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

APPELLANT
(Appellant)

-and-

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

RESPONDENTS
(Respondents)

FACTUM OF THE APPELLANT

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

Overview

1. This case asks this Honourable Court to answer one deceptively simple question: what is our legal responsibility to those who injure themselves while stealing from our property? Specifically, do business owners who store vehicles on their premises owe a legal duty of care to a minor who may steal those vehicles and is subsequently injured in a motor vehicle accident? 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.

2. 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 the Applicant's automobile service centre;
- take the vehicle on a joyride in the middle of the night;
- are involved in a single-vehicle accident on a highway after having driven in Paisley, Ontario; and
- one of the teenagers is severely injured.

3. Notwithstanding the facts of the case, and the obvious degree to which individual responsibility plays a part in the injuries suffered by the Respondent, the trial judge and Court of Appeal below found the Appellant property owner is 37% responsible and should be liable to pay the Respondent minor.

4. The trial judge found a duty of care was already recognized in the case law. The Court of Appeal disagreed, but went on to recognize a novel duty of care. It is submitted that both the trial judge and Court of Appeal erred in finding that the Appellant owed a duty of care to the Respondent. The Court of Appeal did not succinctly state the new duty of care that it recognized, leaving it open to interpretation and uncertainty. Moreover, the Court of Appeal ignored the

fundamental relevance of the Respondent's criminal conduct at both stages of the duty of care analysis.

5. The decision of the Court of Appeal below results in the recognition of a novel duty of care which departs from established principles of law. The Court of Appeal described the novel duty of care alternatively as follows:

a. the duty of a garage/car dealership owner to a minor involved in stealing a car from his property[1]; 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.[2]

6. 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…"[3]

7. This Honourable Court should overturn the decision of the Court of Appeal below and decline to recognize the duty of care established because, on principle, the criminal conduct of the Respondent severs the relationship of proximity necessary to establish the duty of care. Even if sufficient proximity and reasonable foreseeability could have been established in the circumstances of this case (and we submit they have not been), there are *strong* public policy reasons against recognition.

8. Even if it is theoretically possible to impose a duty of care in circumstances similar to the present case, the evidence in the record of this case falls far short of what is required to recognize a novel duty of care: there is no evidence to show the Appellant knew or ought to have known

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[1] *J.J. v. C.C.*, 2016 ONCA 718, at para. 1 ("Court of Appeal Judgment") [**AR Tab 10**].
[2] Court of Appeal Judgment, at para. 13 [**AR Tab 10**].
[3] Court of Appeal Judgment, at para. 31 [**AR Tab 10**]; see also *Campiou Estate v. Gladue*, 2002 ABQB 1037 at para. 44.

about thefts in the area and witness testimony provides the Appellant's garage was not a specific target.

9. 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 Appellant 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.

Brief Factual Chronology

The Appellant Rankin's Garage

10. The Appellant, 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.[4]

11. The Court of Appeal noted that many witnesses at trial testified that they dropped off their respective vehicles at the Appellant's property for repairs after hours by leaving the car keys under floor mats, in the ashtray, or over the visor so that staff would have access to the car.[5]

The Respondent J.J. & Accident

12. 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.[6]

13. C.C.'s mother purchased a 24-pack of beer for the boys to drink.[7] They were left unsupervised. C.C. and T.T. drank heavily. The Respondent did not drink beer.[8]

14. 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.[9] According to C.C., the two boys walked around their hometown with the intention of stealing from unlocked cars.[10]

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[4] Court of Appeal Judgment, at para. 2 [**AR Tab 10**].
[5] Court of Appeal Judgment, at paras. 40-47 [**AR Tab 10**].
[6] Court of Appeal Judgment, at para. 6 [**AR Tab 10**].
[7] Court of Appeal Judgment, at para. 6 [**AR Tab 10**].
[8] Court of Appeal Judgment, at para. 6 [**AR Tab 10**].

15. The pair arrived at the Appellant'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.[11]

16. 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.[12] A single vehicle accident occurred after the pair had driven in Paisley, Ontario, and thereafter decided to travel to Walkerton, Ontario, with the intention to pick up a friend.[13] The Respondent was injured.

Legal Proceedings

17. 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.[14]

18. C.C.'s mother pleaded guilty to a charge of supplying alcohol to minors.[15]

19. 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.[16]

20. The Respondent sued C.C., the Appellant (Rankin's Garage), and C.C.'s mother for negligence. The Respondent conceded, through his parents, that he was partially responsible for his injuries.[17]

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[9] Court of Appeal Judgment, at para. 7 [**AR Tab 10**].
[10] Court of Appeal Judgment, at para. 9 [**AR Tab 10**].
[11] Court of Appeal Judgment, at para. 9 [**AR Tab 10**].
[12] Court of Appeal Judgment, at para. 9 [**AR Tab 10**].
[13] Court of Appeal Judgment, at para. 10 [**AR Tab 10**].
[14] Court of Appeal Judgment, at para. 11 [**AR Tab 10**].
[15] Court of Appeal Judgment, at para. 11 [**AR Tab 10**].
[16] Transcript, dated September 16, 2014, pg. 147, lines 16-32, pg. 148, lines 1-10, pg. 168-169, lines 31-32, lines 1-20 [**AR Tab 36C**].
[17] Court of Appeal Judgment, at para. 12 [**AR Tab 10**].

Evidence at Trial

21. At trial, there was no evidence the Respondent and his accomplice, C.C., had ever attempted to steal from the Appellant before, or that they were known to Rankin's Garage in any way.

22. 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. This evidence related to C.L.C.'s *perception* that a vehicle had once been "taken" from Rankin's Garage.[18]

23. C.L.C. testified that, when she was between 13 and 15 years old, she observed a vehicle being reversed onto the Appellant's property after overhearing unknown individuals state they had taken the vehicle to McDonald's.[19] She provided no information as to who the unknown individuals were and was unable to recall or provide a description.[20]

24. This was the only evidence of any prior incident on the Appellant's property or in Paisley, Ontario prior to the July 2006 theft and accident which caused the Respondent's injuries (apart from the bare assertion of Officer Pittman that vehicle theft and mischief was a common occurrence[21]). Neither C.L.C. nor Officer Pittman's evidence contained any particulars to assist with establishing that drunken teenaged car-thieves are foreseeable plaintiffs.

