S.C.C. Court File No. 37323

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

B E T W E E N:

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

Appellant

and

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

Respondents

and

ONTARIO TRIAL LAWYERS ASSOCIATION
and JUSTICE FOR CHILDREN AND YOUTH

Interveners

MEMORANDUM OF ARGUMENT OF THE INTERVENER
Ontario Trial Lawyers Association
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW

1. At issue in this appeal are the factors courts must consider in determining whether to recognize a duty of care. This case requires this Court to address this fundamental question in the context of difficult and tragic facts: where a minor plaintiff suffered a catastrophic brain injury in a car accident that flowed from a defendant's failure to take basic safety and security precautions, and which occurred while the minor plaintiff was participating in an unlawful act.

2. The Ontario Court of Appeal, affirming the trial judge's conclusion, held that the defendant garage owner owed a duty of care to secure vehicles he possessed for commercial purposes against persons in whose hands they could be potentially dangerous, notwithstanding the fact that the minor plaintiff was involved in stealing a car from his garage. Applying the two-stage *Anns/Cooper* test, the Court of Appeal unanimously found that (1) it was foreseeable in the circumstances that minors may take unsecured vehicles joyriding and injure themselves in so doing, and there was sufficient proximity between the defendant garage owner and minor plaintiff, and (2) there were no residual policy considerations that operated to negate this *prima facie* duty of care.[1]

3. On this appeal, the Appellant garage owner disputes both the Court of Appeal's conclusions on duty of care. The Appellant submits that the fact that the minor plaintiff's injuries occurred while he participated in criminal conduct "severs the relationship of proximity necessary to establish the duty of care", and provides "*strong* public policy reasons against recognition" of a duty of care.[2]

4. The Ontario Trial Lawyers' Association ("**OTLA**") is a non-profit organization whose membership includes approximately 1,000 lawyers practising in the areas of personal injury and insurance litigation. OTLA's objectives include promoting the administration of justice for the public good; upholding and improving the adversarial system; and advancing the cause of those injured by others. OTLA intervened in this appeal because it raises fundamental questions about the legal and policy considerations that must be weighed in recognizing a duty of care, which could have significant ramifications for injured persons whose legal interests OTLA members represent.

5. In OTLA's submission, a plaintiff's unlawful conduct is irrelevant to the *Anns/Cooper* test. It does not sever the proximate connection between a defendant and an injured plaintiff; it does not

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[1] *JJ v CC*, 2016 ONCA 718 at paras 52-53, 55-59, 73.
[2] Factum of the Appellant, James Chadwick Rankin, carrying on business as Rankin's Garage & Sales [Appellant's Factum] at para 7 [emphasis in original].

render a plaintiff's injury unforeseeable; and it does not serve as a policy consideration sufficient to negate a *prima facie* duty of care. Despite the temptation to accede to the sentiment that persons injured in the course of criminal conduct "had it coming", and thus ought to bear responsibility for such injuries, such a notion is inconsistent with the purpose and structure of the law of negligence, as well as this Court's well-reasoned decision in *Hall v Hebert*.[3]

6. The suggestion that no duty of care is owed to persons who engaged in unlawful conduct, while perhaps intuitively appealing to one's righteous instincts, is offensive to the fundamental purpose of tort law, which is to mete out compensation—not punishment.

7. A rule that restricts the imposition of a duty of care on businesses whose acts or omissions in the pursuit of profit create a reasonably foreseeable risk of injury to members of the community would present significant and undue hurdles for injured people seeking relief – including for catastrophic harm, as in the present case. Such a rule could unjustly and disproportionately deprive many individuals of compensatory remedies, and ought not be adopted by this Court.

PART II – STATEMENT OF POSITION ON QUESTIONS IN ISSUE

8. The Appellant framed the issue on appeal as: "Is there a duty of care owed to trespassers and thieves?".[4] In OTLA's respectful submission, the duty of care questions in this case are more complex than the Appellant's characterization suggests, and include the following two issues:

A. Does a commercial enterprise that introduces a danger into a community, including by selling or storing dangerous goods, owe a duty of care to individual members of the community to take reasonable precautions to minimize the risk that individuals will be injured as a result of the danger created?

9. Yes. Where a business sells or stores dangerous goods, it is reasonably foreseeable that individual members of the community could be injured as a result of the danger created, which it controls and from which it benefits. Such businesses owe a duty of care to this class of persons to take reasonable precautions in the circumstances to minimize the risk of injury.

