SCC File No.: 37323

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)

APPLICATION FOR LEAVE TO APPEAL
REDACTED
(JAMES CHADWICK RANKIN, carrying on business as RANKIN'S GARAGE & SALES, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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PART I – STATEMENT OF FACTS

A. Introduction and Overview

1. This case asks this Honourable Court to answer one deceptively simple, but obviously significant question of public importance: what is our legal responsibility to those who injure themselves while stealing from our property?

2. The Court of Appeal's answer to this question has resulted in the recognition of a novel duty of care: one owed by a property owner to a party who, in the commission of a criminal offence, becomes involved in a motor vehicle accident. The facts can be summarized as follows:

- two teenagers (15 and 16 years of age);
- who have never operated a motor vehicle previously;
- under the influence of alcohol and/or marijuana (supplied by one of their mothers);
- trespass on the Applicant's property;
- steal a vehicle from a mechanic's garage;
- in rural Ontario;
- take the vehicle on a joyride in the middle of the night;
- without a license;
- are involved in a single-vehicle accident; and
- one of the teenagers is injured.

3. The decisions below raise the following questions for this Honourable Court's consideration:

a. 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?

b. Are trespassing teenagers owed an enhanced duty of care by virtue of their status as minors under the law?

c. If such an enhanced duty of care exists, is that duty negated when the teenager participates in so-called "adult" and/or criminal activity?

4. This case is not about the law as it is. Rather, it is about what the law *should* be. Prior to the judgment of the Court of Appeal below, the majority of decisions on this topic determined injury to a third party was not a reasonably foreseeable consequence of theft. Moreover, it has been held that, in circumstances where a plaintiff is injured in the course of car theft, it would be

"offensive to society's standards" to hold the defendant liable "[h]owever careless [the defendant] might have been…"[1]

5. The Court of Appeal and the Trial Judge below disagreed both about whether a duty of care to an active participant injured in the course of automobile theft had been established previously.

6. The Court of Appeal described the novel duty of care as follows:

a. the duty of a garage/car dealership owner to a minor involved in stealing a car from his property[2]; 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.[3]

7. Canadian business and property owners need to know the extent to which they face increased liability due to a novel, positive duty of care to protect criminals from the consequences of their own misdeeds.

8. This case provides this Honourable Court a critical opportunity to weigh in on the creation of a novel duty of care. Canadian business owners deserve a thorough assessment as to whether there are strong public policy reasons in this case to negate the extension of a duty of care to thieves in the context of trespassing and vehicle theft.

B. Brief Factual Chronology

9. The Applicant, James Chadwick Rankin, carrying on business as Rankin's Garage & Sales ("Rankin's Garage"), operated as an automobile service centre and used car lot in Paisley, Ontario.

10. On July 8, 2006, the Respondent J.J., then 15 years of age, met his friends C.C., age 16, and T.T., age 16.

[1] *J.J. v. C.C.*, 2016 ONCA 718 (CanLII) at para. 31 ("Court of Appeal Judgment") [Tab 2D]; see also *Campiou Estate v. Gladue*, 2002 ABQB 1037 (CanLII).
[2] Court of Appeal Judgment, at para. 1 [Tab 2D].
[3] Court of Appeal Judgment, at para. 13 [Tab 2D].

11. C.C.'s mother, D.C., purchased a "two-four" case of beer for the boys to drink.[4] They were left unsupervised. C.C. and T.T. drank heavily. The Respondent did not drink beer.

12. All three boys then drank some vodka and smoked marijuana. Afterwards, T.T. went home and both C.C. and the Respondent left the house.[5] According to C.C., the two boys walked around their hometown with the intention of stealing from unlocked cars.

13. The pair arrived at the Applicant's property. C.C. checked two cars and found an unlocked Toyota Camry parked in an area behind the garage. The keys to the Camry were in the ashtray.

14. C.C. and the Respondent decided to steal the car even though neither had a driver's license and neither had previously operated a car.[6] With C.C. driving, the two drove to the nearby town of Walkerton, Ontario, with the intention of picking up a friend. A single vehicle accident occurred *en route* to Walkerton.[7] The Respondent suffered a catastrophic brain injury.

15. C.C. pleaded guilty to theft under $5,000, dangerous operation of a motor vehicle causing bodily harm, and possession of stolen property obtained by theft. A charge of driving with over eighty milligrams of alcohol in his blood was dropped.

16. D.C. pleaded guilty to a charge of supplying alcohol to minors.

17. The investigating police officer, after consultation with the Crown attorney, decided not to charge the Respondent due to the serious nature of his injuries (sustained in the accident) and his ongoing participation in rehabilitation arising from those injuries.[8]

18. The Respondent sued C.C., the Applicant (Rankin's Garage), and D.C. for negligence. The Respondent conceded, through his parents, that he was partially responsible for his injuries.