25. The trial judge admitted and referred to the oral evidence of Officer Pittman which described an OPP program called "Lock it or Lose it" designed to raise awareness of vehicle theft and mischief – "meaning, people going through vehicles and, and, uh, rummaging through them..."[22]

26. The "Lock it or Lose it" program was not formalized until 2007 – *after* the accident which caused the Respondent's injuries.[23] The Officer confirmed during cross-examination that the Respondent and C.C. had not specifically targeted the Appellant's garage and could not

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[18] Ruling of Trial Judge, dated September 15, 2014, pg. 29, lines. 3-12 [**AR Tab 1**]; Transcript, dated Sept. 16, 2014, pg. 182, lines 1-32, pg. 183, lines 1-32, pg. 184, lines 1-18 [**AR Tab 36D**].
[19] Transcript, dated September 16, 2014, pg. 182, lines 1-28 [**AR Tab 36D**].
[20] Transcript, dated September 16, 2014, pg. 182, lines 29-32, pg. 183, line 1 [**AR Tab 36D**].
[21] Court of Appeal Judgment, at para. 50 [**AR Tab 10**].
[22] Transcript, dated September 16, 2014, pg. 155, line 5-10 [**AR Tab 36C**].
[23] Ruling of Trial Judge, dated September 16, 2014, pg. 149-154, lines 17-21 [**AR Tab 2**].

identify any specific communications to the general public involving thefts.[24] There was no confirming evidence to show Rankin's Garage was aware of any such program or that "rummaging through vehicles" was, in fact, a common occurrence.[25]

Trial Judge's Finding on Duty of Care

27. The trial judge determined the Appellant garage owed a duty of care to the minor Respondent.[26] As Justice Morissette explained "…Rankin Garage owed a duty of care to J.J. [the Respondent] for a number of reasons but also because people who [*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."[27]

Jury Charge & Findings

28. In her charge to the Jury, Justice Morissette stated the Appellant owed a duty of care to the Respondent at the time of the accident: "It certainly ought to be foreseeable that injury could occur if a vehicle were used by inebriated teenagers".[28]

29. The Trial Judge mischaracterized Officer Pittman's evidence as having stated "Lock it or Lose it" was introduced because of "…numerous thefts of vehicles left on lots."[29] The Officer's evidence more accurately suggested there had been thefts *from* vehicles rather than thefts *of* vehicles.[30]

30. 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?"[31]

31. Following deliberations, the Jury found:

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[24] Transcript, dated Sept. 16, 2014, pg. 163, lines 27-30; pg. 170, lines 4-10 [**AR Tab 36C**].
[25] Transcript, dated September 22, 2014, pg. 401, lines 20-30 [**AR Tab 5**]; Transcript, dated Sept. 16, 2014, pg. 155, lines 1-31, pg. 156, lines 1-4, pg. 169, lines 22-32, pg. 170, lines 1-10 [**AR Tab 36C**]; Transcript, dated Sept. 25, 2014, Jury Charge, pg. 522, lines 13-20 [**AR Tab 6**].
[26] Transcript, dated September 23, 2014, pg. 422-425 [**AR Tab 5**]; Jury Charge, pg. 519, lines 27-32 [**AR Tab 6**].
[27] Jury Charge, dated September 25, 2014, pg. 521, 522, lines 22-31, 1-8 [**AR Tab 6**].
[28] Transcript at pg. 424, lines 25-32 [**AR Tab 5**].
[29] Jury Charge, dated September 25, 2014, pg. 522, lines 13-20 [**AR Tab 6**].
[30] Transcript, dated September 16, 2014, pg. 155, lines 5-10 [**AR Tab 36C**].
[31] Jury Charge, dated September 25, 2014, pg. 521, 522, lines 22-31, 1-8 [**AR Tab 6**].

a. The Appellant 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.[32]

32. The jury apportioned liability as follows: the Appellant 37%, D.C. 30%, C.C. 23%, and J.J. 10%.[33]

33. The Appellant received the lion's share of the liability (37%), while the two individuals directly involved in the theft and causing the accident were tagged with 33% combined.

Decision on Appeal

34. The primary issue on appeal was whether the trial judge erred in finding the Appellant owed a duty of care to the Respondent where the Respondent was a willing participant in the theft of a motor vehicle. Stated another way, did the Appellant owe a duty of care to a minor involved in stealing a car from its garage and car dealership?[34]

35. The Court of Appeal ultimately found the trial judge's conclusion (that the Appellant owed the Respondent a duty of care) was correct, but reached this conclusion for different reasons.[35] It determined that the duty of care in this case was novel, that none of the existing law was analogous, and that the trial judge had erred in finding a duty of care was already

[32] Court of Appeal Judgment, at para. 14 [**AR Tab 10**].
[33] Court of Appeal Judgment, at para. 15 [**AR Tab 10**].
[34] Court of Appeal Judgment, at para. 1 [**AR Tab 10**].
[35] Court of Appeal Judgment, at para. 4 [**AR Tab 10**].

established. Accordingly, the Court of Appeal undertook an *Anns/Cooper* analysis to determine whether a duty of care existed.[36]

36. 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.[37]

37. The Court of Appeal found its conclusion that thefts by teenagers was reasonably foreseeable was supported by what it considered to be ample evidence:

a. the Appellant's business practice (leaving some vehicles unlocked), and

b. the apparent history of theft in the area.[38]

38. For the Court of Appeal, it was common knowledge that the Appellant's property would be an inviting target for theft and joyriding minors.[39]

39. In support of the history of thefts, the Court referenced the evidence of just two witnesses (Officer Pittman and C.L.C. (C.C.'s sister)).

40. Although there was no evidence of vehicle theft and mischief being commonplace in Paisley *prior to* the accident, the Court of Appeal found that, in the circumstances, it was foreseeable that minors might take a car that was made easily available to them. The Court of Appeal also found that, "…it is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs."[40]

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[36] Court of Appeal Judgment, at para. 33 [**AR Tab 10**].
[37] Court of Appeal Judgment, at para. 38 [**AR Tab 10**].
[38] Court of Appeal Judgment, at para. 39 [**AR Tab 10**].
[39] Court of Appeal Judgment, at para. 68 [**AR Tab 10**].
[40] Court of Appeal Judgment, at para. 53 [**AR Tab 10**].

41. The Court of Appeal found there were no residual policy considerations that operated to negate the *prima facie* duty of care owed by the Appellant.[41] The existence of a duty of care in the circumstances of the within action stemmed from the Appellant's responsibility to have the protection of minors in mind when he made decisions about security at his business.[42]

42. The Court of Appeal determined it was sufficient that a theft problem existed in the area at the relevant time, *regardless* of whether there was evidence the Appellant had any knowledge of such a problem or evidence the thefts were public knowledge such that a reasonably informed member of the public would have been aware.[43]

PART II – STATEMENT OF ISSUES

43. This Appeal raises the following legal and evidentiary issue:

Issue 1: Is there a duty of care owed to trespassers and thieves?

Do property owners who store vehicles on their premises owe a legal duty of care to minors who steal those vehicles and are subsequently injured in motor vehicle accidents?

Issue 2: Is the evidence sufficient to find the Appellant owed a duty of care to the trespassers and thieves in this case?

