SCC File No. 37323

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's Garage & Sales
Appellant

- and -

J.J. by his litigation Guardian, J.A.J., J.A.J. and A.J. and C.C.
Respondents

- and -

ONTARIO TRIAL LAWYERS ASSOCIATION and
JUSTICE FOR CHILDREN AND YOUTH
Interveners

FACTUM OF THE INTERVENER, JUSTICE FOR CHILDREN AND YOUTH

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

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PART I. FACTS AND OVERVIEW

1. At the heart of this appeal is whether the status of the claimants as minors, and the nature of their conduct, are relevant factors to the two-part analysis under the *Anns-Cooper*[1] test for a novel duty of care.

2. Justice for Children and Youth ("**JFCY**") characterizes the duty of care at issue in this appeal as being between businesses that store dangerous equipment, such as cars, and the public. JFCY submits herein that adult activities doctrine cannot be used to negate a duty of care owed to a minor and that the Appellant has applied the adult activities doctrine in a manner that is improper, ill-conceived and problematic for future cases involving minors in negligence law.

3. JFCY generally accepts the facts as described by the parties, and takes no position where they differ. JFCY supports the Respondents' and Intervener Ontario Trial Lawyers Association's position that the assessment of immoral and criminal conduct is not a relevant policy basis to negate a *prima facie* duty of care, and relies on their arguments in respect thereof.

PART II. ISSUES

4. The two issues on appeal from JFCY's perspective are as follows:

   (a) Is the adult activities doctrine applicable at stage two of the *Anns-Cooper* test?

   (b) Are there serious and overriding policy considerations to preclude a novel duty of care in this appeal?

5. As detailed in the paragraphs that follow, JFCY submits that the answer to each of these questions is "no".

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[1] *Anns v. Merton London Borough Council*, [1977] 2 W.L.E. 1024 (H.L.) ["***Anns***"]; *Cooper v. Hobart*, 2001 SCC 79 ["***Cooper***"].

PART III. SUBMISSIONS

A. Issue #1: The Adult Activities Doctrine is Not Applicable at Stage Two of the *Anns-Cooper* Test

6. The Appellant invokes the adult activities doctrine, either expressly or impliedly, at paragraphs 115, 116, 117, 118, 133 and 141 of its factum, to bolster his submission that any criminal conduct, whether perpetrated by a minor or an adult, is a valid policy basis to negate a *prima facie* duty of care, under stage two of the *Anns-Cooper* test.

7. The Appellant specifically relies upon leading case law regarding the adult activities doctrine, in which Canadian courts have found that minors engaged in certain types of activities should be held to an adult standard of care.[2] Adult activities at law have been found to include activities such as driving motor vehicles,[3] riding trail bikes,[4] driving snowmobiles,[5] siphoning gas from an automobile at the request of the owner,[6] and playing golf on a public golf course[7].

8. In attempting to persuade this Court that immoral and illegal conduct can and should preclude a *prima facie* duty of care, the Appellant relies upon the adult activities doctrine, with no regard to its traditional use in the standard of care analysis, or to the criminal context at issue in this appeal.

9. In so doing, the Appellant turns the adult activities doctrine on its head, using it to shield negligent parties from liability, instead of its intended use, discussed below, which is to ensure that injured parties have recourse in circumstances where minors are engaged in select adult (often insurable) activities such as driving cars. Moreover, as noted, the adult activities doctrine is applicable to the assessment of the standard – not duty – of care.

