

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

B E T W E E N:

**JAMES CHADWICK RANKIN,
Carrying on business as RANKIN GARAGE & SALES**

**APPELLANT
(Appellant)**

and

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

**RESPONDENTS
(Respondents)**

and

ONTARIO TRIAL LAWYERS ASSOCIATION

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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 STATEMENT OF FACTS

A. Overview

1. This appeal raises the question, to what extent the law of negligence limits or should limit the accountability of those person(s) whose actions or omissions are found to have contributed to the harm that befalls a youth involved in an unfortunately tragic and catastrophic motor vehicle accident.

2. More specifically as it relates to the facts of the present case, the question before the Court is whether the law does, or should recognize a duty of care owed by the person who failed to secure a vehicle on his premises to the young person injured in one of those unsecured vehicles taken without consent for a “joy ride”.

B. The Role of the Minister

3. The interest of the Minister of Finance in these issues is limited to its role under the Ontario *Motor Vehicle Accident Claims Act*.¹

4. Under the *MVAC Act*, the Minister can pay judgments out of the taxpayer’s Motor Vehicle Accident Claims Fund (“the Fund”) to claimants injured in accidents involving unidentified or uninsured motor vehicles.² In this case, the vehicle taken from Rankin’s Garage (“Rankin’s”) is considered an uninsured motor vehicle because of the exclusion for vehicles in possession of person(s) without consent as set out in the Standard Ontario Automobile Insurance Policy.³ The Fund, established originally as the Unsatisfied Judgment Fund in 1947⁴ is considered by the Courts to be the “payor of last resort”.⁵

5. A precondition to payment out of the Fund requires the applicant to bring an action “against

¹ *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41 [*MVAC Act*].

² *MVAC Act*, ss.7, 12, 19.

³ O.A.P. 1- Ontario Automobile Policy, approved by the Superintendent of Financial Services for use as the standard Owner’s Policy on or after June 1, 2005 [OAP 1], s. 1.8.2.

⁴ *Minister of Consumer and Commercial Relations v. Employers Mutual Liability Insurance Company of Wisconsin*, 1980 CanLII 1798 (C.A.) at para. 7.

⁵ *Young v. Ontario (Minister of Finance)*, 2003 CanLII 23640 (C.A.), at para. 2.

all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in questions and prosecuted against every such person to judgment or dismissal”⁶

6. In this case, the Plaintiff brought action against the driver, C.C. for his negligent operation of the motor vehicle; C.C.’s mother, D.C. for her negligent supervision of minors; and the Appellant, Rankin’s for his failure to safe keep operable customer vehicles left unlocked and unsecured.⁷

7. From the Minister’s perspective, the issues raised in this case are important to the proper administration of the Fund in the public’s interest. Whether or not an applicant seeking payment out of the Fund can reasonably be considered to have a cause of action against persons such as the Appellant, Rankin’s (in commercial settings or otherwise) will determine in the future whether the Minister may be obligated to make payment out of the Fund or whether these claims will ultimately be paid by insurers who have issued policies covering the types of negligence encountered in this case.

C. The *MVAC Act* and Legislative Scheme

8. Under the *MVAC Act*, the Minister is granted power to take such action as he or she considers appropriate “on behalf of and in the name of the defendant.”⁸ Further, under the *Act*, the Minister can act for a minor without the appointment of a litigation guardian.⁹ The role of the Minister in defending the uninsured or unidentified driver is not to protect the interests of that person but to bind them to the decisions the Minister makes in the public interest. This includes seeing that the interests of the injured Plaintiff are addressed by paying what is required out of the Fund or determining there is insurance coverage that should pay the claim instead. This is of particular concern to the Minister as insurance coverage for the damages claimed acts as a complete bar for payment out of the Fund.¹⁰ If a judgment is paid out of the Fund, the judgment is assigned to

⁶ *MVAC Act*, s. 7(3).

⁷ Record of the Appellant, (“A.R.”), Part II, tab 13, p. 1, Fresh as Amended Statement of Claim, dated March 29, 2012.

⁸ *MVAC Act*, s. 8(2).

⁹ *MVAC Act*, s. 8(4).

