

Are Car Thieves Bad Drivers?

Reasonable Foreseeability and the Decision in Rankin's Garage



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Introduction

In *Rankin (Rankin's Garage & Sales) v. JJ*, 2018 SCC 19, the Supreme Court of Canada (the "SCC") clarifies the correct approach to the category and foreseeability inquiries of the duty of care analysis. In finding a duty of care was not established in this case, the court outlined the principles that should continue to guide courts in assessing whether a duty of care exists. This paper sets out the context in which these refinements were made and examines the clarifications outlined by the SCC.

This paper begins with an overview of the duty of care analysis and an explanation of how the category and foreseeability inquiries exist in the duty of care analytical framework. The category analysis (whether the circumstances fall within or are analogous to a pre-existing category of cases where a duty of care has been found) raises two issues in the context of the "foreseeable physical injury" category: the need to frame categories sufficiently narrowly and the "overt act" requirement. The SCC's analysis of foreseeability is examined with respect to the connection between the foreseeability of theft of a vehicle and the foreseeability of physical injury. This review includes a discussion of the evidentiary basis which may be required to establish the

foreseeability of personal injury and whether, in this case, the failure to tender sufficient evidence to establish the foreseeability of physical injury was fatal to the establishment of a duty of care.

The paper concludes with a brief consideration of two points addressed by the majority: the impact of illegal conduct on the part of the plaintiff on the duty of care inquiry and whether or not commercial garages owe a positive duty to minors to prevent the theft of vehicles.

Overview of the Duty of Care Analysis

The modern principled approach to finding whether the tort of negligence can be established is rooted in the neighbour principle developed in *Donoghue v. Stevenson*, [1932] UKHL 100. The neighbour principle provides that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure a neighbour. A neighbour is someone so closely and directly affected by one's act that one ought to reasonably have this person in contemplation as being so affected.

The approach evolved in *Anns v. Merton Borough Council* (1977), [1978] AC 728, where policy considerations expressly became a part of the negligence analysis. The *Anns* test was divided into two stages:

(1) Is there a sufficient relationship of proximity or neighbourhood between the plaintiff and defendant such that, in the reasonable contemplation of the former, carelessness on the defendant's part may be likely to cause damage to the plaintiff?

(2) Are there any considerations which ought to negative, reduce or limit the scope of the duty or class of persons to whom it is owed or the damages to which a breach of duty may give rise?(*Anns*, page 751)

If the first stage is satisfied, a *prima facie* duty of care is found. If so, it is necessary to go on to the second stage to determine if the *prima facie* duty should be negated by policy considerations.

Proximity in the first stage focuses on factors arising from the relationship between the plaintiff and defendant including expectations, representations, reliance, and property and other interests to determine the closeness of a relationship and conclude if it is just and fair to impose a duty of care. The first stage also requires foreseeability, a review of the facts of the case to determine if the type of harm suffered by the plaintiff was reasonably foreseeable by the defendant.

The second stage considers whether there are any residual policy concerns outside of the relationship of the parties that may negative the imposition of a duty of care. This stage asks whether, despite the existence of proximity and foreseeability, there are other policy considerations to support a duty not being imposed. This stage also allows for consideration of the effect of recognizing a duty of care on other legal obligations, the legal system and society overall.

The plaintiff maintains the burden to establish a *prima facie* duty of care (*Childs v. Desormeaux*, 2006 SCC 18). The plaintiff must first show the case falls within or is analogous to a recognized category of duty of care. Failing this, the plaintiff must establish the requisite proximity and reasonable foreseeability supporting a novel duty of care. Once established, the onus is on the defendant to show residual policy considerations

outside of the plaintiff-defendant relationship justify the negation of a duty of care. If the defendant fails, then a duty of care is imposed.

Over the years, the SCC has refined the *Anns* two-stage test, a process which continues to date with the decision in *Rankin's Garage*.

The Decision in *Rankin's Garage*

A. Facts

One evening in July 2016, the 15 year old plaintiff J and his 16 year old friend C were together at C's mother's house in the small town of Paisley, Ontario. The two boys had consumed alcohol and smoked marijuana. They left the house sometime after midnight with the intention of stealing valuables from unlocked cars and eventually arrived at Rankin's Garage & Sales ("Rankin's Garage"), a commercial garage that serviced and sold cars, owned by James Chadwick Rankin ("Rankin").