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[2] Factum of the Appellant dated June 5, 2017 ["**Factum of the Appellant**"] at paras. 117 and 188.
[3] *McErlean v. Sarel et al.*, [1987] O.J. No. 873, 1987 CarswellOnt 762 ["***McErlean***"].
[4] *McErlean, supra* 4; *Robertson v. Butler*, 32 A.C.W.S. (2d) 386, 1985 CarswellNS 13 [*"**Robertson**"]; *Lutley (Guardian ad litem of) v Jarvis Estate,* 144 N.S.R. (2d) 378, 1992 CarswellNS 584 ["***Lutley***"].
[5] *Ryan et al. v. Hickson et al.,* 7 O.R. (2d) 352, 1974 CarswellOnt 398 [*"**Ryan**"]; *Mont et al. v. Black et al.,* 83 N.S.R. (2d) 407, 1988 CarswellNS 14 ["***Mont***"]; *Parril v. Genge,* 1997 CanLII 1466 (NL CA) ["***Parril***"].
[6] *Gormac Investments Ltd v R.M.,* 23 A.C.W.S. (2d) 126, 1983 CarswellBC 1969, ["***Gormac Investments***"].
[7] *Pope v. RGC Management Inc*., 2002 ABQB 823 (CanLII) ["***Pope***"].

i. The adult activities doctrine is relevant to the standard of care applied to minors engaged in select activities

10. The adult activities doctrine is an exception to the rule in negligence that the conduct of minors is generally judged subjectively considering children of like age, intelligence and experience, as stated in the 1956 decision of *McEllistrum v. Etches*[8]:

> It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience.[9]

11. Despite the Court's implicit acknowledgement in *McEllistrum* of the evolving capacities of minors, the adult activities doctrine developed in the United States in the 1960s, and in Canada in the 1970s, to differentiate the standard of care applicable to minors who operate motorized vehicles[10].

12. In the leading case of *McErlean v. Sarel et al.*, the Ontario Court of Appeal summarized the doctrine as follows:

> 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. […] The critical factor requiring greater care is the motor-powered nature of the vehicle. Automobiles, snowmobiles, power boats, motorcycles, trail bikes, motorized mini-bikes and similar devices are, it is manifest, increasingly available to teenagers, and are equally as lethal in their hands as in the hands of an adult… The potential risks of harm involved in such activities are apparent, and they must be recognized by parents who permit their teenagers the use of such powerful machines.[11]

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[8] *McEllistrum v. Etches*, [1956] S.C.R. 787 ["***McEllistrum***"].
[9] *McEllistrum, supra* note 8 at para. 9.
[10] The doctrine evolved to a small number of other contexts not involving motorized vehicles. See paragraph 8 of this factum.
[11] *McErlean, supra* note 4 at para. 55.

13. Why are minors held to an adult standard of care in select circumstances? One expressed rationale for this doctrine is fundamentally economic. As described by Professor Lewis Klar in *Tort Law*[12]:

> Negligence law does not expect young children to possess the common sense, intelligence, and knowledge of the reasonable adult and has fashioned a standard suitable to children. […] A principle which has some jurisprudential basis in raising the standard of care which is to be applied to children is the "adult activities" doctrine. According to the leading American case which applied this principle, *Dellwo v Pearson*, minors who operate automobiles, airplanes, or powerboats will be held to the same standard of care as would adults in similar circumstances. Several reasons may be behind this approach. One is that victims of accidents involving motorized vehicles should be entitled to expect ordinary prudence from the drivers of such vehicles, especially since these activities are ordinarily adult activities. **There is, as well, the probability that such accidents will be covered by liability insurance, and the recognition of the inherent dangers involved in these types of activities. The doctrine has been criticized, however, as being vague and difficult to apply; what, after all, is an adult activity?** As well, its appropriateness in cases where the minor is a plaintiff, and not a defendant, has rightly been questioned. **It has nevertheless been applied in Canada, although infrequently and arguably without making much practical difference to the outcome of the case**.[13]

14. This logic makes intuitive sense. An injured party engaged in an activity that is normally required to be insured, should not be denied appropriate recourse simply because the operator of the vehicle is a minor.

15. Another rationale behind the doctrine was more recently explained by Professors Linden and Feldthusen in *Canadian Tort Law*,[14] in which they write:

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[12] 6th ed. (Toronto: Thompson Reuters, 2017) ["**Klar, *Tort Law***"].
[13] Klar, *Tort Law*, *supra* note 13 at 409, 411-412 [citations omitted].
[14] 10th ed. (Toronto: LexisNexis, 2015) ["**Linden, *Canadian Tort Law***"].

