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Proximity matters: Recent decisions reflect Ontario Courts' increased willingness to grant greater rights to bystanders of motor vehicle accidents

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The recent decisions of [Bustin v Quaranto, 2023 ONSC 5732](#), and [Kellerman-Bernard v Unica Insurance Company, 2023 ONSC 4423](#), present a new dilemma for adjusters and insurance companies alike. In each case a bystander who witnessed a fatal car accident was, in the former, allowed to proceed to trial with their damages claim and, in the latter, entitled to apply for catastrophic designation. These cases represent a trend toward greater rights afforded to bystanders and individuals not directly involved in motor vehicle accidents ("MVAs").

***Bustin v Quaranto* - Negligent Drivers May Hold a Duty of Care Toward Unrelated Bystanders**

While standing in front of his aunt's home in Vaughan, Ontario, the plaintiff bore witness to a tragic double fatality MVA. The plaintiff, who alleged to have suffered physical and mental injuries "akin to or notionally equivalent to being struck by the defendant's vehicle in the Collision," brought a claim against the defendant for his negligent driving.

In response, the defendant brought a motion to strike the plaintiff's statement of claim, contending that it failed to establish a reasonable cause of action. In support of this assertion, the defendant argued no duty of care was owed by him to the plaintiff because the plaintiff lacked direct involvement in the collision.

The judge held that it was not plain and obvious the plaintiff's claim had no reasonable chance of success and allowed the matter to proceed to trial.

In reaching this decision, the judge recognized the pre-established duty of care for "bystanders and others physically present at an accident who suffer nervous shock" even where they were unconnected from the victims. This legal principle—originating from *Alcock v Chief Constable of Yorkshire Police*, [1991] UKHL 5, an old house of lords decision—has been cited multiple times by Canadian courts, including in [Labrosse v Jones, 2021 ONSC 8031](#), and [Cooper v Hobart, 2001 SCC 79](#).

Considering this recognized duty of care, and assuming that the plaintiff's account that he "saw and heard the fatal MVA as it unfolded before him" to be true, the court held that there was sufficient physical proximity to implicate a duty of care owed by the Defendant to the Plaintiff.

It remains to be seen whether at trial the lack of connection between the plaintiff and those injured will establish a duty of care owed by the negligent driver to the plaintiff.

Kellerman-Bernard v Unica Insurance Company

This case revolved around the appellant mother, who—although not physically involved in a bicycle accident—experienced profound psychological and emotional injuries after her son suffered severe injuries in a motor vehicle-bicycle collision.

Despite meeting the criteria of an “insured person” under the Statutory Accident Benefits Schedule (“SABS”), the appellant’s pursuit of a catastrophic impairment designation was met with denial by the defendant, her automobile insurer. The Licence Appeal Tribunal (“LAT”) ruled in favour of Unica, opting for a narrow interpretation of the SABS, asserting that only those directly involved in an accident could qualify for a catastrophic impairment designation.

The Ontario Divisional Court reversed the LAT’s ruling, finding that a parent who suffered psychological and emotional injuries was entitled to apply for a catastrophic impairment designation.

The Court identified three errors of law in the LAT’s interpretation of the SABS:

1. The LAT failed to acknowledge the unambiguous language of s. 45(1), which extends the right to apply for a catastrophic impairment designation to any individual falling under the definition of an “insured person.”
2. By isolating the phrase “caused by an accident” in s. 3(2), the LAT’s interpretation lacked consideration of the section’s broader context. Considering the phrase in context reveals that its purpose is not to restrict entitlement to apply under s. 45(1), but to clarify what impairments are to be considered in assessing whether the impairments are “catastrophic.”
3. The LAT’s interpretation ran counter to the remedial and inclusive purpose of the SABS to provide fairness and support to accident victims, including those facing psychological and emotional challenges. According to [Tomec v Economical, 2019 ONCA 882](#), the definition

of “catastrophic impairment” itself is designed to promote fairness for MVA victims by ensuring those with significant healthcare have access to expanded benefits.

Conclusion

The decisions in *Bustin* and *Kellerman-Bernard* caution insurers and drivers alike that liability for bystander claims following MVAs should be considered seriously, and signals that such claims may be available in other circumstances where a fatality or disturbing injuries are witnessed. Bystander claims that may once have been viewed as frivolous should no longer be discounted as certain to fail. Taken together, these cases may represent a shift toward greater rights afforded to individuals not directly involved in MVAs.

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