B. If an individual is injured in the course of unlawful conduct, does this negate the recognition of a duty of care?

10. Unlawful conduct is not relevant to the duty of care analysis. It does not render a plaintiff's injury unforeseeable, and it does not sever the proximate connection between the defendant and the

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[3] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159.
[4] Appellant's Factum at para 43.

injured plaintiff. Considering a plaintiff's unlawful conduct as a residual policy factor negating a *prima facie* duty of care would be inconsistent with the purpose and structure of the law of negligence. An injured plaintiff's responsibility for damage caused by their own wrongful acts is properly and adequately considered in other aspects of tort law, including (as occurred in this case) in the context of whether a plaintiff is contributorily negligent.

PART III – STATEMENT OF ARGUMENT

11. As this Court has repeatedly affirmed, the test for determining whether a person owes a duty of care involves two questions:

> (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and
>
> (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?[5]

12. The questions at issue in this appeal, as articulated in Part II, reflect this two-stage inquiry.

A. Businesses introducing a danger into their community owe a duty to take reasonable precautions to minimize the risk that individuals in their community will be injured

i. Foreseeability and proximity are established

13. The first step of the *Anns/Cooper* analysis focuses on the relationship between the plaintiff and defendant by considering two aspects: foreseeability and proximity. To establish a *prima facie* duty of care, it must be foreseeable that the defendant's failure to take reasonable care might cause harm to the plaintiff or others similarly situated, and there must be a relationship of sufficient proximity between the parties to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.[6] The essential purpose of this inquiry is to evaluate the *nature of the relationship* between plaintiff and defendant, in order to determine whether it is just and fair to impose a duty of care on the defendant.[7]

14. When businesses sell or store dangerous goods, it is foreseeable that their failure to take reasonable care in securing such goods might cause harm to their customers or other individuals in

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[5] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 20, citing *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, 2001 SCC 79 at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para. 9; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at paras. 47-50; *Childs v. Desormeaux*, 2006 SCC 18 at para. 47).
[6] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 39 & 41.
[7] *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para 50.

the community who come into contact with these goods when they are or ought to be in the businesses' control. Moreover, as they benefit from the sale or storage of such dangerous goods, such businesses have implied responsibilities to the public, including to act with care to reduce risks arising from their for-profit enterprise.[8]

15. An analogy to the well-established common law respecting commercial host liability is apt. In *Stewart v Pettie*, this Court affirmed that there is "no question" that alcohol-serving establishments owe a duty of care not only to their patrons, who become unable to take care of themselves after becoming intoxicated, but also to third parties who might reasonably be expected to come into contact with these intoxicated patrons and to whom those patrons may pose some risk. As this Court explained, it is foreseeable that an intoxicated patron may cause injury to themselves or to third parties by driving, and there is sufficient proximity between the commercial host and third party highway users to ground a duty of care.[9]

16. This Court highlighted in *Stewart* that it was irrelevant to the existence of a duty of care that the injured plaintiff was a passenger in the vehicle driven by the intoxicated patron. The duty arose because the injured plaintiff was a member of a class of persons who could be expected to be on the highway; it was this class of persons—who could foreseeably be injured by the intoxicated patron, and to whom the tavern had a relationship of proximity—to whom the duty was owed.[10]

17. A general duty of care owed by vendors of alcohol to highway users is supported not only by the fact that "it clearly ought to be in the reasonable contemplation of such people that carelessness on their part might cause injury to such third parties",[11] but also because taverns profit from and are in a position of control with respect to the sale of alcohol, the effects of which can foster a risky environment.[12]

18. The same can be said for other for-profit enterprises whose businesses relate to dangerous goods. A hardware store selling nail guns, a department store that sells kitchen knives, a garage