¹⁰ *MVAC Act*, s.22(1).

the Minister for collection measures to obtain reimbursement from the uninsured driver and other uninsured co-defendant(s) on a joint and severable basis.¹¹

9. Through statutory participation in court proceedings, the Minister is able to ensure no payment is made out of the Fund unless warranted and in accordance with the requirements of the *MVAC Act*.¹² As is its practice, the Minister assigned counsel in this case to file a defence on behalf of and in the name of the minor driver, C.C.¹³

10. The *MVAC Act* is part of a legislated automobile insurance scheme in Ontario that includes the *Compulsory Automobile Insurance Act*¹⁴, the *Insurance Act*¹⁵ and the *Highway Traffic Act*.¹⁶ The scheme provides protection for vehicle owners by limiting their liability, as well as placing limits on the rights of those injured, when vehicles are taken without the owner's consent.¹⁷

11. For example, the law prohibits a tort action being brought by C.C. for the injuries which he suffered in this accident.¹⁸ There is typically no liability or uninsured automobile coverage under a Standard Ontario Automobile Policy where a vehicle is used or operated by a person in possession of the vehicle without the owner's consent.¹⁹ However, the same policy will provide for the payment of statutory accident benefits on a no fault basis (with some restrictions) to the person(s) who did drive or occupy the "stolen" vehicle.²⁰

12. In a typical case, statutory accident benefits would be available to J.J. under his parent's policy. His parent's uninsured automobile coverage,²¹ which would ordinarily extend coverage to a

¹¹ *MVAC Act*, s.9.

¹² *MVAC Act*, s. 8(2).

¹³ A.R., Part II, tab 19, p. 30, Amended Statement of Defence and Crossclaim of C.C., dated August 26, 2010.

¹⁴ *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25 [*Compulsory Automobile Insurance Act*].

¹⁵ *Insurance Act*, R.S.O. 1990, c. I.8 [*Insurance Act*].

¹⁶ *Highway Traffic Act*, R.S.O. 1990, c. H.8 [*Highway Traffic Act*], s. 192.; *Ont. Reg. 403/96 - Statutory Accident Benefits Schedule- Accidents on or After November 1, 1996*, s.30.

¹⁷ *Compulsory Automobile Insurance Act*, s. 2(1); *Highway Traffic Act*, s. 192(2).

¹⁸ *Insurance Act*, s. 267.6.

¹⁹ O.A.P. 1, s. 1.8.2.

²⁰ O.A.P. 1, s. 4.4.

²¹ *Insurance Act*, 265, *Ont. Reg. 676 – Uninsured Automobile Coverage*, R.R.O 1990.

dependant, is not available because of the exclusion as set out in section 1.8.2 of the OAP 1.²² Likewise, there could be no recovery against the vehicle owner's policy.

13. The Appellant, Rankin's on the other hand would typically have insurance coverage (personal or commercial) for his own negligence that does not fall under the exclusion that is part of the OAP 1.

D. Statement of Facts

14. This Respondent relies generally on the unchallenged facts as found by the Honourable Trial Judge, and accepts and adopts the facts as outlined in the Factum of the Respondents, J.J. by his Litigation Guardian, J.A.J., J.A.J. and A.J. ("J.J.").

15. The Minister further relies on the fact the two minors did not intend to steal the vehicle, but rather only acted opportunistically when they discovered keys left in the unlocked vehicle.²³

16. The Minister also relies on the fact that the minor, C.C. was charged under the *Youth Criminal Justice Act*²⁴ which emphasises in its Declaration of Principles that the criminality of youth should be treated separately from adults due to diminished moral blameworthiness or culpability consistent with their greater dependency and reduced levels of maturity.²⁵

PART II – STATEMENT OF ISSUES

17. This Respondent states the following with respect to the legal and evidentiary issues put forward by the Appellant:

Issue 1: Is there a duty of care owed to J.J. by Rankin's Garage:

A duty of care is owed to J.J. by Rankin's Garage for the reasons set out by the trial judge and the Court of Appeal.

Issue 2: Was the evidence sufficient to find a duty of care?

There was a sufficient evidentiary foundation in this case to support the trial Judge and

²² *Simison (Litigation Guardian of) v. Catlyn*, 2004 CanLII 22313 (ON C.A.), at para. 27.

²³ Record of the Respondent, J.J. ("R.R."), Part II, tab 8, pp. 60-61, Evidence of C.C., September 17, 2014, pp 236-237.

²⁴ *Youth Criminal Justice Act*, S.C. 2002, c. 1 [*Youth Criminal Justice Act*].

Jury's findings that a duty of care was owed to J.J. by Rankin's Garage.