44. For the purposes of disposing of this particular appeal, the issue is whether the Appellant property owner owes a duty of care to the Respondent minor who was involved in stealing a car from his garage and car dealership. Should this Honourable Court determine there could be a duty of care owed to trespassers and thieves, is there a sufficient evidentiary foundation in this case to support the Court of Appeal's conclusion?

PART III – STATEMENT OF ARGUMENT

Issue 1: Is there a duty of care owed to trespassers and thieves?

45. There is not presently a duty of care owed to trespassers and thieves to inhibit their efforts to steal vehicles, nor should there be. Not in this case, and not in future cases. Following

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[41] Court of Appeal Judgment, at para. 73 [**AR Tab 10**].
[42] Court of Appeal Judgment, at para. 68 [**AR Tab 10**].
[43] Court of Appeal Judgment, at para. 82 [**AR Tab 10**].

the analysis for recognition of a novel duty of care established by this Honourable Court,[44] at least three obstacles militate against recognition in these circumstances:

a. the Respondents were not and should not have been foreseeable plaintiffs;

b. there is no relationship of sufficient proximity arising as between the Appellant and the Respondent to establish a duty of care (the criminal conduct of the Respondent severs the chain linking the Appellant's potential negligence to the accident and its consequences); and

c. in any event, there are strong residual policy grounds to decline recognition of a novel duty of care.

Is the Proposed Duty Novel? Cases Referred to in the Courts Below

46. As noted in *Childs v. Desormeaux*,[45] a preliminary point arises from the *Anns* test developed in *Cooper v. Hobart*:[46] "categories of relationships giving rise to a duty of care may be recognized, making it unnecessary to go through the *Anns* analysis." As such, the first issue raised in this case is whether claims against property owners by trespassers and car thieves who are then subsequently injured off the property in motor vehicle accidents constitute a new category of claim.

47. The Appellant agrees with the Court of Appeal to the extent it found the case law did not support the trial judge's conclusion that a duty of care has already been recognized. In arriving at her conclusion, the trial judge referred to the Respondent's case law and stated the *Anns* analysis would not be required.[47]

48. Notwithstanding the trial judge's apparent endorsement of *Spagnolo v. Margesson's Sports Ltd* [48] and *Kalogeropoulos v. Ottawa*[49], neither case is analogous to the circumstances of

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[44] See, for example, *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 at 10-11; *Childs v. Desormeaux*, 2006 SCC 18, at para. 11.
[45] *Childs v. Desormeaux*, 2006 SCC 18, at para. 15.
[46] *Cooper v. Hobart*, 2001 SCC 79.
[47] Transcript, Ruling, dated September 23, 2014, pgs. 422-423, lines 27-32, 1-5 [**AR Tab 5**].
[48] *Spagnolo v. Margesson's Sports Ltd* (1983), 41 O.R. (2d) 65 (C.A.).
[49] *Kalogeropoulos v. Ottawa*, [1996] O.J. No. 3449 (C.J.) [**ABOA Tab 1**].

the present case. As found by the Court of Appeal: "the trial judge erred in concluding that the appellant owed a duty of care on the basis of these cases…the cases cited are not determinative of the duty of care even in the context of third parties."[50]

49. For the Court of Appeal, *Spagnolo* stood for the proposition that, whereas there was no evidence a car driven by a thief is *more* likely to cause damage to others, it might be *easier* to establish damage to third parties would be reasonably foreseeable if it occurred in the course of a theft or in the course of flight from theft (given the associated nervousness and panic that might accompany the theft).[51]

50. *Spagnolo* raises two important points. First, it highlights the evidentiary deficiency of the record established by the Respondent as there is simply no evidence to suggest the accident occurred as a result of nervousness and panic. Rather, the evidence suggests a calmly formulated plan to retrieve a friend from nearby Walkerton, Ontario after an uneventful drive in Paisley. Secondly, it demonstrates that there is no case law determinative of the issue of whether a duty of care arises in the circumstances of this case.

51. With respect to *Kalogeropoulos*, the Court of Appeal appears to have distinguished its application on the facts. In the present case, the vehicle in question was not left idling "…in front of an all-night coffee shop in Ottawa in the early hours of the morning, shortly following the close of bars in nearby Hull, Quebec".[52]

52. From the foregoing cases, it is clear that the proposed duty would be novel.

The General Test for a Duty of Care

53. Although the vast majority of negligence cases will proceed on the basis of relationships *already* recognized as giving rise to a duty of care, this Honourable Court in *Hill v. Hamilton-Wentworth Regional Police Services Board*[53] provided specific guidance for claims made which concern a novel form of relationship:

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[50] Court of Appeal Judgment, at para. 27 [**AR Tab 10**].
[51] Court of Appeal Judgment, at para. 24 [**AR Tab 10**].
[52] Court of Appeal Judgment, at para. 26 [**AR Tab 10**].
[53] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.

> When such cases arise, the courts must consider whether the claim for sufficient proximity is established. If it is, and the *prima facie* duty is not negated for policy reasons at the second stage of the *Anns* test, the new category will thereafter be recognized as capable of giving rise to a duty of care and legal liability. The result is a concept of liability for negligence which provides a large measure of certainty, through settled categories of liability — attracting relationships, while permitting expansion to meet new circumstances and evolving conceptions of justice.[54]

54. This Honourable Court adopted the two-stage approach of *Anns* in *Kamloops (City of) v. Nielsen*[55] as follows:

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

b. 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?

55. This Honourable Court has held that, at the first stage of the *Anns* test, the key question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Where the plaintiff establishes that such a relationship exists, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.[56]

56. In *R. v. Imperial Tobacco*,[57] this Honourable Court stated that proximity and foreseeability are two aspects of the same inquiry: one which principally asks whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Past guidance from this Honourable Court indicates mere foreseeability is insufficient *per se* to establish the duty: "…not every foreseeable outcome will attract a commensurate duty of care. Foreseeability

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[54] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, at para. 25.
[55] *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 at 10-11; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79, at paras. 25 & 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.
[56] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 39.
[57] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other."[58]

57. In *Hill v. Hamilton-Wentworth,* this Honourable Court stated the following with respect to proximity analyses generally:

a. they involve an examination of "…the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved";[59]

b. different relationships raise different considerations: "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic";[60]

c. no single rule, factor or definitive list of factors can be applied in every case.[61]

58. The plaintiff is obligated to prove a sufficiently close and direct connection between the actions of the "wrongdoer" and the "victims". The relationship may exist even where (as in this case) there is no personal relationship between the victim and wrongdoer.[62]

Stage One: A Prima Facie Duty?

59. Following the *Anns* approach in a highly generalized fashion, the Court of Appeal in this case erroneously concluded it was reasonably foreseeable that intoxicated minors might steal an unlocked car with the keys in it and injure themselves in the process.