> 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…
>
> 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 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**.
>
> This concept, now embraced by the Ontario Court of Appeal, was initially woven into the fabric of Canadian law by Mr. Justice Goodman (as he was then) in *Ryan v. Hickson*…Instead, he held that children who engaged in adult activities such as snowmobile driving, which has **no statutory restrictions with respect to age**, should be given no special privileges, but should be required to live up to the standard of the reasonable person. [15]

16. Professors Linden and Feldthusen articulate a different rationale that would hold those whom society has "permitted" to operate a motorized vehicle, to be held to the same standard as all others permitted to operate the same types of vehicles, regardless of age. This rationale also makes intuitive sense and is similar to the rationale provided in *McErlean,* in which the Court references the permission of parents. When society deems a minor to be ready for a certain type of "adult activity", and extends its permission to so engage, that minor will be held to the same standard as all others permitted to engage in that same activity.

17. However, none of the principled reasons for the adult activities doctrine are triggered at stage two of the *Anns-Cooper* test. The Appellant has offered this Court no reason why the adult activities doctrine, on its own, can or should serve as a residual policy consideration for precluding a minor from an otherwise valid claim in negligence law. There is no explanation given as to why the doctrine, as traditionally construed, should be extended beyond the standard of care analysis to a duty of care analysis, in these or similar circumstances.

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[15] Linden, *Canadian Tort Law*, *supra* note 15 at 168-169, §5.83, §5.84.

ii. The adult activity doctrine should not be applied in conjunction with criminality considerations, given body of law on youth criminal justice

18. The Appellant also seeks to improperly extend the applicability of this narrow exception in negligence law to cases that also raise criminality considerations. However, the doctrine was not intended to be applied, either directly or by analogy, to support an argument that minors should be treated like adults in civil law where they have engaged in criminal conduct. There is good reason for this.

19. The treatment of minors engaged in criminal conduct is subject to a robust body of law that has evolved over decades in Canada and internationally. This body of law acknowledges and accounts for the inherent vulnerabilities, reduced moral culpability and evolving capacities of minors, and ensures there are unique and appropriate protections in place for minors engaged in criminal conduct.[16]

20. Canada's separate and distinct system for youth criminal justice reflects a commitment to recognizing the unique features of adolescence, in particular, and its relevance in law. The principles of the youth criminal justice system are informative in the case at bar given the Appellant's argument that criminal conduct, even when perpetrated by minors, should preclude a duty of care.

21. International consensus and Canadian legal tradition have recognized the inherent vulnerability of minors in society,[17] and specifically in the context of criminal behaviour, occasioned by their lack of sophistication and maturity and their dependence on adults.[18] Widely accepted research into adolescent neurological and psychological development confirms that

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[16] *Youth Criminal Justice Act*, S.C. 2002. c. 1 ["***YCJA***"].
[17] United Nations Convention on the Rights of the Child, 28 May 1990, 1577 UNTS 3 (entered into force 20 November 1989, ratified by Canada on 13 December 1991) ["***UNCRC***"]; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), 29 November 1985, GA Res 40/33.; United Nations Committee on the Rights of the Child, *General Comment No 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20; See also for example: *R. v. D.B.*, 2008 SCC 25; *R. v. L.T.H.*, 2008 SCC 49 at paras. 3, 33, 47; *R. v. R.C.*, 2005 SCC 61 at paras. 41, 43.
[18] *Ibid*. See also for example: For example, *R. v. C.D.*; *R. v. C.D.K.*., 2005 SCC 78; *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, ["***A.B.***"].

adolescents are physiologically and cognitively unable to reason, judge consequences, or make decisions like adults.[19]