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

18. This Respondent agrees that the factual findings made at the trial level should not be interfered with on appeal absent a palpable and overriding error.²⁶ It is submitted that the Appellant has not demonstrated such an error.

19. Whether or not there is a duty of care is a question of law and the standard of review is correctness.²⁷ Conversely, the standard of care is a question of mixed fact and law and accordingly, the standard of review is reasonableness.²⁸

Issue 1: Is there a duty of care owed to J.J. by Rankin's Garage:

20. The Minister supports the view of the Respondents, J.J. and Intervenors that there is a duty of care, either previously recognized in law as found by the trial judge,²⁹ or one that should be recognized for the reasons stated by the Ontario Court of Appeal.³⁰

Issue 2: Was the evidence sufficient to find a duty of care?

21. This Respondent submits that there was a sufficient evidentiary foundation in this case to support the trial Judge and Jury's findings that a duty of care was owed to J.J. by Rankin's Garage.

B. Minister's position on the core issues

22. The Minister agrees generally with the analysis presented by the Respondent, JJ but does not agree to the extent it is the Respondent, J.J.'s position that the analysis of the issue needs to be restricted to commercial undertakings.³¹

²⁵ Respondent, J.J.'s Factum, para. 96.

²⁶ *Housen v. Nikolaisen*, 2002 S.C.C. 33 (CanLII) [*Housen*], at paras. 10-18.

²⁷ *Housen*, at paras. 29-30.

²⁸ *Fullowka v. Royal Oak Ventures Inc.*, 2008 N.W.T.C.A. 4 (CanLII) at para 55.

²⁹ R.R., Part II, tab 12, pp. 104-105, Ruling, September 23, 2014, pp. 422-423.

³⁰ A.R., Part I, tab 10, pp. 134-144, Court of Appeal for Ontario Reasons for Judgment of Strathy C.J.O., Brown and Huscroft J.J.A. ("Reasons"), at paras. 37-73.

23. The Minister submits the legislative scheme supports the recognition of a duty of care. Further, the current public policy, as is evidenced by the legislative scheme, should not prevent the recognition of a duty of care obliging all who have vehicles in their care to do what they can to prevent unauthorized use.³² While it could be argued that “trespassers and thieves” may not be owed a duty of care in many situations, this appeal is grounded in the context of the ubiquity of motor vehicle use which includes joyriding and that is highly regulated for purposes of personal and public safety, including mandatory insurance coverages. It is obvious to most that leaving a car running, or unlocked with the keys accessible risks not only theft, but permits a stranger (with unascertainable driving skills) to 1) damage the vehicle; 2) damage property owned by others; 3) hurt others; and 4) hurt themselves.

24. From the Ministers perspective the cases referred to by the other parties are consistent with the legislative scheme which at its heart sets out a clear relation of proximity in most cases between the motor vehicle, those legally responsible for the motor vehicle and every person who possesses, uses, occupies and/or comes into contact with motor vehicles.³³

25. It is respectfully submitted that recognition of a duty of care with respect to the use and operation of motor vehicles, would promote more careful safe keeping of vehicles leading to a reduction of foreseeable risks, and which on balance would benefit the public at large. Despite the obiter comments of the Court of Appeal the duty does not, in principle need to be restricted to commercial use of vehicles.³⁴ Every owner should have an obligation to lock their vehicles for foreseeable risks.

26. The legislative scheme accepts that criminality itself is not, or should not be a complete bar to recovery. The scheme instead places limits on recovery, rather than eliminating it.³⁵ As the other parties have argued, a similar limiting can be accomplished by focusing instead on the standard of

³¹ Respondent, J.J.’s Factum, para 78.

³² *Kalogeropoulos v. Ottawa*, 1996 CarswellOnt 3827 (C.J.), at para. 37, 50-54.; *Spagnolo et al. v. Margesson’s Sports Ltd. et al.*, 1983 CanLII 1904 (ON C.A.), at paras. 4, 6, 8; *Cairns v. General Accident Insurance Co. of Canada*, 1992 CarswellOnt 2403 (C.J.), at p. 8

³³ See for example, *Insurance Act*, ss. 239, 265, 267.7, 268.

³⁴ A.R., Part I, tab 10, p.134-144, Reasons, at paras.37-73.