60. The Court of Appeal found proximity is established because the Appellant *should have had* minors like the Respondent in mind when considering its security measures.[63] The Appellant's care and control of vehicles imposed a responsibility to secure them against thieves – minor thieves in particular.

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[58] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 41. See also *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.
[59] *Cooper v. Hobart*, 2001 SCC 79, at para. 34.
[60] *Cooper v. Hobart*, 2001 SCC 79, at para. 35.
[61] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, at para. 24.
[62] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, at para. 29.
[63] Court of Appeal Judgment, at paras. 56-59 [**AR Tab 10**].

61. A review of recent jurisprudence, particularly *Childs v. Desormeaux,*[64] reveals that the reasoning of the Court of Appeal below is flawed and a duty of care does not exist in the present case. The Appellant's position is that foreseeability is simply not made out. The criminal acts of the Respondent are a relevant factor at stage one of the analysis.

62. The criminal conduct of the Respondent makes his acts both un-foreseeable and unpredictable (in law and on the record before the Jury and Court of Appeal). In law because the criminal conduct of the Respondent, in trespassing and stealing a vehicle, should count for something in determining whether there is a relationship of sufficient proximity between the Appellant Garage and the Respondents. On the record, because the Respondent produced no evidence establishing that the Appellant Garage was aware of thefts, or that the Respondent specifically targeted Rankin's Garage for that purpose.

Foreseeability

i. Inferential reasoning

63. In *Childs v. Desormeaux,*[65] 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. With respect to the question of foreseeability, Chief Justice McLachlin identified problematic reasoning with inferring foreseeability:

> [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.[66]

64. The same inferential and problematic reasoning is alive in the present case. Spurious evidence suggesting there may have been (but also equally that there was not), 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 and should not make this

[64] *Childs v. Desormeaux*, 2006 SCC 18.
[65] *Childs v. Desormeaux*, 2006 SCC 18.
[66] *Childs v. Desormeaux*, 2006 SCC 18, at para. 29.

particular car theft, driving under the influence, and the consequent risk to passengers or other motorists, reasonably foreseeable.

65. There was simply no evidence in the present case to suggest that the Appellants knew or ought to have known that there would be thefts from garage property, or that a potential thief might be an impaired and unlicensed minor. Hindsight is 20/20. Even if, as the Court of Appeal says, "it is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs"[67], on this record, there is simply the bare assertion that such minors would engage in theft from the Appellant's garage.

66. The Court of Appeal went even further – since the "Lock it or Lose it" program was established in response to theft, any other conclusion about the Appellant's knowledge apparently "misses the point".[68] In *Childs*, under similar factual circumstances (where there was no finding the social hosts knew or ought to have known an impaired guest was about to drive) this Honourable Court rhetorically asked: "…how it can be said that they should have foreseen"[69] that injury would result?

67. Absent a finding as to the knowledge of the Appellant, it is unclear how foreseeability can be established on the record in this case and this Honourable Court must decline to recognize a novel duty of care.

ii. Plaintiff not a true third party

68. For the Court of Appeal below, the fact J.J. was involved in the theft actually meant his injuries were *more* foreseeable. The Court of Appeal below stated, "In most cases…injury to the third party was not a reasonably foreseeable consequence of the theft".[70] It appears the Court of Appeal meant that, unlike the typical scenario in which the third party is unknown to the thief

[67] Court of Appeal Judgment, at para. 53 [**AR Tab 10**].
[68] Court of Appeal Judgment, at para. 82 [**AR Tab 10**].
[69] *Childs v. Desormeaux*, 2006 SCC 18, at para. 28.
[70] Court of Appeal Judgment, at para. 29 [**AR Tab 10**].

operating the vehicle, the third party in this case is not a "true third party" in the sense they are actively involved in the theft.[71]

69. By way of comparison and analogy, the case of *Tong v. Bedwell*[72] 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, the vehicle had disappeared, having been stolen by an unidentified person who proceeded to crash it into the plaintiff's parked vehicle.[73] The plaintiff had no prior relationship to the defendant car owner or unidentified thief.

70. Affirming the decision of the Provincial Court Judge, the Alberta Court of Queen's Bench concluded that the facts in the case were such that the defendant was not negligent in leaving his vehicle unattended with the keys in the vehicle.[74]

71. The Alberta Court of Queen's Bench in *Tong* refused to find 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 defendant could not be contributorily negligent for the damages suffered by the plaintiff's vehicle as a consequence.

72. Applying the reasoning of the courts below to the facts in *Tong* would result in the thief being owed a duty of care by the defendant car owner to prevent him stealing his vehicle and crashing it into the plaintiff's vehicle.

73. The only difference in *Tong* is that the thief was not injured (to our knowledge). Such a conclusion would be problematic – as in *Tong*, there is an essential *un-foreseeable* relationship between the Appellant and Respondent. The reason lies in the unanticipated nature of criminal wrongdoing.

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[71] See, for example, *Tong v. Bedwell*, 2002 ABQB 213; *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).
[72] *Tong v. Bedwell*, 2002 ABQB 213.
[73] *Tong v. Bedwell*, 2002 ABQB 213, at paras. 1-7.
[74] *Tong v. Bedwell*, 2002 ABQB 213, at paras. 56-57.

Proximity

i. Positive Duty to Act

74. Even though the Appellant disputes the finding the plaintiff in this matter was a "true" third party (since he was an accomplice in the theft and voluntarily agreed to enter the stolen vehicle driven by an intoxicated teenager), the question, similar to that in *Childs*, is whether the Appellant has a positive duty to act. Furthermore, is there a positive duty to act even where the Respondent's conduct does not *directly* cause foreseeable physical injury to the plaintiff?[75]

75. In *Childs*, the proposed duty was to take care to prevent harm caused to the plaintiff by a third party. This Honourable Court refused to find a duty of care even if foreseeability of harm was present because, in the circumstances of that case, there was no positive duty to act. The Court identified three situations in which a positive duty to act may arise:

a. where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls;

b. where there is a paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and

c. where defendants either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large.[76]

76. In the present case, proximity involves an inquiry as to the relationship between the Appellant Garage and the injured parties. It also necessarily involves the relationship between the presence of certain conditions or "risks" on the Appellant's property (found by the Court of Appeal to have been created by the Appellant and which "invited" thefts) and the accident itself, where damage *actually* took place.

77. With respect to whether the Appellant intentionally attracted or invites the Respondent to "inherent and obvious risk", the courts below found the Appellant's garage created a situation that attracted teens to steal vehicles. With respect, this finding is at odds with what the

[75] *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, at para. 27.
[76] *Childs v. Desormeaux*, 2006 SCC 18, at paras. 35-37.

foreseeability analysis is intended to capture. This Court should reject the proposition that the conduct of a civil defendant intentionally attracts and invites criminal wrongdoing. While a defendant is ordinarily required to foresee the reasonable consequences of their actions, the concept should not be extended to include criminal behavior.