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[8] See *Childs v. Desormeaux*, 2006 SCC 18 at para 37, citing, *inter alia*, *Dunn v. Dominion Atlantic Railway Co.* (1920), 60 S.C.R. 310, 1920 CanLII 67 (SCC) (in which a railway company was held liable for negligence after it ejected a disorderly intoxicated passenger at a closed station during the night, and the passenger was later killed by a passing train) and *Jordan House Ltd. v. Menow*, 1973 CanLII 16 (SCC), [1974] S.C.R. 239 (in which a hotel was found to owe a duty to a drunken patron, upon ejecting him from its bar, to see that he got home safely either by taking him under its charge or putting him under the charge of a responsible person).
[9] *Stewart v. Pettie*, [1995] 1 SCR 131, 1995 CanLII 147 (SCC) at paras 28-29, 33.
[10] *Stewart v. Pettie*, [1995] 1 SCR 131, 1995 CanLII 147 (SCC) at para 30.
[11] *Stewart v. Pettie*, [1995] 1 SCR 131, 1995 CanLII 147 (SCC) at para 33.
[12] *Wandy v. River Valley Ventures Inc*., 2014 SKCA 81 at para 21.

repairing automobiles, and a sporting goods store selling hunting rifles each profit from and are in a position to control items that foster a risky environment and create a real and foreseeable risk of injury unless basic precautions are taken to secure them. As they are benefiting from and controlling these dangerous items, such businesses ought to have in their reasonable contemplation that carelessness on their part, including in securing these dangerous goods, might cause injury to individuals who come into contact with the goods while they are under the businesses' control.

ii. Unlawful conduct does not sever the proximate connection between a defendant's breach and a plaintiff's injury nor render the injury unforeseeable.

19. The Appellant argues that criminal conduct "severs the relationship of sufficient proximity".[13] It makes much of the fact that this Court, in *Hercules Management*, explained that "proximity" is intended to connote "that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's *legitimate interests in conducting his or her affairs*".[14] In OTLA's submission, the phrase "legitimate interests" is not a suggestion that a duty of care can be undermined by unlawful conduct, but rather refers simply to a plaintiff's genuine interests or common-law rights – including to be safe from personal injury occasioned by another's negligence.

20. The duty of care stage of the negligence analysis, particularly the first step of the *Anns/Cooper* test, focuses on the *relationship* between the defendant and plaintiff—not on their behaviour, which is addressed when assessing standard of care and contributory negligence, respectively. As this Court explained in *Stewart v Pettie*, "the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct."[15]

21. Indeed, in *Hall v Hebert*, which concerned a drunk driver who was injured when he crashed his friend's car, this Court squarely rejected the notion that a plaintiff's unlawful actions are

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[13] Appellant's Factum at para 88.
[14] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24 [emphasis in Appellant's Factum at para 89].
[15] *Stewart v. Pettie*, 1995 CanLII 147 (SCC), at para. 32. Justice Epstein echoed this reasoning, writing for the Ontario Court of Appeal in *Rausch v. Pickering (City)*: "The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm.": *Rausch v. Pickering (City)*, 2013 ONCA 740 at para 39, citing *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at paras. 25-27. It is also for this reason that there is no merit to the Appellant's argument (at paras 126-136 of its factum) that, if the Ontario Court of Appeal's decision is upheld, its duty of care would change according to the actual or perceived incidence of crime in the area. The imposition of a duty of care does not hinge on circumstances specific to the community at issue, as it is simply about the relationship between the parties. Such circumstances may be relevant only to defining the appropriate *standard* of care in the circumstances, which provides content to a recognized duty of care.

relevant to the question of whether he was owed a duty of care by a defendant who was also negligent. In so doing, this Court highlighted that "*Donoghue v Stevenson*, the source of our modern law of negligence and of the concept of duty upon which it is founded, requires that a person exercise reasonable care towards all his or her neighbours",[16] explaining:

> ***It does not say that the duty is owed only to neighbours who have acted morally and legally***. Tort, unlike equity which requires that the plaintiff come with clean hands, does not require a plaintiff to have a certain moral character in order to bring an action before the court. ***The duty of care is owed to all persons who may reasonably be foreseen to be injured by the negligent conduct***.[17]

22. This Court reaffirmed this reasoning in a different context in *Ingles v. Tutkaluk Construction Ltd*,[18] holding that the plaintiff had not, through his own negligence, "removed himself from the class of persons to whom a duty of care was owed".[19] This Court explained:

> …it is inconsistent with the conceptual role of the duty of care within the traditional tort law analysis to consider the plaintiff's conduct as a consideration which can remove him or her from the scope of a duty which would otherwise be owed to him or her… a duty of care should be grounded in considerations of proximity and foreseeability. The legality or morality of the plaintiff's conduct is an extrinsic consideration.[20]

23. Unlawful conduct does not sever the proximate connection between the parties, and it does not make an injury unforeseeable. It is irrelevant to establishing a *prima facie* duty of care.

