Toronto Law Journal

Testing the Limits of a Nervous Shock Claim

Stephen N. Libin and Saher Ahmad, Dutton Brock LLP[1]

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]

---

[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

---

[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.

---

[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.