[4] Court of Appeal Judgment, at para. 6 [Tab 2D].
[5] Court of Appeal Judgment, at para. 7 [Tab 2D].
[6] Court of Appeal Judgment, at para. 9 [Tab 2D].
[7] Court of Appeal Judgment, at para. 10 [Tab 2D].
[8] Proceedings at Trial, dated September 16, 2014, pg 147, 148, 168, 169, Lines 16 – 32, 1 – 10, 31 – 32, 1 – 20 [Tab 4D].

C. Judicial History

Evidence at Trial

19. The Trial Judge determined the Applicant garage owed a duty of care to the minor Respondent and a Jury apportioned 37% responsibility to the Applicant for Respondent's injuries – the lion's share of the blame.

20. There was no evidence the Respondent and his accomplice, C.C., had ever attempted to steal before, or that they were known to the Applicant in any way.

21. The Trial Judge admitted and referred to anecdotal evidence from C.L.C. (C.C.'s sister) regarding an incident she allegedly observed 17–19 years prior to the trial.

22. This evidence related to C.L.C.'s *perception* that a vehicle had once been "taken" from Rankin's Garage.[9]

23. C.L.C. testified that, when she was between 13 and 15 years old, she observed a vehicle being reversed onto the Applicant's property after overhearing unknown individuals state they had taken the vehicle to McDonald's.[10] She provided no information as to who the unknown individuals were and was unable to recall or provide a description.[11]

24. This was the only evidence of any prior crime or theft on the Applicant's property or in Paisley, Ontario prior to the July 2006 theft and accident which caused the Respondent's injuries.

25. The Trial Judge admitted and referred to the oral evidence of Officer Pittman concerning the "Lock it or Lose it" OPP program, but this was formalized in 2007 – *after* the accident which caused the Respondent's injuries.[12]

26. There was no evidence before the court to the effect the Applicant knew or ought to have known about the program at the time of the July 2006 accident.[13]

[9] Ruling of Trial Judge, dated September 15, 2014, pg 29 , Lines 3 – 12 [Tab 4A]; Proceedings at Trial, dated September 15, 2014, pg 182, 183, 184, Lines 1 – 32, 1 – 32, 1 – 18 [Tab 4B].
[10] Proceedings at Trial, dated September 15, 2014, pg 182, Lines 1 – 28 [Tab 4A].
[11] Proceedings at Trial, dated September 15, 2014, pg 182, 183, Lines 29 – 32, 1 [Tab 4A].
[12] Ruling of Trial Judge, dated September 16, 2014, pg 149 - 154, Lines 17 – 21 [Tab 4C].
[13] Proceedings at Trial, dated September 16, 2014, pg 155, 156, 169, 170, Lines 1 – 31, 1 – 4, 22 – 32, 1 – 10 [Tab 4D]; Proceedings at Trial, dated September 25, 2014, Charge to the Jury, pg 522, Lines 13 – 20 [Tab 2A].

Jury Charge & Findings

27. In her charge to the Jury, Justice Morissette stated the Applicant owed a duty of care to the Respondent at the time of the accident.

28. It was explained that the Jury's task with respect to duty of care involved answering "…was Rankin's conduct such that it provided an opportunity to commit a crime by young people?"[14]

29. The Trial Judge continued by stating, "…Rankin Garage owed a duty of care to J.J. [the Respondent] for a number of reasons but also because people who are [*sic*] entrusted with the possession of motor vehicles must assure themselves that the youth in their community are not able to take possession of such dangerous objects."[15]

30. Following deliberations, the Jury found:

a) The Applicant was negligent by: leaving the car unlocked; leaving the key in the vehicle; knowing or ought to have known about the potential risk of theft; very little security; and inconsistencies in testimony;

b) C.C. was negligent by: drinking under age; not having a driver's licence; stealing a car; impaired operation of the car; and trespassing;

c) D.C. was negligent by: providing alcohol to minors; failing to supervise minors; and failing to secure personal alcohol; and

d) J.J. was negligent by: willingly getting into a stolen car; knowing C.C. did not have a driver's licence; knowing C.C. was impaired; knowing C.C. was an inexperienced driver; and for having participated in stealing the car.[16]

31. The jury apportioned liability as follows: the Applicant 37%, D.C. 30%, C.C. 23%, and J.J. 10%.[17]

Decision on Appeal

32. The primary issue on appeal was whether the Trial Judge had erred in finding the Applicant owed a duty of care to the Respondent under circumstances in which he was a willing