The garage property was not secured. J and C made their way around the property to look for unlocked cars and found one parked behind the garage. C entered the vehicle and found the keys in the ashtray. C decided to steal the car to pick up a friend in a nearby town and told J to enter the stolen car. Despite not having a driver's license or any experience driving, C drove the car on the highway and a single vehicle accident ensued in which J suffered a catastrophic brain injury. J sued C, Rankin's Garage and C's mother.

B. Trial Decision

At trial, Morissette J. concluded that previous cases had already established the existence of a duty of care for parties in a similar relationship but still elected to apply the *Anns* test to the circumstances. She held that the risk of harm to J was reasonably foreseeable as Rankin knew he had an obligation to secure his vehicles and it "certainly ought to be foreseeable that injury could occur if a vehicle were used by inebriated teenagers". Morissette J. found no policy reasons to negate the duty of care. The jury apportioned liability as follows:



- Rankin’s Garage: 37%
- C’s mother: 30%
- C: 23%
- J:10%

The decision was appealed by Rankin’s Garage.

C. Court of Appeal Decision

The Ontario Court of Appeal upheld the trial decision with respect to the finding of the existence of a duty of care. Huscroft JA. found the trial judge erred in recognizing that there was already a category of cases establishing a duty of care, as the cases relied on by Morissette J. involved harm to a third party and not harm to a participant of the theft. However, in applying its own Anns test, the court found that both theft of the vehicle and harm were reasonably foreseeable. The court found sufficient proximity between the parties to establish a duty of care. In its assessment of whether the theft and ensuing harm were foreseeable, the court considered the following evidence:

- Rankin’s Garage had a practice of leaving cars unlocked with keys in them or in other accessible areas. Rankin’s testimony on the point was inconsistent and the jury found that he left the car unlocked, left the key in the car and had very little security in place.
- There was a history of theft at Rankin’s Garage. A witness testified she saw a stolen vehicle taken from Rankin’s Garage being returned and a police officer gave evidence that auto theft and mischief were common occurrences in the area.

After considering this evidence, Huscroft JA. held it was a matter of “common sense” that minors might harm themselves joyriding especially if impaired by alcohol or drugs. This provided the necessary link from foreseeability of theft to foreseeability of personal injury to allow the court to conclude that foreseeability was met for the purposes of the duty of care inquiry.

D. The SCC Decision

Karakatsanis J., on behalf of a 7-2 majority of the court, reversed the ruling of the Ontario Court of Appeal and found there was no duty of care owed to J. The court applied its own Anns test and found Rankin’s Garage did not owe a duty of care to the injured plaintiff, as reasonable foreseeability of personal injury could not be established. A summary of the main points of the SCC’s decision is set out below:

1. No Previous Category of Relationship Recognizing Duty of Care

The majority did not find that this case should fall within a category of “foreseeable physical injury”. The majority held that categories should be framed narrowly and applying the category of foreseeable physical injury to the circumstances of this case would be an overly broad application. The theft of a vehicle and resulting physical injury could potentially involve theft from a commercial property or theft from a residential property. A category which would necessarily include both types of potential defendants would not allow the consideration of the distinction between such parties which may be relevant to proximity and policy considerations. The majority considered that the inclusion of the circumstances of this case into the foreseeable physical injury category would signal an unwarranted expansion of this category which would subsume other, more narrowly defined categories involving physical harm.

2. Risk of Personal Injury was not Reasonably Foreseeable

The majority emphasized the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff’s situation. Reasonable foreseeability and proximity should operate as limiting principles that ensure liability is found only when the defendant reasonably ought to have contemplated the type of harm suffered by the plaintiff. The majority held that the risk of physical injury was not reasonably foreseeable in this case.

The majority noted that the Court of Appeal’s analysis of the evidence of cars being left unlocked at Rankin’s Garage and the history of theft related only to risk of theft in general. This evidence did not suggest that if a vehicle was stolen it would be operated in an unsafe manner. The evidence also did not address the risk of theft by a minor or the risk of theft leading to an accident causing personal injury. The majority did not find that reasonable foreseeability of physical harm could be found in the factual record.

The majority did not accept that anyone who leaves a vehicle unlocked with the keys inside should reasonably anticipate that someone could be injured if the vehicle was stolen. There must be something in the factual matrix that connects the theft and subsequent unsafe driving of the stolen car to make personal injury foreseeable.