³⁵ O.A.P. 1, section 1.8.2.; *Highway Traffic Act*, s. 192(2).

care and contributory negligence.³⁶

27. The Minister relies on this Court's decision in *Hall* which held the illegality of actions be dealt with as a defence rather than to determine the duty of care in first instance.³⁷ This is important to the Minister as it retains the discretion to refuse to pay judgments for Public Policy reasons which are unique to its administration of the Fund.

28. Policy consideration such as the need to have special regard for youth and children, the general obligation of all to prevent harm, and more importantly, the importance of motor vehicle safety in Canadian society are all valid considerations.

PART IV – SUBMISSIONS ON COSTS

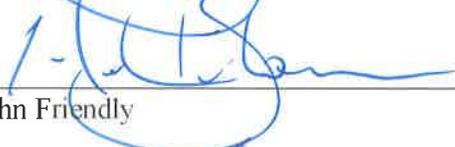
29. In the circumstances the Minister does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

30. The Minister makes these submissions only for the purposes to explain its role and provide perspective with respect to the larger legislative context. It also asks in the name and on behalf of C.C. that the result of the decisions below be upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of August, 2017.


 On _____
 Jennifer Chapman


 On _____
 John Friendly

³⁶ Respondent, J.J.'s Factum, paras. 79-81.

³⁷ *Hall v. Hebert*, 1993 CanLII 141 (S.C.C.), at p. 176.

PART VI – TABLE OF AUTHORITIES

<u>Cases</u>	<u>Para.</u>
1. <i>Cairns v. General Accident Insurance Co. of Canada</i> , 1992 CarswellOnt 2403 (C.J.)	24
2. <i>Fullowka v. Royal Oak Ventures Inc.</i> , 2008 NWTCA 4 (CanLII)	20
3. <i>Hall v. Hebert</i> , 1993 CanLII 141 (SCC)	27
4. <i>Housen v. Nikolaisen</i> , 2002 SCC 33 (CanLII)	18, 20
5. <i>Kalogeropoulos v. Ottawa</i> , 1996 CarswellOnt 3827 (C.J.)	24
6. <i>Minister of Consumer and Commercial Relations v. Employers Mutual Liability Insurance Company of Wisconsin</i> , 1980 CanLII 1798 (ON CA)	4
7. <i>Simison (Litigation Guardian of) v. Catlyn</i> , 2004 CanLII 22313 (ON CA)	12
8. <i>Spagnolo et al. v. Margesson's Sports Ltd. et al.</i> , 1983 CanLII 1904 (ON CA)	24
9. <i>Young v. Ontario (Minister of Finance)</i> , 2003 CanLII 23640 (ON CA)	4
<u>Legislation/Regulations</u>	
10. <i>Compulsory Automobile Insurance Act</i> , R.S.O. 1990, c. C.25, s. 2(1) <i>Assurance-automobile obligatoire (Loi sur l')</i> , L.R.O. 1990, chap. C.25, s. 2(1)	
11. <i>Highway Traffic Act</i> , R.S.O. 1990, c. H.8, s. 192(2) <i>Code de la route</i> , L.R.O. 1990, chap. H.8., s. 192(2)	
12. <i>Insurance Act</i> , R.S.O. 1990, c. I.8, s. 265 , 267.6 , 268 , 239 <i>assurances (Loi sur les)</i> , L.R.O. 1990, chap. I.8, s. 265 , 267.6 , 268 , 239	
13. <i>Motor Vehicle Accident Claims Act</i> , R.S.O. 1990, c. M.41, ss., 7 , 8(2),(4) , 9 , 12 , 19 , 22(1) <i>indemnisation des victimes d'accidents de véhicules automobiles (Loi sur l')</i> , L.R.O. 1990, chap. M.41, ss. 7 , 8(2),(4) , 9 , 12 , 19 , 22(1)	
14. Ontario Automobile Policy (OAP 1) , ss. 1.8.2, 4.4	
15. <i>Ont. Reg. 403/96 – Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996</i> , s. 30 <i>Règl. de l'Ont. 403/960 - Annexe sur les indemnités d'accident légales - accidents survenus le 1er novembre 1996 ou après ce jour</i> , s. 30	
16. Ont. Reg. 676 –Uninsured Automobile Coverage , R.R.O. 1990	
17. <i>Youth Criminal Justice Act</i> , S.C. 2002, c. 1, Declaration of Principle at s. 3(1)(b) <i>Loi sur le système de justice pénale pour les adolescents</i> (L.C. 2002, ch. 1), Déclaration de principes, s. 3(1)(b)	