[14] Jury Charge, dated September 25, 2014, pg 521, 522, Lines 22 – 31, 1 – 8 [Tab 2A].
[15] Jury Charge, dated September 25, 2014, pg 521, 522, Lines 22 – 31, 1 – 8 [Tab 2A].
[16] Court of Appeal Judgment, at para. 14 [Tab 2D].
[17] Court of Appeal Judgment, at para. 15 [Tab 2D].

participant to the theft of a motor vehicle. Stated another way, did the Applicant owe a duty of care to a minor involved in stealing a car from its garage and car dealership?[18]

33. The Court of Appeal ultimately found the Trial Judge's conclusion (that the Applicant owed the Respondent a duty of care) was correct, but reached this conclusion for different reasons.[19] It determined that the duty of care in this case, notwithstanding statements in the Trial Judge's jury instruction below, was novel. None of the existing law was analogous and the Trial Judge had erred in finding a duty of care was already established. Accordingly, the Court of Appeal undertook an *Anns/Cooper* analysis to determine whether a duty of care existed.[20]

34. In arriving at its conclusion with respect to the duty of care, the Court of Appeal stated:

> Plainly, the mere possibility that something *may* occur is insufficient to establish reasonable foreseeability that it *will* occur: *Mustapha v. Culligan Canada Ltd*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 13. But absolute foreseeability is not required. *Reasonable* foreseeability is the test, and we are concerned here not with anyone who may steal a vehicle, but with minors – young people who are relatively immature and cannot be expected to exercise the judgment an adult would, especially if, as in this case, alcohol and drugs are involved.[21]

35. The Court of Appeal decided that there was ample evidence to support the conclusion of foreseeability: the Applicant's business practice (leaving some vehicles unlocked), as well as the apparent history of theft in the area.[22]

36. For the Court of Appeal, it was common knowledge that the Applicant's property would be an inviting target for theft and joyriding minors.

37. In support of the history of thefts, the Court referenced the evidence of just two witnesses (Officer Pittman and C.L.C.) with respect to the alleged prior history of vehicle theft in general, and from the Applicant's garage in particular.

38. Although there was no clear evidence such messages and communications to the public were commonplace *prior to* the accident, the Court of Appeal found that, in the circumstances, it

[18] Court of Appeal Judgment, at para. 1 [Tab 2D].
[19] Court of Appeal Judgment, at para. 4 [Tab 2D].
[20] Court of Appeal Judgment, at para. 33 [Tab 2D].
[21] Court of Appeal Judgment, at para. 38 [Tab 2D].
[22] Court of Appeal Judgment, at para. 39 [Tab 2D].

was foreseeable that minors might take a car that was made easily available to them. Furthermore, said the Court of Appeal, "…it is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs."[23]

39. The Court of Appeal found there were no residual policy considerations that operate to negate the *prima facie* duty of care apparently owed by the Applicant.[24] The existence of a duty of care in the circumstances of the within action stems from the Applicant's responsibility to have the protection of minors in mind when he made decisions about security at his business.[25]

PART II – STATEMENT OF ISSUES

40. This leave application raises the following issues of national and public importance:

Issue 1: Is There a Duty of Care to Trespassers and Thieves?
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?

Issue 2: Does the Minor Status of the Respondent Augment the Duty of Care?
Are trespassing teenagers owed an enhanced duty of care by virtue of their status as minors under the law?

Issue 3: Does Criminal Behaviour Effect Duties Owed to Minors?
If such an enhanced duty of care exists, is that duty negated when the teenager participates in so-called "adult" and/or criminal activity?

PART III – STATEMENT OF ARGUMENT

Issue 1: Is There a Duty of Care to Trespassers and Thieves?

Establishing a Novel Duty of Care

41. This Honourable Court adopted the two-stage approach of *Anns* in *Kamloops (City of) v. Nielsen*[26] as follows:

(1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,

(2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

[23] Court of Appeal Judgment, at para. 53 [Tab 2D].
[24] Court of Appeal Judgment, at para. 73 [Tab 2D].
[25] Court of Appeal Judgment, at para. 68 [Tab 2D].
[26] *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 10-11.

42. Following this approach, the Court of Appeal in this case concluded it was reasonably foreseeable that minors might steal an unlocked car with the keys in it and injure themselves in the process. Proximity was established because the Applicant *should have* had minors like the Respondent in mind when considering security measures. The Applicant's care and control of multiple vehicles imposed a responsibility to secure them against thieves – minors in particular.

43. The Court of Appeal went on to find no residual policy concerns negate the existence of the novel duty of care. The Court emphasized that the duty recognized below would *only* arise in specific circumstances.

Lowering the Bar on Proximity

44. The decision below significantly lowers the bar in terms of what is required to establish a duty of care. The first stage of the test calls for an examination of proximity. In other words, in this case, what links a garage owner to a passenger in a vehicle stolen from the garage?