3. Illegal Conduct does not Sever Proximity and Negate a Duty of Care

The majority held it was unnecessary to consider the effect of illegal conduct on the proximity inquiry but addressed the point in its decision as the issue was a focus of the submissions before the court. The notion that illegal or immoral conduct by a plaintiff precludes the existence of a duty of care has consistently been rejected by the SCC, including in the decisions of *Hall v. Hebert*, [1993] 2 SCR 159 and *British Columbia v. Zastowny*, 2008 SCC 4. The court commented that private law is corrective and based on compensation for harm arising from the defendant unreasonably creating the risk of harm. If the mere fact of illegal behavior could eliminate a duty, negligent defendants would be immunized from the consequences of their actions.

Illegality may operate as a defence to tort actions in limited circumstances when it is necessary to preserve the integrity of the legal system. The majority found this concern did not arise in this case. Plaintiff wrongdoing is incorporated into the analysis through a finding of contributory negligence, as occurred in this case.

4. Rankin's Garage did not have a Positive Duty to Guard against Risk of Theft by Minors

J argued that Rankin's Garage owed a positive duty to minors to secure the vehicles as businesses dealing with potentially dangerous goods owe a duty to prevent theft of those goods by minors. J argued that a car garage is analogous to a commercial vendor of alcohol who owes a duty to those harmed by intoxicated patrons. The majority found this analogy was misguided. A garage benefits financially from servicing cars but has no commercial relationship with and does not profit from people who might steal cars. The court found vehicles could not be equated with loaded guns or other goods which are inherently dangerous. Commercial garages have care and control of many vehicles and necessarily have to turn their mind to security of those vehicles but having many vehicles does not necessarily create a risk of personal injury.

The fact that J was a minor did not automatically give rise to a distinct obligation to act. There are circumstances where the court recognizes a specific duty to children but these duties are imposed based on the relationship of care, supervision and control

rather than the age of the child. No relationship involving care, supervision or control existed in this case.

The Category Analysis

A. Overview of the Category Analysis

In the seminal decision of *Cooper v. Hobart*, 2001 SCC 79, the SCC held that an *Anns* test should only be applied in cases considering a novel duty of care. Before a court begins the two-stage analysis of the *Anns* test, a court must, as a preliminary point, determine whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized (*Cooper*, para 41). If the case falls within or is analogous to a recognized category, then a plaintiff only needs to prove that harm was reasonably foreseeable to establish a *prima facie* duty of care (*Cooper*, para 36). Judges were directed to give considerable weight to the existence of categories and not seek to explain away established categories.

Not every novel fact situation that comes to a court should be considered as a new category of case. A duty of care is a general notion describing a class or type of case and not a particular fact situation. Therefore, finding a recognized category or an analogous category does not require a direct match on the facts. Minute details of the impugned conduct are concerns for the standard of care and are not to be considered in the duty of care analysis.

The SCC gave further guidance on how to approach the category analysis in *Deloitte & Touche v. Livent Inc (Receiver of)*, 2017 SCC 63. The court in *Deloitte* noted (para 28) that the use of overly broad categories is problematic:

It follows that, where a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized...

(Emphasis added)

Identifying established categories in an overly broad manner is problematic because residual policy concerns are not considered after a finding that a case falls within or is analogous to a recognized category, as these policy concerns were presumably taken into account when the category was first established. As result, a finding

of proximity based on applying a recognized category must be grounded in more than just the identity of the parties but also on examination of the context of the particular relationship at issue. If this is not done, courts risk recognizing a *prima facie* duty of care without any examination of second-stage residual policy concerns. To recognize proximity between parties for all purposes would represent an unwarranted broadening of an established category of proximity resulting in the failure to consider the scope of activity in respect of which proximity was previously recognized and risk a premature imposition of a *prima facie* duty of care (*Deloitte*, para 52).

B. The Foreseeable Physical Injury Category in Rankin’s Garage

1. Categories must be Framed Sufficiently Narrowly

The majority held that the category must be framed narrowly, taking guidance from recent decisions of the court adopting a tighter approach. In *Deloitte*, the court framed the category of the auditor-client relationship narrowly by recognizing not just the relationship between the parties but also the specific purpose of the relationship in the circumstances of the case. The court held that although proximity had been recognized between an auditor and its client for the purposes of preparing a statutory audit in *Hercules Management Ltd v. Ernst & Young*, [1997] 2 SCR 165, this did not mean proximity and a consequent duty of care should be recognized between the same parties for the purpose of soliciting investment. The court in *Deloitte* held the relationship between an auditor and its client in respect of soliciting investment had not been previously recognized and a new *Anns* test should be conducted.

The issue that arose in *Rankin’s Garage* was whether the case fell within the category of foreseeable physical injury. The dissent recognized the majority’s concern that this was an overly broad category but was of the view that whether this category subsumes other, narrower categories was not a legitimate concern as the court had previously approved of this category in *Cooper and Childs*.

