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Navigating Disputes: Dispute Resolution Clauses in Contracts

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Background

Due to the cost of litigation arising from contractual disputes, it has become commonplace for contracts to include a dispute resolution clause. The dispute resolution clause provides a roadmap for resolving conflicts outside of the courtroom. It specifies pre-determined steps to follow in case of a dispute. This clause is designed to promote efficient resolutions and curb costs. Depending on the nature of the contract and the structure of the deal, it can include multi-step de-escalation strategies, procedures for mediation and/or arbitration.

Parties rely on the terms and conditions of a contract to protect their interests, define obligations and navigate conflict. The strength of any contract lies not only in its ability to clearly articulate the terms governing the parties' relationship but in its capacity to avoid and resolve disputes.

In order to draft a comprehensive dispute resolution provision, the parties must consider conflict avoidance strategies in the early stages of the negotiation process. Addressing conflict resolution at the outset, when each party holds greater negotiating power, also provides for stronger dispute avoidance strategies. This can prevent delays, reduce expenses, and minimize disruption of business operations. With the above in mind, this paper will highlight several issues to consider when drafting a dispute resolution clause. This is not a conclusive list of factors as each contract is different with its own unique subtleties.

1. ***Dispute Avoidance***

Preparing a roadmap to mitigate disputes *before* they arise strengthens a party's ability to respond effectively when they occur. Grounds for conflict may include a breakdown in communications, delayed performance and changes in delivery or payments.

A proactive approach to dispute resolution that accounts for the nuances of a contract is an effective cost saving mechanism and a means of preserving the parties' relationship. Consider the following example. An enterprise signs a technology contract with a supplier to implement a solution with minimal discussion about dispute resolution. The parties hastily adopt boilerplate dispute resolution language. As the work unfolds, it proves to be expensive and more complex than originally thought. Rising costs, dissatisfaction with performance and delayed payment deteriorate the parties' relationship. In the absence of a well drafted dispute resolution clause and faced with an increasingly strained relationship, the parties are forced to contemplate litigation.

Courts are generally reluctant to interpret ambiguous terms in a manner that imposes obligations on the parties. It is therefore imperative that this provision sets out the parties' intentions clearly and accurately. This will help avoid disagreements over the interpretation of the dispute resolution clause itself. A prompt and pre-determined response to issues that may arise fosters open communication prompts timely discussion. If necessary, it also encourages legal advice on how best to resolve or renegotiate the terms to mitigate the likelihood of future disputes.

2. The Multi-Step Clause

Multi-step or escalation clauses are provisions that require the parties to engage in specific steps prior to commencing arbitration. These actions can include escalating the dispute to senior management for discussion, engaging in negotiation and attending mediation within predefined timeframes. A common underlying theme across all such steps is the parties' commitment to resolving the dispute in good faith.

To be effective, this clause must explicitly outline the steps required as conditions precedent. For example, if the parties have agreed to negotiate before resorting to arbitration, their agreement must expressly state that negotiation is a condition precedent to arbitration. If the parties agree to "make all reasonable efforts" to resolve their conflict by negotiation, a timeframe within which the negotiation must be conducted should be stated in the agreement to allow the parties to move from one step to another without delay.[1] Other areas that are helpful to specify include the timeframe to complete certain steps of the negotiation, potential areas of disagreement and how to communicate the issues throughout the negotiation process.

Additional conditions may include the requirement to provide a notice of dispute within a specific timeframe. This notice must set out the nature of the dispute, provide full particulars of it along with supporting documents. The defaulting party is then granted an opportunity to cure the default or issue at the core of the dispute within an agreed upon period. Incorporating a cure period is imperative for the party alleged to be in default and can be an efficient method of de-escalation. Each of these conditions should be negotiated and expressly stated in the agreement.

3. The Arbitration Clause

The delays and exorbitant legal fees associated with litigation lead businesses to seek more efficient and economical alternatives. When it comes to controlling costs, choosing alternative dispute resolution strategies such as arbitration can be very effective. It is worth noting that while arbitration is less expensive than litigation – avoiding arbitration using the strategies previously discussed will be an even more meaningful cost-saving measure.

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[1] *Alberici Western Constructors Ltd. v. Saskatchewan Power Corporation*, 2015 SKQB 74, aff'd 2016 SKCA 46.