45. The decision below stands for the following propositions in that regard:

1. the injury to an active participant/passenger in a vehicle stolen from a garage or dealership is reasonably foreseeable because there is a general understanding and expectation that teens may get drunk or high and commit crimes; and

2. garage or dealership owners have a positive duty to act to prevent people from trespassing on their property, stealing their vehicles, driving drunk, and subsequently injuring active participants/passengers in that vehicle.

46. On such a basis, the number of instances in which there is a sufficiently close relationship to justify imposition of a duty are *significantly increased*.

<u>Foreseeability</u>

47. The analysis in *Childs v. Desormeaux*,[27] (where this Honourable Court refused to find that social hosts of parties where alcohol is served owe a duty of care to public users of highways) is particularly apt. On foreseeability in *Childs*, Chief Justice McLachlin identified problematic reasoning with inferring foreseeability:

[27] *Childs v. Desormeaux*, 2006 SCC 18 ("*Childs*").

> [A] history of alcohol consumption and impaired driving does not make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. The inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability — even in the case of commercial hosts, liability has not been extended by such a frail hypothesis.[28]

48. The same inferential and problematic reasoning is alive in the present case. Spurious evidence suggesting there may have been, at some point in the distant past, a car theft on the premises and an Officer's testimony that an anti-theft program was deployed some time following the accident in question does *not* make this particular car theft, driving under the influence, and the consequent risk to passengers or other motorists, reasonably foreseeable.

49. The other troubling aspect on foreseeability is with respect to the treatment in the decisions below of the fact the Respondent was not a true third party. The Court below acknowledged, "In most cases…injury to the third party was not a reasonably foreseeable consequence of theft".[29] Typically, the third party is a "true third party" in the sense that they are not actively involved in the theft.[30]

50. *Tong* provides an example where the plaintiff is a true third party. While stopped at the intersection, the defendant in *Tong* abandoned his vehicle (with the keys in the ignition) to pursue a vandal who smashed his front windshield. When the defendant returned to the intersection, his vehicle had disappeared. The vehicle was stolen by an unidentified person and ended up crashing into the plaintiff's parked vehicle.[31] The plaintiff had no prior relationship to the defendant car owner or unidentified thief.

51. Affirming the decision of the Provincial Court Judge, the Alberta Court of Queen's Bench concluded that the facts in this case were such that the defendant was not negligent in leaving his vehicle unattended with the keys in the vehicle.[32]

[28] *Childs*, *supra*, at para. 29.
[29] Court of Appeal Judgment, at para. 29 [Tab 2D].
[30] See, for example, *Tong v. Bedwell*, 2002 ABQB 213 (CanLII) ("*Tong*"); *Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC); *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB) ("*Canadian Pacific*").
[31] *Tong*, *supra*, at paras. 1-7.
[32] *Tong*, *supra*, at paras. 56-57.

52. The Alberta Court of Queen's Bench in *Tong* agreed with the court below and refused to find that it would have been *reasonably foreseeable* to the defendant car owner that a thief would operate his vehicle in such a manner that would cause damage to the plaintiff's vehicle. Further, the thief's acts constituted *novus actus interveniens*, and the defendent could not be contributorily negligent for the damages suffered by the plaintiff's vehicle in this case. Applying these ideas to the present matter, the decisions below appear to say the thief in *Tong* could be owed a duty of care by the defendant car owner to prevent him stealing his vehicle and crashing it into the plaintiff's vehicle. The only difference in *Tong* is that the thief was not injured (to our knowledge).

53. In coming to its conclusions about foreseeability, the Court in *Tong* referred to the following passage *Canadian Pacific v. Paul Morsky Ltd*[33]:

> If one strips away the legalese from the judgments involving intervening tortfeasors, a common sense approach to the problem is evident. While words like foreseeability, remoteness and effective causes are used, the decisions come down on the side of equity. What the Courts are actually saying, as I perceive it, is that a defendant guilty of slight negligence should not be responsible for massive damage resulting from the actions of an intervening wrongdoer.[34]

54. Similar reasoning ought to have applied in the present case. On a practical level, the Applicant garage owner should not be responsible for massive damage to a car thief simply because it left a car on its lot accessible.

Failure to Act

55. The next consideration under proximity is with respect to the failure to act. This Honourable Court in *Childs* refused to find a duty of care even if foreseeability of harm was present because there was no positive duty to act. The Court identified three situations in which a positive duty to act may arise:

1. where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls;
2. where there is a paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and

[33] *Canadian Pacific, supra,* at p. 401.
[34] *Tong, supra,* at para. 55.