78. It is inappropriate to suggest that a defendant intentionally attracts criminal conduct, or in any way invites third parties to commit criminal acts against them. Such reasoning is faulty in that it conveniently ignores the volition of the criminal actor. It also ignores the fact that, to even access the vehicles, the Respondent first had to trespass on the Appellant's property.

79. In *Horsley v. MacLaren*[77] 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.*[78] 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.

80. 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.

81. The other two situations in *Childs* are not applicable. There is no paternalistic relationship of supervision and control such as those of a parent-child or teacher-student as required for the second situation.

82. With respect to the third situation, 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. The example given in *Childs* of a business of this nature was a commercial host who serves alcohol to guests. This type of commercial enterprise would be considered to benefit from offering a service to the public at large and therefore has a duty to act to prevent foreseeable harm to third-party users of the highway.[79]

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[77] *Horsley v. MacLaren*, [1972] S.C.R. 441.
[78] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.
[79] *Childs v. Desormeaux*, 2006 SCC 18, at paras. 35-37.

83. Another example given in *Childs* of the third situation included *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*[80] 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.

84. As noted in *Childs*, the theme that unites the examples noted above is reasonable reliance between the plaintiff and defendant. In circumstances where a business creates or invites others into a dangerous situation, that business may reasonably expect those taking up the risk will rely on the business to ensure the risk is reasonable, or that appropriate steps are taken to address the risk when it materializes.[81] In this case the plaintiff's presence (and the associated risks of that presence) came as a result of their decision to trespass on the Appellant's property and steal a vehicle. The Appellant's garage cannot be said to create or invite others into a dangerous situation. The appellant garage was closed, and does not profit from after-hours activities.

ii. Breaking the Chain: An Alternative Assessment

85. Assuming the trial judge is correct, and "It certainly ought to be foreseeable that injury could occur if a vehicle were used by inebriated teenagers",[82] what then is the connection between this finding and the Appellant garage?

86. One may intuitively understand that where a vehicle is driven by an inebriated teenager in circumstances where the vehicle is intentionally lent to the driver with consent, and they are subsequently injured in a crash, that the owner of that vehicle (or their insurer) should compensate them, subject to contributory negligence considerations. At the same time, one may intuitively understand that where a garage takes possession of an owner's vehicle and subsequently loses that vehicle, the garage may be liable to compensate the owner.

87. What is less clear, however, is why not locking doors with the keys in the vehicle is the basis for compensating injuries which result from the negligent operation of the vehicle after it is stolen and taken off the owner's property. It was explained that the Jury's task with respect to

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[80] *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC).
[81] *Childs v. Desormeaux*, 2006 SCC 18, at para. 40.
[82] Transcript, dated September 23, 2014, pg. 424, lines 25-32 [**AR Tab 5**].

duty of care involved answering "…was Rankin's conduct such that it provided an opportunity to commit a crime by young people?"[83] Must that include *every* consequence of crime by young people (such as injuries resulting from the inappropriate usage of stolen property)? Even if there is a duty recognized for garage owners to handle vehicles such that they are not stolen, the requirement to anticipate theft by drunken teenagers and the potential injuries which could result from such thefts is a step too far.

iii. Should Illegitimate Interests be Considered at the First Stage?

88. One question posed by the circumstances of this case is how the criminal conduct of the Respondents factors into the analysis. Is criminal conduct something business owners should anticipate and does the possibility of criminal acts give rise to a corresponding duty, or should the criminal conduct militate against recognition of the duty because it essentially severs the relationship of sufficient proximity (as in the *Occupiers' Liability Act* context[84])?

89. Pursuant to *Hercules Management Ltd. v. Ernst & Young*,[85] "proximity" is intended to connote "…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*".[86]

90. The decisions below suggest something more is required. They appear to require that the *illegitimate* interests of a potential 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.

91. 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.

92. 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

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[83] Jury Charge, dated September 25, 2014, pg. 521-522, lines 22-31, 1-8 [**AR Tab 6**].
[84] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2.
[85] *Hercules Management Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165.
[86] *Hercules Management Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), at para. 24.

criminal behaviour and at the same time shifts blame to the Appellant for following its ordinary practice. Is there room for individual responsibility in the analysis? This Honourable Court should not ignore the series of choices made by the Respondent in the sequence of events which ultimately culminates in the accident. The Appellant submits proper consideration of these actions leads to the conclusion reached in *Campiou Estate v. Gladue*, that recognition of a duty to protect thieves from the consequences of their misdeeds is inappropriate.[87]

iv. The Minor Status of the Respondent at Stage One

93. There is nothing in law to suggest the minor status of the Respondent is a relevant factor at the first stage of the duty of care analysis.

94. Whereas, in negligence, bare trespassing by drunken teenagers *may* be foreseeable and potentially requires a property owner to keep their property free of dangers (which are themselves reasonably foreseeable) 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 Appellant.

95. This is where the policy considerations integrated in the *Occupiers' Liability Act* show their persuasive force. In that context, no liability flows to the occupier where the intention of entering the premises was to commit criminal acts.

96. At para. 28 of the decision below, the Court of Appeal 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)."[88] On its face, there are obvious 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.

97. On one level, the Court of Appeal below appears to unreasonably impose on business owners an obligation to consider a *very* specific sub-set of young people (one which business owners should not reasonably be made to anticipate). At another level, framing the requirement this way is meant to paint the Appellant as someone who should have taken reasonable steps to protect children. The Appellant submits this is a gross mischaracterization of the Respondent –

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[87] *Campiou Estate v. Gladue*, 2002 ABQB 1037.
[88] Court of Appeal Judgment, at para. 28 [**AR Tab 10**].

J.J. and C.C. should not be taken as mere "children". Rather, they were thinking, autonomous individuals who made a series of bad choices, criminal choices which had dire consequences. These factors should not be discounted at the first stage of the analysis.

Stage Two: Negated by Policy Considerations?

Occupiers' Liability Act: An Applicable Legislative Provision & Existing Remedy?

98. For the Court of Appeal below, public policy established for the purposes of occupiers' liability "has nothing to do with the circumstances of this case, whether directly or by analogy."[89] The Court found no basis for the *Occupiers' Liability Act*[90], and, in particular, s. 4(2) to limit the scope of any applicable common law duty of care.

99. The Court of Appeal's remarks are problematic for a number of reasons. As recently discussed by the Ontario Court of Appeal, the *Occupiers' Liability Act*, since it first came into force on September 8, 1980, has governed the duty of care owed by an occupier of premises to anyone who enters those premises.[91]

100. In this case, although the single vehicle accident which caused the Respondent's damage occurred well off the Appellant's "premises"[92], the common law duty of care imposed by the Court of Appeal involves the Appellant's conduct and behavior on its own property. As such, it is perfectly appropriate to consider the *Occupiers' Liability Act* as a source of applicable policy with respect to the Appellant garage's duty of care.

