor attempted to rescue anyone, the defendant argued that the plaintiff could not establish the requisite proximity in the first part of the test to establish a duty of care.¹⁰

The Court looked to prior case law from the United Kingdom where a duty of care was found to be owed to bystanders to an incident alleging nervous shock caused by the “sight or hearing of the event on or of its immediate aftermath.”¹¹ Based on this, the Court found the plaintiff had alleged sufficient material facts in his Statement of Claim to establish a duty of care and declined to strike the claim as it was not plain and obvious that the claim would not succeed at trial.¹²

Key Takeaways

This case demonstrates that the Court will not be receptive to dismissing novel or arguably unviable claims on their face. Practically, this means that these claims will be entitled to their day in court, which may incentivize future novel claims, regardless of their merit, because, in the absence of an early dismissal, it will be more cost effective for defendants to settle these matters than litigate them to conclusion.

Although *Bustin* was not a product liability claim, this decision may lead to greater exposure for manufacturers, including potential liability to individuals beyond the end user of the product at issue. Product liability claims may potentially be advanced by those who have been witness to incidents involving a product, and *Bustin* makes clear that these claims will not be subject to early dismissal on a motion to strike. It is important to note, however that *Bustin* did not involve an actual determination of the merits of the claim, nor did it assess whether the plaintiff had suffered any compensable damages, so only time will tell whether or not actual liability can be established in such a claim and the degree of damages that may be awarded.

¹ *Bustin v. Quaranto*, 2023 ONSC 5732, (*Bustin*).

² *Bustin* at para. 5.

³ *Rules of Civil Procedure*, RRO 1990, Reg 194, at r 21.01(1)(b).

⁴ *Bustin*, at para. 11.

⁵ *Bustin* at para. 15.

⁶ *Bustin* at para. 17.

⁷ *Bustin* at para. 18.

⁸ *Bustin* at para. 18.

⁹ *Bustin* at para. 23.

¹⁰ *Bustin* at para. 27.

¹¹ *Bustin* at para. 25.

¹² *Bustin* at para. 27.

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