3. where there is a need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.[35]

56. The present case tenuously deals with the first situation. The courts below found the Applicant's garage created a situation that attracted teens to steal its vehicles. However, fitting this set of facts into that first situation is completely at odds with what that situation is intended to capture. It also ignores the fact that, to even access the vehicles, the Respondent had to *trespass* on the Applicant's property.

57. For example, in *Horsley v. MacLaren*[36] this Court held that a boat captain owes a duty to take reasonable care to rescue a passenger who falls overboard and in *Crocker v. Sundance Northwest Resorts Ltd.*[37] that the operator of a dangerous inner-tube sliding competition owes a duty to exclude people who cannot safely participate. These, of course, are situations where there is an *actual* invitation.

58. By simply leaving keys in a vehicle, it cannot be said the owner of that vehicle is now inviting people to steal it. Further, it cannot be the case that there is a positive duty on businesses to prevent people from committing crimes against that business.

59. The other two situations are not applicable. There is no paternalistic relationship of supervision and control and it would be a stretch of logic to find that a garage or dealership engage in a commercial enterprise that includes implied responsibilities to protect the public at large.

60. The examples given in *Childs* of the third situation included *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*[38] where the Court held that police had a legal duty to warn the plaintiff of danger she faced. This is because police are statutorily obligated to prevent crime, and, at common law, they owe a duty to protect life and property.

[35] *Childs*, *supra*, at paras. 35-37.
[36] *Horsley v. MacLaren*, [1972] S.C.R. 441.
[37] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.
[38] *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC).

61. Obviously a business is not obligated (statutorily or at common law) like the police to prevent crime or protect life and property. However, in some respects, the decisions below impose such a positive duty.

Residual Policy Considerations: Potential Consequences of the Decision Below

62. The Court of Appeal below stated that recognition of a duty of care in this case would not have wide ranging implications. The Court found, "There is no large class of claimants that will be able to take advantage of this decision…"[39]

63. If the decision below stands, however, the novel duty recognized below may also arise in the following circumstances:

a. A woman places her purse next to her on a bench. She's distracted and a thief, taking the unattended purse as an "invitation", snatches it and flees the scene. He trips over the purse strap, and suffers a catastrophic brain injury. Is the woman liable for the thief's injury?
b. A shopper leaves their scooter outside a store. A thief seizes the opportunity to steal the scooter. While riding away, the thief is struck by a car and suffers a catastrophic brain injury. Is the shopper liable for the thief's injuries?
c. A bike store leaves bicycles unlocked in its yard. Teens trespass, steal a bike and are later involved in an accident. Is the store liable for having left its bikes accessible?
d. Garden shears are stolen from a hardware store and the thief is injured by the garden shears as he/she is running home? Is the operator of the store liable for the thief's injuries?

64. Canadians would likely respond in the negative to each of these questions. Why should it be any different in the present circumstances?

65. The fact the Court of Appeal abrogates the values of individual responsibility raises a significant question of public importance for this Honourable Court's consideration. The decisions below strongly imply 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.

66. The decisions below would impose a positive duty on ordinary individuals and businesses to prevent criminal acts and the consequences that may flow from such acts.

[39] Court of Appeal Judgment, at para. 65 [Tab 2D].

67. Rejection of this idea has been articulated in past case law decisions, including (perhaps most clearly) in the case of *Campiou (Estate of) v. Gladue* as follows:

> In this case I will skip over the first stage of *Anns*, discussed in *Edwards*, although I doubt even that first stage is met here. I propose, instead, to move to the second stage, whether there exist residual policy considerations which justify denying liability. I conclude they do exist. I have set out what I conclude to be the facts about the deceased's involvement. She was an active participant in the events leading to the crash. This is not a case of a homeowner setting a beartrap for trespassers. There is nothing inherently dangerous in a truck. This is a simple case of a theft, a joyride with an impaired driver, a rollover and a death of a passenger. However careless Dandeneault might have been in securing the truck that carelessness should not result in a liability by him to any of the truck's illegal occupants. It would be offensive to society's standards to hold a truck owner liable for injuries suffered by those participating in a theft of the truck, a joyride and a rollover causing injury to any participating occupant.[40]

68. The decisions below are in direct contradiction with that statement of law.

Residual Policy Considerations: Shifting Standard of Criminality

69. In *Fullowka v. Royal Oak Ventures Inc*. the Northwest Territories Court of Appeal stated as follows with respect to the liability of motor vehicle owners:

> Owners of motor vehicles are not liable for torts committed by persons who steal their vehicles, even if the owner was allegedly negligent in allowing the theft. The owner has no control over the thief after the theft takes place.[41]

70. A number of authorities from other jurisdictions stand for the same proposition.[42]

71. Either the decision of the Court of Appeal below (recognizing a novel duty of care in this case) marks a clear and dramatic break from established legal propositions, or it represents an exception for a particular type of plaintiff (i.e. minor, intoxicated, etc.). In either case, this Honourable Court's intervention would provide Canadian business owners a clearer picture of their obligations going forward.