The majority held that recognizing a category of foreseeable physical injury in this case would be contrary to recent guidance in *Deloitte* to frame categories narrowly. The majority expressed concern that the application of such a broad category would ignore important distinctions between business and residential defendants relevant to proximity and policy concerns. It would also render previously

recognized categories redundant in cases of physical injury, for example, the duty of a motorist to users of the highway and the duty of a manufacturer to a consumer.

2. The Overt Act Requirement

The foreseeable physical injury category was first articulated in *Cooper* as an example of a category of relationships where a duty of care was already recognized in the law. The court commented that for a case to fall within this category, a plaintiff need only show that physical harm was foreseeable as a result of the defendant’s conduct. This broad articulation of the category was revised by the SCC in *Childs* (para 31) to require “an overt act” by the defendant causing foreseeable physical harm to the plaintiff:

Foreseeability without more may establish a duty of care. This is usually the case, for example, where an *overt act of the defendant has directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy.

(Emphasis in original)

In *Childs*, the court held that the plaintiff’s claim that the social hosts should have prevented the defendant from drinking and driving concerned a failure to act rather than an overt act which may found a duty of care (*Childs*, para 32). Therefore, the foreseeable physical injury category did not apply.

The SCC in *Rankin’s Garage* did not consider the refinement to the foreseeable physical injury category outlined in *Childs*. This is somewhat surprising given the majority’s recognition that categories should be defined narrowly. One would think that an attempt to adequately define the scope of the category of foreseeable physical injury would include some discussion as to whether or not the overt act of a vehicle owner in failing to secure the vehicle could be said to “directly cause” physical injury to an individual involved in the theft of the vehicle. Instead, the court opted to base its decision solely upon the foreseeability element of the duty of care analysis.

Reasonable Foreseeability

A. Overview of Reasonable Foreseeability

Reasonable foreseeability is used by the courts in multiple elements of the negligence analysis as a limiting principle that defines the nature and scope of responsibility in tort. When one commits a harmful action it cannot meaningfully be viewed as “wrong” in law if the actor could not reasonably have contemplated that the action might produce the harm.¹ As the effects of one’s actions may have indeterminate consequences, no coherent conception of responsibility can suppose that a person is responsible for everything that could be called a consequence of his or her actions.² Therefore, a defendant should only be responsible for harm that could be reasonably foreseen and prevented. Whether a person understands the possibility or risk of harm is typically considered using an objective test. Foreseeability is assessed based on whether a person knew or should have known of the risk of harm flowing from a particular act or omission.

Foreseeability plays a significant role in three elements of negligence: duty of care, standard of care and proximate cause (remoteness).

In the duty of care analysis, the foreseeability inquiry was traditionally a low threshold for the plaintiff to overcome. To establish foreseeability in the duty of care analysis, the plaintiff must offer facts to persuade the court that the risk of the type of harm to the plaintiff or class of persons in the plaintiff’s position was reasonably foreseeable.³ Whether injury to the plaintiff was foreseeable should be assessed from the perspective of the reasonable person at the time of the activity in question and not with the aid of hindsight after the injury has occurred.

In the standard of care analysis, whether a person has breached the standard of care depends first on that person’s ability to contemplate that the impugned action may cause the type of risk to the type of person that actually manifests in the context of the facts of the case. Risks that are the foreseeable results of the defendant’s conduct are considered in whether he or she exercised reasonable care.

In the proximate cause (remoteness) analysis, foreseeability is considered in arguments of policy, practicality and case-specific fairness considerations. The court at this stage looks at whether the specific type of injury that occurred was foreseeable and whether, as a

question of law, it is appropriate to recognize that the specific injury was a foreseeable risk of the act committed by the defendant. The proximate cause (remoteness) inquiry considers how far legal liability of the defendant should extend given that the defendant owes a duty of care.⁴

There must be an evidentiary basis for the foreseeability inquiry, even in the duty of care analysis. In this case, the majority held that a duty of care could not be found because J failed to establish a sufficient evidentiary basis to establish that Rankin should have reasonably foreseen that his

actions in failing to secure the vehicles created a risk of physical injury to the plaintiff.

B. Are Car Thieves Bad Drivers?

The court was split as to whether the plaintiff had established that a risk of personal injury was reasonably foreseeable. Both the majority and the dissent recognized that the risk of theft was foreseeable in the circumstances. However, the majority held that the theft of the vehicle could be linked to foreseeability of harm to this plaintiff.