The arbitration clause sets the pace at which the parties proceed to and participate in an arbitration. It must articulate the process to be followed once the conditions precedent for initiating arbitration have been met. For example, the clause will state that if a dispute cannot be resolved by way of negotiation or mediation within a set timeframe, it will be resolved fully and finally by way of arbitration. Further, while the provisions of the contract shall not operate to prevent recourse to the courts as permitted by the *Arbitration Act*, *1991*, S.O. 1991, c. 17, in all other respects, there shall be no appeal from the arbitrator's award on questions of law or any other questions provided that the arbitrator has followed the rules of the contract in good faith. This language will grant an arbitrator the jurisdiction to preside over the dispute and to issue a binding order while leaving the door open to further litigation if certain conditions are not followed, there is an error of jurisdictions or evidence has not been properly considered, etc. Identifying the venue for the arbitration, the language it will be conducted in and the number of arbitrators presiding over it are equally important.

Procedural ambiguities will add to the delay, increase costs and can further frustrate the parties. It is imperative that the parties take the time to agree on the processes such as the appointment of the arbitral tribunal, the timeline for submission of pleading, parameters for documentary requests and discoveries, as well as the form and impact of the arbitrator's decision, including costs awards and the costs of the arbitration itself.

Concluding Remarks

Canvassing potential areas of conflict is much more manageable during the initial stages of a contractual negotiation before a dispute arises. This approach is particularly effective for fostering successful long-term business relationships based on mutual understanding and prompt dispute resolution. Incorporating a well-defined dispute resolution mechanism, including conditions precedent to an alternative dispute resolution practice (ie. arbitration), not only establishes clarity in contractual agreements but also promotes efficient conflict resolution. It also encourages lawyers to continually look for new ways to develop a better understanding of the client's objectives. By promoting lower costs, eliminating surprises and keeping clients well-informed, the dispute resolution clause can improve the client relationship.

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Estate Planning for Separated Spouses Requires Careful Consideration

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The intersection between estates law and family law has long been a complex and intricate landscape to navigate.

The amendments to the Ontario *Succession Law Reform Act* (“**SLRA**”), implemented in 2022, added a new layer of complexity.

With these statutory amendments, both estates and family lawyers need to carefully consider the implications of separation and divorce in estate matters and advise their clients on how such changes in the law can and will impact their estate plan. If separating spouses fail to be vigilant in structuring their affairs during a divorce, they will face unintended consequences.

For example, previously, under sections 15 and 16 of the *SLRA*, a marriage revoked a prior will, unless the will stated that it was expressly made in contemplation of the marriage. These sections were repealed with the 2022 amendments. Thus, a marriage no longer automatically revokes a prior will.

Another example relates to when a testator spouse becomes separated *or* divorced after their will is made. With the 2022 amendments, under section 17, the will is treated as if the surviving spouse died before the deceased spouse such that all gifts to the surviving spouse are voided if they were separated (in accordance with the definition outlined in section 17 of the *SLRA*) or divorced, at the time of the testator’s death. Note that the surviving spouse may still be a creditor of the estate because of liability for child support or spousal support, whether by prior separation agreement, existing court order or new order.

A further example is when a testator has appointed their spouse as their estate trustee. With the 2022 amendments, under section 17, the law presumes that a separated or divorced spouse shall not be appointed as the deceased spouse's estate trustee. There are exceptions however to this presumption, if a "contrary intention" appears in the testator’s will. Then, a divorced or separated spouse may be appointed as the estate trustee in accordance with the deceased spouse’s will.

Finally, if spouses were separated at the time of one’s death, and the deceased spouse did not have a will (which is not advisable), then with the 2022 amendments, under section 43.1, the surviving spouse will not have the right to entitlement of the deceased spouse’s property. Separation agreements may also impact beneficiary designations, even where the will or designations in the source document were not changed.

[1] The collaboration of the authors is result of their roles as Mentor and Mentee in the TLA Family & Estates Mentorship program.

When lawyers are assisting clients who are separated, but not yet divorced, several steps are advisable. Firstly, it is essential for lawyers to address whether the *SLRA* or other legal instruments, such as separation agreements, will impact bequests and appointments in existing testamentary instruments, such as wills, insurance policies and RRSPs. Secondly, lawyers should confirm their client's intentions regarding bequests, estate trustee appointments (including alternate trustees), and beneficiary designations. Thirdly, lawyers should review with their clients whether new or revised testamentary instruments are necessary to prevent unintended appointments or beneficiary designations.