72. If the Court is carving out some new exception, it too goes against established propositions of law which suggest there should be no duty of care to the Respondent in these

[40] *Campiou (Estate of), supra,* at para. 43-44. [Emphasis added].
[41] *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4 (CanLII) at para. 69-70 (*"Fullowka")*.
[42] See *Tong, supra*; *Moore v. Fanning* (1987), *supra*; *Canadian Pacific, supra*

types of situations. *Fullowka* is again instructive in regards to a duty owed by a commercial entity to an intoxicated person:

> Commercial hosts have been found liable for the torts of intoxicated persons, *subject to the proof of causation*. A commercial host owes a duty to the driving public with respect to the risk created by drivers who become intoxicated at the host's premises, *but not necessarily to the point that the commercial host has to take positive steps to prevent the intoxicated driver from driving*. Social hosts are not similarly liable. In these cases the tort of the immediate tortfeasor (the intoxicated person) is usually negligence, not an intentional tort.[43]

73. This however only applies to "hosts" and not businesses at large. The exception, if that is what it is in the present case, casts the net *extremely* wide and potentially captures a wide-range of businesses.

No Evidence of Flight to Escape Pursuit in this Case

74. The Court of Appeal acknowledges the fact it would be rare to find a duty of care owed to third parties in matters arising out of the theft of a vehicle.[44] In *Spagnolo v. Margesson's Sports Ltd (1983),*[45] the Court of Appeal noted a car driven by a thief was *not* more likely to cause damage to others than a car driven by someone lawfully in possession. The Court of Appeal also recognized the inherent difficulty in establishing reasonable foreseeability given the passage of time since the theft occurred.[46]

75. That being said, the Court of Appeal relies on *Spagnolo* in support of its conclusion with respect to reasonable foreseeability in this case because *Spagnolo* contains language to the effect that the defendant's position *would have been different* if damage occurred in the course of flight from the theft of the car.[47]

76. In other words, the Court suggested it might be *easier* to argue that damage to third parties, in these circumstances, would be reasonably foreseeable (in light of the nervousness and panic that might accompany the theft).

[43] *Fullowka, supra,* at para. 69.
[44] Court of Appeal Judgment, at para. 28 [Tab 2D].
[45] *Spagnolo v. Margesson's Sports Ltd (1983),* 1983 CanLII 1904 (ON CA), 41 O.R. (2d) 65 (C.A.).
[46] Court of Appeal Judgment, at para. 24. [Emphasis added] [Tab 2D].
[47] Court of Appeal Judgment, at para. 24 [Tab 2D].

77. Notwithstanding the Court's remarks in *Spagnolo*, the case law has not *generally* recognized flight from the theft of a vehicle as a determinative factor in establishing whether damages which arise as a consequence of the theft are reasonably foreseeable.[48]

78. In the present case there was no evidence of flight. No one was chasing the Respondent and his accomplice. Even if there had been a chase, the Respondent's actions were purposive, deliberate acts.[49] The accident occurred sometime after the vehicle was taken from the Applicant's property, as the Respondent and C.C. were on their way to pick up a friend in another town – clearly they did not fear pursuit.

79. It remains for this Honourable Court to decide whether concepts from the established jurisprudence militate against the recognition of a duty of care in these circumstances.

Different Standards for Different Communities

80. Another concerning aspect of the decisions below is that the finding of negligence is based in part upon the fact that it occurred in a town in which teens may be roaming around looking for trouble. This situation is akin to *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens,*[50] where the Court considered several factors that suggested negligence could not be maintained against a business which had not secured the keys to a vehicle which was started, placed on rail tracks, and which caused damage to two locomotives and twenty-two rail cars[51]:

> It is important to bear in mind the setting in which the acts of negligence were alleged to have occurred. The Town of Beverley was a "sleepy hollow", in five years there had never been an offence investigated by the police. The residents left their vehicles unlocked within half a mile of the Trans-Canada highway. Given this background, it is difficult to arrive at a conclusion that it was foreseeable that leaving the grader as it was would result in injury to others, particularly when a grader is a more complex piece of equipment operationally than an automobile, a truck or a farm tractor. The words of Halvorson, J., in the *Morsky* case, supra, at p. 399 are particularly apt. He states:
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> > "It was the duty of Morsky to ensure that the tractor was left at night in a safe position. In this respect Morsky was obliged to take such precautions as would be expected of an individual with prudent foresight, common

[48] *Moore et al., supra*.
[49] *Moore et al., supra.*
[50] *Canadian Pacific, supra.*
[51] *Canadian Pacific, supra*, at para. 1.