101. There is both a *direct* and *analogous* link between the *Occupiers' Liability Act* and the circumstances of the present case. Notwithstanding the Court of Appeal's dismissive approach, the reasons are obvious on even a cursory examination of the various applicable provisions of the *Act*.

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[89] Court of Appeal Judgment, at para. 64 [**AR Tab 10**].
[90] *Occupiers' Liability Act*, RSO 1990, c O.2.
[91] *MacKay v Starbucks Corporation*, 2017 ONCA 350, at para. 10.
[92] Within the meaning of the *Occupiers' Liability Act*, RSO 1990, c O.2.

102. Section 2 of the *Act* replaces the common law duty of care with a single statutory duty. Section 3 of the *Act* provides the duty of care that is owed by an occupier of premises to persons entering onto the premises as follows:

> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.[93]

103. The term "occupier" is defined inclusively at s. 1 of the *Act* as follows:

> "occupier" includes,
> (a) a person who is in physical possession of premises, or
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises[94]

104. Prior to the inception of the *Occupiers' Liability Act*, the common law duty of care owed by occupiers mandated a standard of care that was more or less stringent depending on why the injured person was on the property – were they invited, licensees, or trespassers?[95] In some ways, the current *Occupiers' Liability Act* regime preserves this continuum by restricting liability for risks willingly assumed and criminal conduct.

105. Specifically, section 4(2) expressly limits an occupier's liability in circumstances where the party suffering damages has entered the premise with the intention of committing criminal acts:

> Risks willingly assumed
> 4. (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.
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> Criminal activity
> (2) A person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1).[96]

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[93] *Occupiers' Liability Act*, RSO 1990, c O.2.
[94] *Occupiers' Liability Act*, RSO 1990, c O.2.
[95] *MacKay v. Starbucks Corporation*, 2017 ONCA 350, at para. 10.
[96] *Occupiers' Liability Act*, RSO 1990, c O.2.

106. Section 4(2) of the *Act* aligns neatly with the Appellant's submission with respect to the persuasive force of *Campiou*. 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…"[97]

107. If this Honourable Court recognizes a novel duty of care, dismissing the clear relevance of the *Occupiers' Liability Act*, then such a duty should be framed so as to adequately integrate the policy and limitations that were part and parcel of the former common law duty. That is to say, risks willingly assumed, including criminal activity, should be understood as a limit to imposing the duty. Risks willingly assumed should not be restricted to only being a factor in determining contributory negligence.

Sending the Wrong Message: The Negative Impact of the Decision Below

108. 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…"[98]

109. The fact the Court of Appeal abrogates the values of individual responsibility raises a significant question of public policy by strongly implying 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. Is that a message we want to send throughout Canadian society?

110. The decisions below, if left unchecked, may impose a positive duty on ordinary individuals and businesses to prevent criminal acts and the consequences that may flow from such acts.

111. Rejection of this idea has been articulated in past case law decisions, including (perhaps most clearly) in the case of *Campiou* 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

[97] See *Campiou Estate v. Gladue*, 2002 ABQB 1037.
[98] Court of Appeal Judgment, at para. 65 [**AR Tab 10**].

> 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.[99]

112. The decisions below are in direct contradiction with this statement of law. 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.[100] In each of the cases, the court refused to find a duty of care. There is no reason to treat the present case differently.

Criminal Behaviour Should Sever the Duty of Care Owed – Even for Minors

113. At trial, Justice Morissette rejected the Appellant's policy arguments on the basis the Respondent, if successful, would not recover from the "…character of his conduct, illegal or otherwise, but from the damage caused to him by the negligent act of the defendant…"[101]

114. In so doing, and by comparing the Appellant's argument to an assertion that, as in equity, the Respondent must come with "clean hands"[102], the trial judge erred in failing to consider the relevance of criminal conduct in establishing a relationship of sufficient proximity and failed to appropriately consider the need to condemn criminal acts as a residual policy ground.

115. By essentially confirming this approach, the Court of Appeal decision below stands the duty of care analysis on its head. The Respondent in this case was actively engaged in criminal activity at all relevant times, and yet this was determined to have no force as a residual policy consideration or even at the preliminary proximity analysis.

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[99] *Campiou (Estate of), supra,* at para. 43-44. [Emphasis added].
[100] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB); *Tong v. Bedwell*, 2002 ABQB 213; *Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC).
[101] Transcript, dated September 23, 2014, pg. 425, lines 1-27 [**AR Tab 5**].
[102] Transcript, dated September 23, 2014, pg. 425, lines 1-27 [**AR Tab 5**].

116. There is no sound basis to treat a teen in such situations, as different from an adult, particularly when they are engaging in adult activities. To do otherwise imposes an *enhanced* duty of care on the owner of the commercial property when crimes on that property are perpetrated by teens – this is illogical and extends both the jurisprudence and associated public policy in a precarious direction.

117. 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:

> 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.[103]

118. 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.
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> …
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> 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.[104]

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[103] *Ryan et al. v. Hickson et al.*, 1974 CanLII 871 (ON SC).
[104] *McErlean v. Sarel et al.*, 1987 CanLII 4313 (ON CA). [Emphasis added].

Is the Respondent's Criminal Conduct Relevant Only to Establish Contributory Negligence?

119. At the second stage of the *Anns/Cooper* analysis, the Court of Appeal found no residual policy concerns negate the existence of the novel duty of care. To minimize potential policy concerns, the Court emphasized that the duty recognized below would *only* arise in specific circumstances.

120. The Court of Appeal below cited the case of *British Columbia v. Zastowny*[105] as having affirmed the proposition, originally stated in *Hall v. Hebert*,[106] that illegal conduct does not preclude the existence of a duty of care: "It is well established that the duty of care operates independently of the illegal or immoral conduct of an injured party".[107]

121. The Court of Appeal misinterprets these decisions to mean the duty of care analysis does not involve consideration for the criminal conduct of an injured party, that such will simply be taken into account in determining contributory negligence.[108] With respect, this undermines the policy component of the analysis and is a misstatement of the law.

122. Contrary to the discussion in the Court of Appeal below, *Zastowny* more accurately stands for the principle that the doctrine of *ex turpi* applies to bar claims for past wage loss due to incarceration.[109] 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.[110]

123. Moreover, in *Hall*, McLachlin J. (as she then was) was careful to state the more fundamental question underlying recognition of liability in tort: "The relationship between

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[105] *British Columbia v. Zastowny*, 2008 SCC 4.
[106] *Hall v. Hebert*, [1993] 2 SCR 159 at 182.
[107] Court of Appeal Judgment, at para. 71 [**AR Tab 10**]; *Hall v. Hebert*, [1993] 2 SCR 159.
[108] Court of Appeal Judgment, at para. 72 [**AR Tab 10**].
[109] See discussion in *British Columbia v. Zastowny*, 2008 SCC 4, at paras. 23-30.
[110] *British Columbia v. Zastowny*, 2008 SCC 4, at para. 30.

plaintiff and defendant which gives rise to their respective entitlement and liability arises from a duty predicated on foreseeable consequences of harm."[111]

124. 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 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.