B. A plaintiff's unlawful conduct does not justify negating a **prima facie** *duty of care*

24. Once a *prima facie* duty of care is established, the second stage of the *Anns/Cooper* test requires the court to consider whether there exist any residual policy considerations that ought to negate or reduce the scope of the duty of care or the class of persons to whom it is owed. This stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.[21] Such considerations include where a *prima facie* duty of care would conflict with an

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[16] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 30, citing *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) [references omitted].
[17] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 30 [emphasis added].
[18] *Ingles v. Tutkaluk Construction Ltd*, 2000 SCC 12, which held that the negligent conduct of an owner-builder does not absolve a municipality of its duty to take reasonable care in exercising its power of building inspection.
[19] *Ingles v. Tutkaluk Construction Ltd*, 2000 SCC 12 at paras 26-27.
[20] *Ingles v. Tutkaluk Construction Ltd*, 2000 SCC 12 at para 35, citing *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at 182.
[21] *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para 51, citing *Cooper v. Hobart*, 2001 SCC 79 at para 37.

overarching statutory or public duty,[22] or where a duty of care would raise the spectre of liability to an indeterminate class of people.[23]

25. In *Hill v Hamilton-Wentworth*, this Court emphasized that "policy concerns raised against imposing a duty must be more than speculative; a real potential for negative consequences must be apparent."[24] Justice Major previously described negating a duty of care as an "extreme" step, stating: "While the law may grant immunity from liability based on policy reasons, those reasons must be clear and compelling…".[25]

26. This high bar for "obvious and persuasive"[26] policy considerations is warranted in light of their severe consequences. As Justice Cromwell wrote in *Elliott v Insurance Crime Prevention Bureau*, "to negate a *prima facie* duty of care, the policy concerns must be serious and overriding in nature given that the effect of invoking them will be to deny a party compensation" when they have been injured by negligent conduct.[27] In their seminal text *Canadian Tort Law*, Justice Linden and Professor Feldthusen observe: "In effect, a no duty decision grants an immunity to those who act negligently, even recklessly."[28]

27. This Court clarified in *Childs v Desormeaux* that, once a plaintiff has established a *prima facie* duty of care, "the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it."[29]

28. The fact that a plaintiff's catastrophic injury occurred while he was involved in unlawful conduct does not provide a compelling, obvious, or persuasive reason to negate a *prima facie* duty of care owed by a negligent defendant to an injured plaintiff.

29. The Appellant argues that recognizing a duty of care in this case "send[s] the wrong message", "abrogates the values of individual responsibility", and would "strongly impl[y] that an individual or business – the victim of a criminal act – is responsible for the consequences of

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[22] *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para 6
[23] *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.
[24] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.
[25] *Dobson (Litigation Guardian of) re Dobson*, [1999] 2 SCR 753 at para 128 (in dissent).
[26] *Ibid.*
[27] *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115 at para 79 per Cromwell, JA (as he then was).
[28] Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis, 2015) at §9.55.
[29] *Childs v. Desormeaux*, 2006 SCC 18 at para 13.

criminal acts committed against them".[30] These arguments erroneously conflate two distinct concepts. It cannot fairly be argued that a court is condoning or assigning any responsibility for criminal conduct simply by requiring a negligent defendant to pay compensatory damages to an injured plaintiff for the consequences flowing from the defendant's negligence.[31] As Justice McLachlin (as she then was) held in *Hall v Hebert*:

> …compensatory damages are not properly awarded as compensation for an illegal act, but only as compensation for personal injury. Such ***damages accomplish nothing more than to put the plaintiff in the position he or she would have been in had the tort not occurred.*** No part of the award which compensates injury can be said to be the profit of, or the windfall from, an illegal act. It may be that had the plaintiff not committed an illegal act, like driving while impaired as in this case, he or she would never have suffered injury. But the same point could be made in the context of every tort: had the injured party not first done X or Y, he or she would not have been subject to the negligence of the tortfeasor. The question that the law asks is whether an injured party suffered a recognized sort of injury, at the hands of someone who owed this party a duty of care, and who caused reasonably foreseeable damage by falling below the standard of care that the law imposes... ***such compensation as a plaintiff properly recovers arises not from the character of his or her conduct, illegal or otherwise, but from the damage caused to him or her by the negligent act of the defendant***. He or she gets only the value of, or a substitute for, the injuries he or she has suffered by the fault of another. He or she gets nothing for or by reason of the fact he or she was engaged in illegal conduct.[32]

30. Recognizing that a duty of care is owed by a business whose negligence causes injury to a plaintiff, despite the plaintiff having committed an unlawful act, is not "offensive to society's standards".[33] Such an argument runs afoul of this Court's considered decision in *Hall v Hebert*, which made clear that a plaintiff's unlawful conduct is *irrelevant* to establishing a duty of care.