> sense and ordinary intelligence. Looking back on the event it is easy enough to now say that Morsky could have done more. Taking into account the complexity involved in starting the tractor and the fact that there had been no problems with vandals on this project, it is my view that Morsky did what a reasonable man would have done."
>
> Similarly, the claim of negligence against the R.M. cannot be maintained. It is important to note that the standard of care required of the R.M. in its storage practices and its instruction of operators with respect to storage practices may well be a higher one in different circumstances. For example, it would be expected that storage practices in a larger centre such as Swift Current, might be more stringent.[52]

81. Considering the present case and *Canadian Pacific* together raises an important question as to whether the content of the duty of care changes in light of the relative level of criminal activity in a community. In other words, applying the principle set out by the Court of Appeal below, is there now one standard for businesses or individuals residing in "bad" neighbourhoods and one for "good" neighbourhoods (where the crime rate is lower)?

82. Had the events of this case taken place in a "sleepy hollow" would the outcome have been different? If so, what metrics should courts apply going forward?

83. What is particularly worrying in the present case is that the evidence adduced in support of the conclusion that vehicle theft was common was extremely thin. Accordingly, the decisions can be seen as lowering what is required to trigger a duty to prevent criminal activities. Is there really a positive duty to ensure nothing may be construed as inviting criminal activity wherever teenagers may live (such as leaving a car unlocked)?

84. Overall, the decision of the Court of Appeal for Ontario creates a novel and problematic extension of the law which, if not addressed by this Honourable Court, will likely contribute to increased regional variance and inconsistency across jurisdictions.

<u>Issue 2</u>: Does the Minor Status of the Respondent Augment the Duty of Care?

85. The Applicant does not contest the Court of Appeal's statement that "…it is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs."[53] The question is whether the relationship between youth, joyriding,

[52] *Canadian Pacific, supra,* at paras. 32-33.
[53] Court of Appeal Judgment, at para. 53 [Tab 2D].

impaired driving, and the accident in which the Respondent was involved is sufficiently connected to the actions of the Applicant.

86. There is nothing in law to suggest the minor status of the Respondent is a relevant factor. Mere trespassing by drunken teenagers *may* be foreseeable and possibly requires a property owner to keep their property free of dangers (which are themselves reasonably foreseeable). However, it does not follow that the decision to then steal a vehicle and the consequences of that theft are in any way the responsibility of the Applicant.

87. At para. 28 of the decision, the Court stated "Theft by young people with little experience in driving in these circumstances was reasonably foreseeable, and the accident occurred in the course of the theft (during the flight thereafter)."[54] On its face, there are defects with this statement. It is one thing to anticipate trespassing or even theft, but quite another to have to impute particular subjective characteristics to the foreseeable thief.

88. The fact the Respondent was a minor at the time of the accident appears to have played a significant role in the Court of Appeal's conclusion on the existence of a duty of care. Indeed, the Trial Judge stated:

> Under Canadian law children under the age of 16, although they may protest against it, require guidance and direction from parents and older persons. Society has always recognized how important it is to promote the safety of children under the age of 16 to ensure their reasonable safety.[55]

89. This commonsense proposition however does not translate to the creation of a duty and no case law is cited to support some sort of enhanced duty owed to individuals under the age of 16. If there is any such duty, it ought to be negated by the illegal acts committed by the Respondent.

<u>Issue 3</u>: Does Criminal Behaviour Affect Duties Owed to Minors?

90. Pursuant to *Hercules,*[56] "proximity" is intended to connote "…the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the

[54] Court of Appeal Judgment, at para. 28 [Tab 2D].
[55] Charge to the Jury, dated September 25, 2014, pg 521, 522, Lines 26 – 31, 1 – 2 [Tab 2A].
[56] *Hercules Management Ltd. v. Ernst & Young,* 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165.

defendant may be said to be under an obligation to be mindful of the plaintiff's *legitimate interests in conducting his or her affairs*".[57]

91. The decisions below suggest something more is required. They appear to require that the *illegitimate* interests of the plaintiff must also be considered. That a business owner must be mindful of an enhanced duty to young people in the commission of an offence against his business and against his property.

92. The Court of Appeal below, in conducting its *Anns/Cooper* analysis, relied on the Respondent's status as a minor, while ignoring the criminal and so-called "adult activities" he actively engaged in, to find that a duty of care existed.

93. The Court took a "boys will be boys" view of the activity that the Respondent and his accomplice had engaged in – the analysis blames alcohol and drugs for the Respondent's criminal behaviour and at the same time shifts blame to the Applicant for following its ordinary practice sometimes leaving vehicles accessible on its property.