The intersection between estates law and family law became more complex with the amendments to the *Succession Law Reform Act* implemented in 2022. Separating spouses must continue to be acutely aware of how their separation may affect their estate planning. Careful estate planning and professional advice from both an estates lawyer and family lawyer are essential to ensure their intentions are realized and to avoid unintended consequences in the distribution of their assets. Estates and family lawyers should work collaboratively to guide their clients through this intricate legal landscape.

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Testing the Limits of a Nervous Shock Claim

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Motor vehicles are everywhere and collisions are a regular part of our modern society. Countless people are injured – often fatally – on a daily basis. Industries have developed around the care for and representation of those who sustain direct injuries. But can a bystander that merely observed the collision and who has no relationship with the victims bring an action for mental injuries? A recent decision of the Superior Court suggests that such a claim *may* be viable.

While the motion judge's decision not to dismiss the action at a preliminary motion is understandable, the refusal to do so may open the flood gates to countless meritless claims for nervous shock in an already stressed judicial system. If a claim does not fall within an already recognized cause of action or duty of care, the court ought to determine whether such a claim is viable at the pleadings stage. Just as recognizing a novel cause of action should be undertaken with great caution, permitting a novel duty of care to proceed without opining conclusively on the existence of such a duty can similarly lead to unintended consequences.

The Curious Case of *Bustin v Quaranto*

Daniel Bustin was standing outside his aunt's home when he allegedly heard the initial sounds of a serious motor vehicle collision. He claims that he "felt the ground shake, and observed the accident play out with the vehicles rolling and being torn apart in front of him".[2] The plaintiff had no relationship to anyone involved in the collision and did not participate in the rescue. He was nothing more than a bystander.

Nonetheless, from witnessing the double-fatality collision, the plaintiff claimed that he suffered physical and mental injuries. He commenced an action against the driver he alleges caused the collision. In response, the defendant, Vince Quaranto, sought to strike the statement of claim under Rule 21.01(b) of the Ontario *Rules of Civil Procedure* for failing to disclose a cause of action.

To Whom is a Duty of Care Owed?

The existence of a duty of care is the bedrock of a claim in negligence. Without a duty of care, the plaintiff does not have a cause of action in negligence against the defendant. A general duty to protect bystanders from "nervous shock" has not been recognized in Canadian courts. Rather such duty has generally been limited to rescuers and to family members who witness the aftermath of a motor vehicle collision. But the scope and nature of such duties are not closed. A new or expanded duty of care may be recognized following the "Anns / Kamloops" analysis.[3]

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[1] Stephen N. Libin is a partner and Saher Ahmad is an associate at Dutton Brock LLP.
[2] *Bustin v. Quaranto*, 2023 ONSC 5732 at para 5 [*Bustin*].
[3] See *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Kamloops v. Nielsen*, [1984] 2 SCR 2.

A duty of care to an ordinary bystander, unconnected with the victims of an accident, finds its modern roots in a House of Lords decision. In *Alcock v. Chief Constable of Yorkshire Police*,[4] the House of Lords considered the scope of liability in the context of nervous shock claims following a 1989 incident at Hillsborough Stadium in Sheffield, England, which resulted in nearly 100 deaths and more than 750 injuries. Most of the plaintiffs witnessed the incident on television, while a small number observed the incident in person.

The House of Lords ultimately held that those that viewed the incident on television – regardless of their relationship with the deceased – lacked sufficient *proximity* to warrant a duty of care. Whereas, those that observed the incident in person failed to lead evidence of a particularly close relationship with the deceased such that they failed to establish that the loss was *foreseeable*.[5]

Establishing the existence of a duty of care requires a determination of sufficient proximity between the parties such that a defendant would reasonably contemplate that carelessness on his or her part may likely cause damage to the plaintiff. It further requires consideration of any potential factors which ought to negate or limit that duty. The latter includes policy considerations and the court must consider the impact of imposing a new duty. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.[6]

The Motion to Strike

As noted above, the plaintiff alleged that he heard the "initial sounds of the catastrophic impact" and "observed the accident play out with the vehicles rolling and being torn apart in front of him". The plaintiff did not provide any further description of the collision in the pleading nor did he indicate his distance from the collision. Given that Mr. Bustin was neither related to the victims nor involved in the rescue, the defendant sought to strike the claim because the law did not recognize a duty of care to be free of nervous shock in connection with a motor vehicle collision in these circumstances.