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¹ David G Owen (2009), “Figuring Foreseeability” 44 Wake Forest L Rev 1277 at 1278

² *Ibid.*

³ Linden, The Honourable Allen M. and Bruce Feldthusen, *Canadian Tort Law*. 10th ed., LexisNexis Canada Inc., 2015, page 322.

⁴ Klar, Lewis N. and Cameron S.G. Jefferies. *Tort Law*. 6th ed., Thomson Reuters Canada Limited, 2017, page 565.

In considering this issue, the court looked at both the evidentiary record from the case and past decisions cited by the parties where stolen vehicles had been involved in collisions causing injury.

1. Foreseeable Risk of Theft versus Foreseeable Risk of Physical Injury

In *Rankin's Garage*, the majority emphasized the importance of distinguishing evidence establishing foreseeability of theft from evidence establishing foreseeability of physical injury. Evidence establishing a risk of theft would not be sufficient without evidence of some connection between the theft of the vehicle and the risk of physical injury. A review of the decisions considered by the court reveals that this connection between the theft and the risk of injury is an elusive concept that is often either presumed to exist or is based on relatively scanty evidence.

Between the Ontario Court of Appeal and the SCC, thirteen decisions were reviewed that considered whether physical injury resulting from a thief's operation of a stolen vehicle was foreseeable. The trial court decisions typically involved a low threshold in the determining whether the evidentiary record established a foreseeable risk of theft of a vehicle. Evidence that established a foreseeable risk of theft included one or more of the following factors:

- vehicle left unlocked;
- leaving keys inside car;
- leaving keys inside ignition;
- leaving car unattended with engine running;
- leaving car to chase after vandal; and
- car keys being stolen with no subsequent effort to secure the vehicle

Of the cases reviewed, only three outlined sufficient evidence to establish reasonable foreseeability of physical injury. In all other decisions, no duty of care was found. In the three cases, the courts were able to rely on evidence regarding the factual matrix of the theft that made it objectively foreseeable to the defendant that physical injury could result from the car thief's driving of the stolen vehicle.

In *Cairns v. General Accident Assurance Co. of Canada*, (1992) 34 ACWS (3d) 710 (Ont Ct of Justice Gen Div), the connecting factor to establish foreseeability of physical injury was evidence that it was reasonably foreseeable that the vehicles which were stolen would be stolen and

ultimately driven by minors. The defendant dealership knew minors had earlier stolen the car keys for a number of vehicles on the lot but still failed to secure the vehicles from theft. The possibility of those minors stealing the vehicles and driving on the road created a danger that linked the theft with the risk of physical injury. The court reasoned that young inexperienced drivers fleeing the scene of a theft created a foreseeable risk. Of note, this analysis was conducted by the court at the proximate cause (remoteness) stage rather than in the duty of care analysis.

A trial court found reasonable foreseeability of physical injury when a large, loaded truck was left unlocked and running in front of an all-night coffee shop shortly after the bars closed in *Kalogeropoulos v. Ottawa (City)*, (1996) 66 ACWS (3d) 265 (Ont Ct of Justice). The court found that it was foreseeable that the thief might experience nervousness and panic in the car chase initiated by city employees after the theft and this created a foreseeable risk of physical injury as the driver might have difficulty controlling the large vehicle.

General evidence of the propensity of car thieves to be dangerous drivers was considered by the British Columbia Supreme Court in *Provost v. Bolton*, 2017 BCSC 1608. In that case, a police chase ensued after a vehicle was stolen resulting in injury to a third party when the thief crashed the stolen vehicle into her car. The court found a basis to establish reasonable foreseeability of injury to the plaintiff through reference to evidence presented to a Parliamentary Committee on the danger to the public from dangerous driving by car thieves. The court also heard evidence from police officers on the connection between thieves fleeing the police and erratic driving, which creates a risk to the public. *Provost* was the only decision where foreseeability of harm was established on evidence outside of the facts of the case and, given the decision in *Rankin's Garage*, provides some guidance to plaintiffs going forward of an approach to avoiding the application of the decision.

2. Foreseeability of Theft by Minors

At trial, the judge relied upon the foreseeability of theft by a minor to impose a duty of care. This was an acknowledgement that minors could be inexperienced or reckless drivers and, therefore, create a foreseeable risk of physical injury. The majority at the SCC found that the trial judge erred in this regard as the risk of theft does not automatically include the risk of theft by minors and indicated that additional evidence would be required to establish this point. No evidence

was led by J with respect to this issue and the majority noted that the jury appeared to have found liability based solely on the foreseeability of theft (*Rankin's Garage*, para 33). Evidence from J's father that he was of the view that a variety store across the street from Rankin's Garage was a youth hangout based upon only one visit was not a sufficient evidentiary basis to establish reasonable foreseeability of theft by minors.

