

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

JAMES CHADWICK RANKIN, carrying on business as RANKIN'S GARAGE & SALES

**APPLICANT
(Appellant)**

-and-

J.J. by his Litigation Guardian, J.A.J., J.A.J. and A.J.

**RESPONDENTS
(Respondents)**

**REPLY TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(JAMES CHADWICK RANKIN, carrying on business as RANKIN'S GARAGE
& SALES, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)**

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Novel Duty of Care: the Stark Irrelevance of *Ex Turpi* to this Application

1. The Respondents' position with respect to the doctrine of *ex turpi* rest on a flawed premise – namely, it proceeds from an assumption this case does not involve the creation of a novel duty of care.¹

2. The Respondents cite the case of *British Columbia v. Zastowny* as having affirmed the proposition, originally stated in *Hall v. Hebert*,² that illegal conduct does not preclude the existence of a duty of care.³ With respect, *Zastowny* more accurately stands for the principle that the doctrine of *ex turpi* applies to bar claims for past wage loss due to incarceration.⁴

3. Rothstein J. clearly expresses this point as follows:

The judicial policy that underlies the *ex turpi* doctrine precludes damages for wage loss due to time spent in incarceration because it introduces an inconsistency in the fabric of the law that compromises the integrity of the justice system. In asking for damages for wage loss for time spent in prison, *Zastowny* is asking to be indemnified for the consequences of the commission of illegal acts for which he was found criminally responsible. *Zastowny* was punished for his illegal acts on the basis that he possessed sufficient *mens rea* to be held criminally responsible for them. He is personally responsible for his criminal acts and the consequences that flow from them. He cannot attribute them to others and evade or seek rebate of those consequences.⁵

4. Moreover, in *Hall*, McLachlin J. (as she then was) is careful to state the more fundamental question underlying recognition of liability in tort: “The relationship between plaintiff and defendant which gives rise to their respective entitlement and liability arises from a duty predicated on foreseeable consequences of harm.”⁶ There is a significant difference in the relationship between the parties in *Hall* and the present case. In *Hall*, the intoxicated Plaintiff asked for and received permission to drive the vehicle from its owner. The vehicle's owner was

¹ See, for example, the Respondents' materials at paras. 2, 13, and 14 where it is acknowledged the Court applied the *Anns/Cooper* test to “identify” the novel duty of care.

² *Hall v. Hebert*, [1993] 2 SCR 159, 1993 CanLII 141 (SCC) at p. 182.

³ Note: the Respondents derive this statement from *Hall v. Hebert*, [1993] 2 SCR 159, 1993 CanLII 141 (SCC). See Respondents' materials at para. 4.

⁴ See discussion in *British Columbia v. Zastowny*, [2008] 1 SCR 27, 2008 SCC 4 (CanLII) at para. 23-30.

⁵ *British Columbia v. Zastowny*, [2008] 1 SCR 27, 2008 SCC 4 (CanLII) at para. 30.

⁶ *Hall v. Hebert*, [1993] 2 SCR 159, 1993 CanLII 141 (SCC) at p. 182. [Emphasis added].

aware the Plaintiff had consumed 11 or 12 bottles of beer *prior to* his request to drive. In the present case, there was no prior interaction between the parties: the relationship was that of trespassers and thieves to a business.

5. The doctrine of *ex turpi* does not preclude damages for personal injury because *ex turpi* is a defence – it operates independent of any duty of care owed by the Applicant. It is the existence of the duty of care itself that is the issue in this case.

6. The Respondents' reliance upon both *Hall*⁷ and *Zastowny*⁸ provides no definitive answer to the ultimate questions at issue before the Court:

- are trespassers and thieves injured during the commission of a crime owed a duty of care by the people they trespass against and steal from?
- are trespassing teenagers owed an enhanced duty of care by virtue of their status as minors under the law?
- if such an enhanced duty of care exists, is that duty negated when the teenager participates in so-called “adult” and/or criminal activity?

7. At best, the Respondents' submission raises a fundamental issue of public importance: to what extent should the criminal conduct of a plaintiff factor into a Court's analysis, pursuant to *Anns/Cooper*, as to whether or not to recognize a novel duty of care?

8. It falls to this Honourable Court to resolve this and other disputes surrounding the Court of Appeal's establishment of a novel duty of care in these circumstances.

Wide Ranging Implications of the Court of Appeal Decision Below

9. This case provides this Honourable Court a significant opportunity to weigh in on the creation of a novel duty of care. There are strong public policy reasons in this case, including the criminal conduct of the Respondents, that justify negating the extension of a duty of care to thieves in the context of trespassing and vehicle theft.

10. The Respondents assert that recognition of a duty of care in this case would *not* have wide ranging implications. If the decision below stands, however, the novel duty recognized

⁷ *Hall v. Hebert*, [1993] 2 SCR 159, 1993 CanLII 141 (SCC).

⁸ *British Columbia v. Zastowny*, [2008] 1 SCR 27, 2008 SCC 4 (CanLII).

below may also arise in a number of unforeseen circumstances as identified in the Applicant's memorandum.⁹

11. The Court of Appeal described the novel duty of care in this case as follows:
- a. the duty of a garage/car dealership owner to a minor involved in stealing a car from his property¹⁰; or
 - b. the duty of someone entrusted with possession of a motor vehicle to assure that the youth in their community are unable to take unauthorized possession of that motor vehicle.¹¹

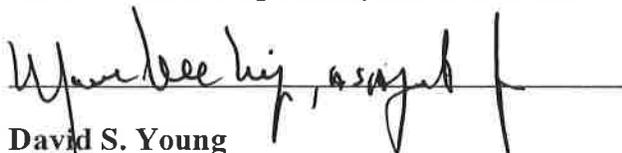
12. The question is this: should this Honourable Court recognize the duty of care in these circumstances and in the form articulated by the Court of Appeal below? The decision of the Court of Appeal abrogates the values of individual responsibility and raises a significant question of public importance for this Honourable Court's consideration.

13. Critically, the decision of the Court of Appeal strongly implies that an individual or business – the victim of a criminal act – is responsible for the consequences of criminal acts committed against them. In other words, that they share in the blame, by somehow “inviting” criminal acts against their property.

14. Indeed, in the present case, the victim of a car theft was apportioned the largest share of the liability.

15. Canadians need to know the extent to which they owe positive duties of care to protect criminals from the consequences of their own misdeeds.

All of which is respectfully submitted this 20th day of January, 2017



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⁹ Applicant's Materials at para. 63.

¹⁰ Court of Appeal Judgment, at para. 1 [Tab 2D].

¹¹ Court of Appeal Judgment, at para. 13 [Tab 2D].