125. The Court of Appeal's consideration of both *Hall*[112] and *Zastowny*[113] provides no definitive answer to the ultimate questions at issue before the Court. This Honourable Court should affirm the relevance of criminal conduct at the second stage of the analysis.

Different Standards for Different Communities

126. At a very practical level, if the duty of care recognized below is adopted at large, it is submitted the duty would change according to the crime rate and/or perceived crime incidence of theft in the area. It is not clear from the decisions below whether anything hinges on the civil defendant's perception or whether the plaintiff must prove an objective state of affairs with respect to thefts generally.

127. Another concerning aspect of the decisions below is that the finding of negligence is based in part upon a malleable, indeterminate factor: that it occurred in a town in which teens may be roaming around looking for trouble.

128. This situation is akin to *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*,[114] 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

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[111] *Hall v. Hebert*, [1993] 2 SCR 159 at 182. [Emphasis added].
[112] *Hall v. Hebert*, [1993] 2 SCR 159.
[113] *British Columbia v. Zastowny*, 2008 SCC 4.
[114] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB).

was started, placed on rail tracks, and which caused damage to two locomotives and twenty-two rail cars[115]:

> 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 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.[116]

129. Considering the present case and *Canadian Pacific* together raises an important question: does the content of the duty of care change in light of the relative level of criminal activity in a community? In other words, applying the principles 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)?

130. What is particularly worrying in the present case is that there was no evidence adduced in support of the conclusion that vehicle theft in Paisley, Ontario, was common. 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)?

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[115] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB), at para. 1.

[116] *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB), at paras. 32-33.

131. 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 (and potentially impose a range of different standards) across jurisdictions.

Shifting Standard of Criminality

132. 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.[117]

133. 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 should reject the approach adopted below.

134. 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 types of situations. *Fullowka* is again instructive in regards to the 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.[118]

135. 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.

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[117] *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, at para. 69-70 ("*Fullowka")*; see also *Tong v. Bedwell*, 2002 ABQB 213; *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).

[118] *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, at para. 69.

136. If the decision of the Court of Appeal below is maintained, there will be a stark difference in the liability of civil defendants depending on which side of a given property line an accident occurs. It is submitted that a wide variation in liability and the applicable analysis would unduly complicate the question of determining civil liability in these circumstances.

137. Alternatively, s. 4(2) of the *Occupiers' Liability Act* provides one clear answer: in light of the analogous nature of s. 4(2), the Appellant's liability should be limited as a consequence of the Respondents' criminal behaviour.[119]

The Minor Status of the Respondent Should Not Modify the Duty of Care (If Found)

138. 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:

> 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.[120]

139. This "common sense" proposition however does not translate to the creation of a duty and no case law is cited to support an 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.

140. As this Honourable Court has stated elsewhere, not every foreseeable outcome attracts a duty of care. Foreseeability must be grounded in a relationship that would make it both just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.[121]

141. Irrespective of the Respondent's age, it is submitted the conduct he was engaged in militates against recognition of a novel duty of care to compensate him. Alternatively, should this Honourable Court determine a novel duty should be recognized, the minor status of the Respondent should not overwhelm the analysis particularly as he was engaging in an adult and

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[119] See *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB), at p. 401 with respect to taking a common sense approach to intervening tortfeasors.

[120] Jury Charge, dated September 25, 2014, pg. 521-522, lines 26-31, 1-2 [**AR Tab 6**].

[121] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 41; See also *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.

criminal activity at all material times. Any duty found in this matter should not apply in the circumstances of the case.

No Evidence of Flight to Escape Pursuit in this Case

142. 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.[122] In *Spagnolo v. Margesson's Sports Ltd (1983),*[123] 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. In the present case, the Court of Appeal acknowledged the inherent difficulty in establishing reasonable foreseeability given the passage of time since the theft occurred.[124]

143. 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.[125]

144. 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).

145. 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.[126]

146. 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.[127] The accident occurred sometime after the vehicle was taken from the Appellant's property after the Respondent and C.C. drove in Paisley Ontario and were on their

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[122] Court of Appeal Judgment, at para. 28 [**AR Tab 10**].
[123] *Spagnolo v. Margesson's Sports Ltd (1983)*, 1983 CanLII 1904 (ON CA), 41 O.R. (2d) 65 (C.A.).
[124] Court of Appeal Judgment, at para. 24 [**AR Tab 10**].
[125] Court of Appeal Judgment, at para. 24 [**AR Tab 10**].
[126] *Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC).
[127] *Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC).

way to pick up a friend in another town – clearly they did not fear pursuit. There was no panic, hurry, or pursuit.

Issue 2: Is the evidence sufficient to find the Appellant owed a duty of care to the trespassers and thieves in this case?

The Decision Below Rests on an Improper Evidentiary Foundation

147. Even if it is theoretically possible to impose a duty of care in circumstances similar to the present case, the evidence in the record of this case falls far short of what is required to find that the Appellant property owner owes a duty of care to the Respondent minor who was involved in trespassing and stealing a car from his garage.

148. A key issue was whether Mr. Rankin knew, or ought to have known, "in other words, foreseeability", that his vehicles were exposed to a more likely than not risk of theft. The Trial Judge concluded it would be prejudicial to allow rumour evidence and would not allow evidence of rumour or innuendo to support the point.[128] However, the evidence she does rely on is just that: rumour.

149. The Trial Judge relies on evidence from C.L.C. (C.C.'s sister) with respect to her recollection about a car being stolen from the Appellant's property, but the incident allegedly occurred over 17 years earlier. The Trial Judge also relies on evidence from Officer Pittman about the area generally, but the material aspects of his testimony deal with events after the accident.

C.L.C. (C.C.'s Sister)

150. C.L.C. (C.C.'s sister) testified about an incident that she allegedly observed when she was between the age of 13 and 15 (approximately 17 to 19 years prior to trial) relating to her perception that a vehicle had been "taken" from the Appellant's Garage.[129]

151. C.L.C. stated she observed a vehicle being reversed onto the Appellant's property by unknown individuals, and that, after overhearing unknown individuals state that they had taken a

[128] Transcript, dated September 15, 2014, pg. 29, lines 12-25 [**AR Tab 1**].
[129] Transcript, dated September 16, 2014, pg. 182, lines 1-15 [**AR Tab 36D**].

vehicle to McDonald's, concluded this was the case.[130] C.L.C. offered no confirming information as to who those individuals were and was unable to provide a description.[131]

152. Critically, because the identity of these individuals is unknown, it is impossible to determine whether those involved were thieves or the owners of the vehicle. Additionally, the age of these individuals is indeterminate – meaning it is impossible to say theft by young people was foreseeable. Finally, there was no evidence that Mr. Rankin was aware of a vehicle being removed from his lot without authorization during the period between 1995 and 1997, or whether he had any knowledge of such incidents occurring on his property.