Additional Takeaways From Rankin's Garage

A. The Effect of Illegal Conduct in Severing Proximity and Negating a Prima Facie Duty of Care

The fact that the court found that no duty of care was owed to J, a participant in the theft of the vehicle, raises the question as to whether this result was merely a disguised policy decision not to compensate a criminal, or a strict application of principled analysis. One may wonder if the result would have been different if an innocent third party had been injured.

In the context of harm suffered by car thieves as a result of negligent operation of the stolen vehicle, the courts have not always been resolute in their commitment to not let illegal conduct affect the duty of care analysis. For example, in *Campiou Estate v. Gladue*, (2002) 332 A.R. 109 (ABQB), the court found it would be "offensive to society's standards" to allow a truck owner to be held liable for the injuries suffered by those who participated in theft of the truck. In support of allowing courts to expressly decide matters on the basis of public policy, the court cited Lord Denning in his decision in *Dutton v. Bognor Regis United Building Co.*, (1971), [1972] 1 QB 373 (Eng CA):

. . . But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application (p. 1060). It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.

The majority in *Rankin's Garage* specifically addressed the issue of illegal conduct although it was not a necessary element of its decision. The majority reiterated the principle from Hall that illegal or immoral conduct by a plaintiff does not preclude the existence of a duty of care. Tort law is based on compensation for harm that results from the defendant's unreasonable creation of risk of that harm and if illegal behaviour by the plaintiff eliminated that duty, it would effectively immunize negligent defendants from the consequences of their actions (*Rankin's Garage*, para 63). The majority noted that whether an innocent third party or a participant of the theft is injured by the negligent act of the defendant is determined only "by chance" and there should be no analytical difference in the duty of care analysis between the two scenarios. In Hall, the court explained that illegal conduct by the plaintiff should only be raised as a defence to bar a cause of action when concern for the integrity of the legal system trumps the concern of finding the defendant liable (*Hall*, para 5).

B. Commercial Garages and the Positive Duty to Guard Against Risk of Theft

The majority considered whether Rankin's Garage owed a positive duty to secure vehicles on its property against theft by minors and found it did not owe such a duty. J submitted that Rankin's Garage owed a duty to secure the vehicles on its property as they were goods that are potentially dangerous. J and the Ontario Trial Lawyers Association, as an intervenor, argued that a commercial garage is analogous to a commercial vendor of alcohol who has a responsibility to reduce the risks associated with the sale or storage of dangerous goods.

The majority found this analogy was misguided as commercial alcohol vendors owe a duty based on the commercial relationship between the vendor and customer and the vendor's incentive to profit from over-serving alcohol, increasing the risk to the public. Commercial garages, on the other hand, do not have a relationship of incentive with car thieves. The majority also distinguished cars from loaded guns and found they are not inherently dangerous items requiring careful storage to protect the public. Cars may be dangerous in the hands of inexperienced drivers but this risk would "only realistically exist in certain circumstances" (*Rankin's Garage*, para 60).

J also submitted that Rankin's Garage owed a positive duty to minors to prevent theft. While the majority agreed that a positive duty of care owed to minors has been found in certain circumstances, such a duty has only been imposed when there is a relationship of care,

supervision and control between the defendant and a minor, such as the teacher-student relationship (*Childs*, para 36). The duty exists based on the vulnerability of minors and the defendant's formal position of power. The majority found that no similar relationship existed in this case (*Rankin's Garage*, para 61).

Conclusion

The majority decision of the court in *Rankin's Garage* confirms that a duty of care should only be established following a sufficiently rigorous analysis of whether the particular harm at issue is foreseeable. Formerly, this was considered a low threshold but the decision in *Rankin's Garage* appears to indicate that courts should be cognizant of the requirement of a sufficient evidentiary basis before finding that a specific type of harm is foreseeable. The rulings with respect to the category and foreseeability analyses in the decision create a higher threshold for the establishment of a duty of care. It will be interesting to see if future decisions from the court continue to narrow the circumstances in which a duty of care is found or whether *Rankin's Garage* is primarily recognized as a cautionary example with respect to ensuring sufficient evidence is lead at trial to establish a duty of care.

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