31. In *Hall*, Justice McLachlin held that "courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances", where the narrow criteria for the defence of *ex turpi causa* are met.[34] The Court arrived at this conclusion after careful analysis and for good reasons that ought to be reaffirmed.[35]

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[30] Appellant's Factum at paras 108-109.
[31] See Beverley McLachlin, "Weaving the Law's Seamless Web: Reflections on the Illegality Defence in Tort Law" in Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, eds, *Defences in Tort* (Portland: Hart Publishing, 2015) 207 at 213 [McLachlin, "Reflections on Illegality"], Respondents' Authorities, tab 30.
[32] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 18 [emphasis added].
[33] See *Campiou Estate v. Gladue*, 2002 ABQB 1037 at para 44, cited in Appellant's Factum at para 111. As Justice McLachlin stated in her recent article, "it is difficult to see how the dignity of the courts is undermined when awarding purely compensatory damages to the claimant for an injury intentionally or negligently caused by the defendant.": McLachlin, "Reflections on Illegality" at 213, Respondents' Authorities, tab 30.
[34] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 5.
[35] Indeed, this Court unanimously affirmed Justice McLachlin's majority reasons from *Hall* in *British Columbia v Zastowny*, 2008 SCC 4. *Hall* has also been affirmed more recently in provincial appellate courts: see, e.g., *Zhang v. Cute-Go Novelty Inc*., 2016 BCCA 451 at paras 13-20 and *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11 at paras 72-80.

32. First, punishment is not the purpose of tort law.[36] Tort law is compensatory in nature. The suggestion that defendants do not owe a duty to take care in respect of persons who engaged in unlawful conduct is premised not in principle but on a gut instinct for retribution. The necessary implication of such a suggestion is that persons who have engaged in unlawful conduct are not entitled to receive compensation for foreseeable injuries caused by others' breaches of the standard of care. Such a result is unduly harsh, and has no basis in legal reasoning—simply because the plaintiff was a wrongdoer does not necessarily mean that he can have no remedy at law for harm done to him.[37]

33. Second, the legality or morality of a plaintiff's conduct is extrinsic to the correlative framework of private law. As this Court explained in *Zastowny*, a plaintiff's illegal conduct does not negate a duty of care because it is independent of the relationship between plaintiff and defendant.[38] This goes to the purpose and structure of the law of negligence. Tort law seeks to accomplish justice between the parties to the particular action; the court acts at the instance of the wronged party to rectify the damage caused to him by a particular defendant. It is this corresponding relationship between plaintiff and defendant, and between their respective rights and obligations, that lies at the heart of private law and gives rise to tort liability.[39] Because the legality of the plaintiff's conduct relates only to one party – it has no relationship to any duty owed *by the defendant* – it does not fit in the correlative structure of tort law. As Justice McLachlin explained in *Hall*,

> In the rare cases where concerns for the administration of justice require that the extrinsic consideration of the character of the plaintiff's conduct be considered, it seems to me that this is better done by way of defence than by distorting the notion of the duty of care owed by the defendant to the plaintiff.[40]

34. Third, negating a duty of care on the basis of a plaintiff's unlawful conduct would be a seriously disproportionate response to wrongdoing—particularly in instances of catastrophic injury such as the present case. Whereas exemplary damages operate (on rare occasions) to vary the *amount* of damages a defendant is required to pay as a consequence of his conduct (which amount

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[36] McLachlin, "Reflections on Illegality" at 212, Respondents' Authorities, tab 30.
[37] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 134 per Cory J (in dissent).
[38] *British Columbia v Zastowny*, 2008 SCC 4 at para 20.
[39] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at paras 31-32, citing Ernest J. Weinrib, "The Special Morality of Tort Law" (1989), 34 McGill L.J. 403 at 408; Ernest Weinrib, "Disintegration of Duty", (2006) 31 Adv Q 212 at 215, Respondent's Authorities, tab 34. See also, generally, Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349; Ernest Weinrib, *The Idea of Private Law* (Oxford, Oxford University Press, 2012); and Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012).
[40] *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at para 32.