Officer Pittman

153. Officer Pittman testified the Respondent had not specifically targeted Rankin's Garage:

> Q. So, they weren't targeting Rankin's, at least according to this statement, correct?
> A. Not that I pulled out of it, this evidence anywhere, no, sir.[132]

154. This suggests that there was nothing inherently attractive about the Appellant's property to justify the position that thefts by teenagers from that property should have been reasonably foreseeable. For example, there was no evidence in the record to show that perception among teenagers was Rankin's Garage was a good place to find unlocked cars.

155. In the absence of such evidence, it was inappropriate to conclude Mr. Rankin had the requisite knowledge to anticipate the specific kind of thief (namely drunken teenagers) who may come across his property and remove an unlocked vehicle.

156. The trial judge also relied on the oral evidence of Officer Pittman concerning the "Lock it or Lose it" OPP program, which formalized in 2007 after the theft and accident in question took place.[133] There was no evidence to support the finding the Appellant garage knew (or reasonably

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[130] Transcript, dated September 16, 2014, pg. 182, lines 1-28 [**AR Tab 36D**].
[131] Transcript, dated September 16, 2014, pg. 182, 183, lines 29-32 [**AR Tab 36D**].
[132] Transcript, dated September 16, 2014 at pg. 163, lines 27-30 [**AR Tab 36C**].
[133] Ruling of Trial Judge, dated September 16, 2014, pg. 149-154, lines 17-21 [**AR Tab 2**].

ought to have known) about the thefts reported by Officer Pittman or the "Lock it or Lose it" program at the time of the accident in July 2006.[134]

157. Officer Pittman testified that the "Lock it or Lose it" program was not finalized at the time of the accident, but that the OPP would periodically have auxiliary members check vehicles and notify owners if a vehicle was found to be unlocked. Officer Pittman was unable to provide any statistics or data with respect to the frequency of thefts in Paisley or Walkerton, or how many vehicles were found to be unlocked prior to the theft from Rankin's property on July 9, 2006.[135]

158. The OPP also periodically sent out media releases and placed articles in local newspapers, though the Officer was unable to confirm any specific dates when the OPP advertised this issue or attempted to bring it to the general public.[136]

159. While Officer Pittman made the bare assertion that thefts from vehicles within the Walkerton, Ontario, detachment area occurred, there was no other relevant evidence in support of the assertion that thefts were common in Paisley, Ontario, and/or a matter public knowledge up to and including at the time of the accident.

The Court of Appeal Disregarded Serious Issues with the Evidence

160. Notwithstanding the unreliability of the evidence outlined above, the Court of Appeal described this testimony as relevant to establishing a prior history of vehicle theft "both in general and from Rankin's Garage in particular".[137]

161. Furthermore, the Court of Appeal relied upon the testimony of C.L.C. to "reinforce" the conclusion that it was reasonably foreseeable that minors might take a car from Rankin's Garage if it was made easily available to them.[138]

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[134] Transcript, dated September 16, 2014, pg. 155-156, lines 1-31, 1-4, pg. 169-170, lines 22-32, 1-10 [**AR Tab 36C**]; Jury Charge, dated September 25, 2014, pg. 522, lines 13-20 [**AR Tab 6**].
[135] Transcript, dated September 16, 2014, pg. 151, lines 1-19, pg. 154-155, lines 1-13, 1-27, pg. 169-170, lines 21-32, 1-10 [**AR Tab 36C**].
[136] Transcript, dated September 16, 2014, pg. 155, lines 1-27, pg. 170, lines 4-10 [**AR Tab 36C**].
[137] Court of Appeal Judgment, at para. 48 [**AR Tab 10**].
[138] Court of Appeal Judgment, at para. 53 [**AR Tab 10**].

162. Although the Court of Appeal concluded otherwise, it is improper to require that the Appellant garage "should have had minors like J.J. in mind…"[139] when there was no evidence to suggest young people had ever stolen anything from his property and in the absence of any evidence to show it was a matter of public knowledge that thefts were occurring at the relevant time.

Conclusion

163. This Honourable Court should overturn the decision of the Court of Appeal below and decline to recognize the duty of care. Individual responsibility must not evaporate from the common law of negligence – the individual decisions to become intoxicated, trespass, steal a car, and drive while impaired can and should be brought to bear on any assessment of foreseeability. It is submitted these decisions strongly militate against a finding of civil liability against the Appellant garage in this case because such conduct effectively severs the relationship of proximity necessary to establish the duty of care.

164. This is not the case to recognize the duty of a garage/car dealership owner to a minor involved in stealing a car from his property, or 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. Should this Honourable Court find sufficient proximity and reasonable foreseeability could have been established in the circumstances of this case, there are *strong* public policy reasons against recognition. Imposition of the novel duty of care would create a shifting standard of civil liability, and blames the victim of a criminal act for the consequences of criminal acts committed against them.

165. Even if this Honourable Court affirms recognition of a novel duty of care, it is submitted the evidentiary record in this case is extremely modest, and in many respects non-existent. As such, this is not an appropriate case to apply a novel duty of care. The Court of Appeal worked its way around significant defects in the evidence in an unhelpful and erroneous fashion. Taken together, the decisions below upset the integrity of negligence analyses generally and warrant intervention by this Honourable Court.

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[139] Court of Appeal Judgment, at para. 56 [**AR Tab 10**].

166. In short, the Respondent's criminal conduct can and should factor into the analysis at both stages of the *Anns/Cooper* test.

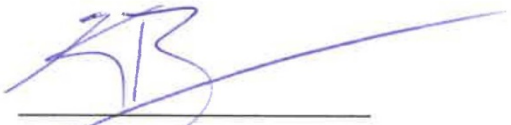
PART IV – SUBMISSIONS ON COSTS

167. The Appellant submits that costs should follow the event, and if its appeal is successful, seeks its costs here and below.

PART V – ORDERS SOUGHT

168. The Appellant respectfully requests that the appeal be granted, with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2017



David S. Young
Kevin R. Bridel
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PART VI – TABLE OF AUTHORITIES

Cases **Para.**

Legislation/ Regulations/ Rules

Occupiers' Liability Act, R.S.O. 1990, c. O.2, ss. 1, 2, 3, 4(2)