94. In reaching their decisions, the Trial Judge and the Court of Appeal below relied on evidence that was vague (at best) and not reliable or relevant to conclude that the Applicant ought to have known criminal activity was rampant in its neighbourhood and should have taken measures to protect its property – specifically from minors who would be tempted at the prospect of driving cars. As noted above, there was no evidence from any witness to indicate that any resident of Paisley, Ontario was aware of or had any problem arising out of the theft of vehicles.

95. The Court of Appeal's decision stands the law of duty of care on its head. The Respondent in this case may be considered a minor in law, however, he was actively engaged in criminal activity at all relevant times. There is no sound basis to treat a teen in such situation as different from an adult. To do otherwise imposes an enhanced duty of care on the owner of the commercial property when crimes on that property are perpetuated by teens – this is illogical and extends jurisprudence and public policy in a precarious direction.

96. Indeed, in *Ryan et al. v. Hickson et al.*, the Court referred to *Canadian Negligence Law* (1972), at pp. 33-34, where Professor Linden stated:

[57] *Hercules Management Ltd., supra,* at para. 24.

> Special rules for children make sense, especially when they are plaintiffs; however, when a young person is engaged in an adult activity, which is normally insured, the policy of protecting the child from ruinous liability loses its force. Moreover, when the rights of adulthood are granted, the responsibilities of maturity should also accompany them. In addition, the legitimate expectations of the community are different when a youth is operating a motor vehicle than when he is playing ball. As one American court suggested, juvenile conduct may be expected from children at play, but "one cannot know whether the operator of an approaching snowmobile ... is a minor or adult, and usually cannot protect himself against youthful imprudence even if warned". Consequently, there has been a movement toward holding children to the reasonable man standard when they engage in adult activities. A more lenient standard for young people in the operation of motor vehicles, for example, was thought to be "unrealistic" and "inimical to public safety". When a society permits young people of 15 or 16, Highway Traffic Act, R.S.O. 1970, c. 202, s. 18, the privilege of operating a lethal weapon like an automobile on its highways, it should require of them the same caution it demands of all other drivers.[58]

97. Similarly, in *McErlean v. Sarel et al.*, the Court of Appeal for Ontario stated:

> Where a child engages in what may be classified as an "adult activity", he or she will not be accorded special treatment, and no allowance will be made for his or her immaturity. In those circumstances, the minor will be held to the same standard of care as an adult engaged in the same activity.
>
> …
>
> Just as the law does not permit a youth engaged in the operation of an automobile to be judged by standards other than those expected of other drivers, it cannot permit youths engaged in the operation of other motorized vehicles (whether there are any statutory restrictions with respect to age or not) to be judged by standards other than those expected of others engaged in the same or like activity.[59]

98. There are a number of cases in which the court has been asked to determine whether or not there exists a duty of care where the sole allegation against that defendant relates to their negligence in securing a vehicle, or the keys to a vehicle.[60] In each of the cases, the court refused to find a duty of care. There is no reason to treat the present case differently and to do so raises an issue of public importance.

[58] *Ryan et al. v. Hickson et al.*, 1974 CanLII 871 (ON SC). [Emphasis added].
[59] *McErlean v. Sarel et al.*, 1987 CanLII 4313 (ON CA). [Emphasis added].
[60] *Canadian Pacific , supra*; *Tong, supra*; *Moore v. Fanning* (1987), *supra*.

Conclusion

99. This Honourable Court now has a critical opportunity to weigh in on the creation of a novel duty of care. Even if sufficient proximity and reasonable foreseeability could be established, there are *strong* public policy reasons against recognition. This Honourable Court can decide to negate the extension of a duty of care to thieves in a case arising out of the theft of a vehicle.

100. The decisions below amount to a novel and positive duty of care to protect criminals from the consequence of their own misdeeds. This Honourable Court's guidance is sought in the matter because Canadian business and property owners need to know the extent to which they face increased liability under these unique – and nearly impossible to anticipate – circumstances.

PART IV – SUBMISSION ON COSTS

101. The Applicant respectfully requests costs of this application to be granted in the cause.

PART V – ORDER SOUGHT

102. The Applicant requests that leave to appeal be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th day of November, 2016.

Counsel for the Applicant, James Chadwick Rankin carrying on business as Rankin's Garage & Sales

PART VI – TABLE OF AUTHORITIES

AT PARA.

Cases

Campiou Estate v. Gladue, 2002 ABQB 1037 (CanLII) 6, 67

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Spagnolo v. Margesson's Sports Ltd (1983), 1983 CanLII 1904 (ON CA), 41 O.R. (2d) 65 (C.A.) 74, 75, 77

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PART VII – STATUTORY PROVISIONS

N/A