A motion to strike for failing to disclose a cause of action requires a court to determine whether it is "plain and obvious" that the claim has no reasonable prospect of success. The analysis is conducted without evidence and on the assumption that that the facts – unless patently ridiculous or incapable of proof – as pleaded in the statement of claim are accepted for the limited purpose of the motion.

Justice Doi found that it was not "plain and obvious" that the plaintiff's claim has no reasonable prospect of success.[7] Her Honour noted that any uncertainty or novelty arising from unsettled jurisprudence should not cause the claim to be struck and that the court should adopt a

[4] [1991] UKHL 5 {*Alcock*}.
[5] Notably, the relationships at issue pertained to a brother and a brother-in-law.
[6] *Labrosse v. Jones et. al.*, 2021 ONSC 8031 at para 18 [*Labrosse*].
[7] *Bustin*, para 3.

generous approach that errs on the side of allowing a novel but arguable claim to proceed to trial.[8]

In finding that the "door to recognizing a duty of care to an ordinary bystander, unconnected with the victims of an accident"[9] remained open, the motion judge relied upon the comments of Lord Keith in *Alcock*: "The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific." The Court further noted that *Alcock* had been cited with approval by various courts in Canada. For reasons suggested below, our view is that such reliance by the motion judge was misplaced.

The motion judge ultimately concluded: "I accept that the Plaintiff has established a duty of care under the bystander category in *Alcock*, which Canadian courts have recognized." Her Honour went on to find that the issues of "factual uncertainty or legal novelty as to the merits of this duty of care" should be determined based on a full evidentiary record. Accordingly, Her Honour refused to strike the claim.

Should Such a Duty be Recognized?

In our view, it was open to the motion judge to dismiss the claim on the Rule 21 motion and Her Honour's reluctance to do so may lead to unintended consequences. The recognition of – or as in this case, the tacit endorsement of – a new duty of care is similar to the recognition of a new cause of action. It must be done with extreme caution.

Former Chief Justice McLauchlin discussed a "judicial reluctance to dramatically recast established rules of law".[10] Her Honour warned that courts are not always in the best place to recognize the economic and policy issues underlying the choice it is asked to make. The Supreme Court subsequently emphasized that the recognition of a new duty of care must consider "whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care."[11]

The Court of Appeal for Ontario similarly advocated for slow and incremental changes to the common law. The Court observed that when the Supreme Court recognized a duty of honest contractual performance, "it did so on the basis that good faith contractual performance already *existed* in Canadian common law as a general organizing principle that underpins and informs existing common law rules. Creation of the new common law duty was justified on the basis that it was an incremental step that followed from the implications of the general organizing principle, a step that responded to societal needs and vindicated the

[8] *Bustin*, para 27.
[9] *Bustin*, para 25.
[10] *Watkins v. Olafson*, [1989] 2 SCR 750 at 760.
[11] *Cooper v. Hobart*, 2001 SCC 79 at para 30.

reasonable expectations of commercial parties without precipitating unintended effects."[12] These comments apply equally to the potential recognition of a new duty of care.

The Court of King's Bench of Alberta similarly cautioned: "The common law has been slow to recognize causes of action because of personal injury to third parties distinct from the claimant."[13]

However, such an analysis does not necessarily require a factual record and can be performed at the pleadings stage. The Supreme Court recently considered the issue of novel causes of action in *Atlantic Lottery*. Justice Brown, writing for the majority, held: "It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings."[14]

When the Court of Appeal for Ontario recognized the tort of "intrusion upon seclusion", it did so based on a comprehensive review of domestic and international case law, federal and provincial legislation and academic commentary. Although the appeal arose from a summary judgment motion, the Court of Appeal did not rely on any of the evidence filed by the parties on the motion and did not require a trial on the merits to determine the existence of the new cause of action.[15] The Court of Appeal similarly determined that the tort of harassment did not exist and should not be recognized in Ontario without reference to the evidence before the court.[16]