can be set at a level proportionate to his wrongful acts), to negate a duty of care due to illegality would completely deprive a plaintiff of her cause of action. Denying a cause of action is not only punitive, but it is an arbitrary and blunt method of meting out punishment.[41]

35. In the alternative, should a plaintiff's unlawful conduct be considered under the second step of the *Anns/Cooper* test as a residual policy consideration, it must be balanced against policy grounds that weigh *in favour of* the recognition of the duty of care in the circumstances,[42] such as compensation; deterrence; whether the defendant created a risk of injury in pursuance of profit; and whether the injured plaintiff is a minor entitled to a heightened form of protection.

36. In its factum, the Appellant asks rhetorically, "Is there room for individual responsibility in the analysis?"[43] The answer lies elsewhere in the law of tort. Establishing a duty of care is just one aspect of the negligence analysis, and it does not necessarily result in a finding of liability against a defendant. Upholding the Court of Appeal's decision will not result in the grave consequences the Appellant suggests. Even where a duty of care is recognized, a plaintiff's cause of action may fail on another step of the negligence inquiry, such as remoteness of the injury;[44] due to an established defence, such as *volenti non fit injuria* (the plaintiff's assumption of risk) or *ex turpi causa* (that damages would allow a person to profit from unlawful acts and thus introduce an inconsistency in the law);[45] or may be curtailed due the plaintiff's contributory negligence, as occurred in this case.

PART IV – SUBMISSIONS ON COSTS

37. OTLA seeks no costs on this appeal, and asks that no costs be ordered against it.

PART V – ORDER REQUESTED

38. OTLA takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2017.

Gavin MacKenzie/Brooke MacKenzie/
Brian Cameron

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[41] See The Law Commission, Consultation Paper No 160, "The Illegality Defence in Tort: A Consultation Paper" (London, UK: The Stationery Office, 2001) at 69.
[42] Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Toronto: LexisNexis, 2015) at §9.66; *Paxton v Ramji*, 2008 ONCA 697 at para 80.
[43] Appellant's Factum at para 92.
[44] See *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27.
[45] See *Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159 at paras 5, 13, 17, 35.

PART VI – TABLE OF AUTHORITIES

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JURISPRUDENCE	
Campiou Estate v. Gladue, 2002 ABQB 1037	30
Childs v. Desormeaux, 2006 SCC 18	14, 27
Dobson (Litigation Guardian of) re Dobson, [1999] 2 SCR 753	25, 26
Dunn v. Dominion Atlantic Railway Co. (1920), 60 S.C.R. 310, 1920 CanLII 67 (SCC)	14
Edwards v. Law Society of Upper Canada, 2001 SCC 80	24
Elliott v Insurance Crime Prevention Bureau, 2005 NSCA 115	26
Hall v. Hebert, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159	5, 21, 29, 31, 32, 33, 36
Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165	19, 24
Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41	11, 25
Ingles v. Tutkaluk Construction Ltd, 2000 SCC 12	22
JJ v CC, 2016 ONCA 718	2
Jordan House Ltd. v. Menow, 1973 CanLII 16 (SCC), [1974] S.C.R. 239	14
Odhavji Estate v. Woodhouse, 2003 SCC 69, citing *Cooper v. Hobart*, 2001 SCC 79 at para 37	13, 24
Paxton v Ramji, 2008 ONCA 697	26, 35
Rausch v. Pickering (City), 2013 ONCA 740	20
R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 at paras 39 & 41	13
Stewart v. Pettie, [1995] 1 SCR 131, 1995 CanLII 147 (SCC)	15, 16, 17, 20
Wandy v. River Valley Ventures Inc., 2014 SKCA 81	17

AUTHORITY	**CITED IN PARA**
JURISPRUDENCE	
British Columbia v Zastowny, 2008 SCC 4	33
Livent Inc. v. Deloitte & Touche, 2016 ONCA 11	31
Mustapha v. Culligan of Canada Ltd., 2008 SCC 27	36
Zhang v. Cute-Go Novelty Inc., 2016 BCCA 451	31
SECONDARY SOURCES	
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