In our view, it was open to the motion judge to consider the issue more broadly. At the time of writing, we are unaware of any decision in which a court in Canada has found a duty of care in favour of an *unconnected* bystander claiming to have suffered nervous shock.[17] As noted above, our view is that the Court's reliance upon *Alcock* was misplaced. While Canadian courts have cited *Alcock* with approval, it is for the principle that a duty of care in negligence extends beyond physical injury to cover "nervous shock". It has not been cited with approval by the courts in the manner suggested by the motion judge. Similarly, the cases relied upon by the plaintiff to demonstrate "an arguable case" do not involve unconnected bystanders but rather they involve family members or plaintiffs that also suffered physical injuries themselves.[18]

The novelty of the proposed duty of care was an important consideration for the motion judge but it should not have served as the basis upon which to deny the motion. Justice Zarnett recently commented: "The fact that a claim is novel is not a sufficient reason to strike it. But

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[12] *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 at para 23 [*Merrifield*].
[13] *SM v. Alberta*, 2014 ABQB 376 at para 69.
[14] *Atlantic Lottery*, 2020 SCC 19 at para 19. *Atlantic Lottery* involved an appeal of a class proceeding in which the Court was required to consider whether the pleading disclosed a cause of action using the same analysis as is conducted on a Rule 21 motion.
[15] *Jones v. Tsige*, 2012 ONCA 32 at paras 15 - 90.
[16] *Merrifield, supra* note 12. The Court of Appeal did review the evidence when considering whether the existing tort of intentional infliction of metal suffering provided a sufficient legal remedy.
[17] In *Deros v McCauley*, 2011 BCSC 195, the court found that the mental injuries sustained by the plaintiff – a friend of the person involved in the collision – were too remote to be reasonably foreseen.
[18] See for example: *Labrosse*, *supra* note 6; *Saez-Larrazabal v. Criminal Injuries Compensation Board*, 2012 ONSC 3500 (Div Ct); *Latimer v. Canadian National Railway Company*, 2007 CanLII 5689 (ONSC).

the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed."[19]

The British Columbia Supreme Court recently considered similar issues when a father suffered mental injuries after witnessing his daughter – who suffered only scrapes – struck by a motor vehicle. The Court found that on the facts of that case that the plaintiff's mental injuries were not foreseeable, but noted:

> Counsel were unable to find a case … where a parent successfully claimed for mental injury after witnessing an accident that blessedly resulted in minor injuries to their child, as here. Of course, personal injury claims for children are not rare; nor are accidents where the parent is physically near the child at the time of the accident. This jurisprudential silence speaks volumes.[20]

Motor vehicle collisions are not rare – to the contrary, they are a common occurrence on our roads – and they are regularly witnessed by unconnected bystanders. The absence of any decision in which an unconnected bystander has successfully claimed for nervous shock in Canada supports our view that no such duty of care exists in Ontario law.

Potential Consequences of the Decision

The decision in *Bustin* adds uncertainty to the law rather than clarity. Whether it will be used in future cases to support a recognition of a broader duty of care to prevent mental injury to unconnected witnesses of motor vehicle collision is yet to be seen. However, at a time when judicial resources are scarce and preliminary determinations are increasingly difficult to obtain, the refusal to dismiss Mr. Bustin's claim for failing to disclose a cause of action may exacerbate these existing problems.

When considering a claim involving a rescuer at a triple-fatality motor vehicle collision who suffered PTSD, the British Columbia court commented that: "The application of the concepts of proximity, foreseeability and causation effectively provide the necessary control mechanisms to prevent the creation of a volume or flood of valid and invalid nervous shock claims."[21] But when the vast majority of motor vehicle and other tort claims are resolved without a trial, there is a real risk that the unintended consequence of the *Bustin* decision may lead to such a flood from uncontested bystanders.

While judges may be reluctant to dismiss an action on a Rule 21 motion, such hesitance ought to be reserved for cases involving causes of actions and duties of care that are already recognized in the jurisprudence. When faced with a novel claim, judges should be encouraged to exercise a gatekeeping role so as to avoid unnecessary ambiguity. Whether a duty of care is owed to prevent unconnected bystanders from suffering nervous shock in a motor vehicle context now requires a definitive position from the Court.

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[19] *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para 51.
[20] *Xiang v Wong*, 2023 BCSC 1984 at para 58.
[21] *Arnold v. Cartwright Estate*, 2007 BCSC 1602 at para 42.