22. This international legal consensus is articulated in the United Nations Convention on the Rights of the Child ("UNCRC") which is expressly incorporated into the *Youth Criminal Justice Act.*[20] The UNCRC recognizes that "childhood is entitled to special care and assistance" and requires "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity". The UNCRC accordingly requires that in all actions concerning minors, including those undertaken by a court of law, the best interests of the child shall be a primary consideration. Consideration of the best interests of the child is a threefold concept – a substantive right; a fundamental interpretive principle; and, a rule of procedure – in the public and private realms.[21]

23. This Honourable Court has noted that the recognition of minors as inherently vulnerable has deep roots in Canadian and international law, and that "the law attributes the heightened vulnerability based on chronology, not temperament."[22] This Court has also accepted the UNCRC and other international legal instruments as relevant interpretive tools in evaluating the approach to the rights and entitlements of children in a range of legal subject areas.[23] The realization of children's rights as vulnerable members of society is equally significant in the context of negligence law. It is important that this Honourable Court's decision in this appeal be informed by an appreciation for the unique place of children and their rights and obligations,

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[19] See Jones, B., Birdsell, M., & Rhodes, E., "A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth" (2013) 3:2 CR (7th) 350 at 356-357 citing: Laurence Steinberg, "Adolescent Development and Juvenile Justice" (2009) 5 Annu. Rev. Clin. Psychol. 459 at 465-468; Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?" (2009) 64 Am. Psychologist 739, at 742.

[20] *YCJA*, *supra* note 17.

[21] UNCRC, *supra* note 18, Preamble, Article 3; *YCJA*, *supra* note 17 Preamble; *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71; United Nations Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14.

[22] *A.B.*, *supra* note 19 [internal citations omitted].

[23] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 70 - 71, *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at paras 170 – 178; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056 – 1057; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at paras. 92 – 93.

including the internationally-accepted understanding of the best interests of the child as a primary consideration, and the rights of children in adolescence.

24. As such, the Appellant's use of the adult activities doctrine, in the manner in which it has on this appeal, is highly problematic for at least three reasons.

25. ***First***, the Appellant's argument in this respect is confusing and ill-conceived. The Appellant seems to be arguing that: the minors were involved "adult activities" (i.e. driving); for which minors have been held to the adult standard of care at law; the minors were also involved in criminal activities (i.e. stealing) for which there is case law that immoral and criminal conduct is a policy basis upon which to negate a novel duty of care (albeit contrary to this Court's jurisprudence); thus, there is precedent to preclude a novel duty of care in the case at bar.[24] This argument infuses the law on the standard of care to an analysis on the duty of care, without any explanation for why this approach is or should be acceptable.

26. ***Second***, by relying on the adult activities doctrine, thus equating minors to adults, the Appellant is seeking to circumvent well-established law protecting minors. The Appellant is importing criminality considerations into a duty of care analysis, but without the safeguards in place for the treatment of minors in criminal contexts. Whenever the moral culpability of a minor's conduct is at issue, their inherent vulnerabilities should be analyzed in the proper context. This is consistent with the courts' general application of a subjective analysis to the liability of minors in negligence law.

27. ***Third***, the Appellant's argument risks expanding the scope of the adult activity doctrine to include criminal conduct without any exploration of the serious consequences to the treatment of youth at law.

28. The Appellant provides no analogous precedent – and none exists based on the research conducted by JFCY – for applying the adult activities doctrine in the manner proposed. Importantly, none of case law relied upon by the Appellant in his submissions regarding stage two of the *Anns-Cooper* test involve minors. The adult activities doctrine is simply not relevant to the issues articulated by the Appellant on this appeal.

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[24] In particular, Factum of the Appellant at para. 141.

B. Issue #2: There are No Serious and Overriding Policy Considerations to Preclude a Novel Duty of Care on this Appeal

29. The second stage of the *Anns-Cooper* test permits residual policy considerations to negate a *prima facie* duty of care. These policy considerations are "not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."[25] As stated by the Court of Appeal in this case, "[t]he second stage of the analysis is concerned not with the impact of a duty on the defendant, but more broadly on other legal obligations, the legal system and society in general"[26]

30. The policy considerations proffered at stage two "must be more than speculative; a real potential for negative consequences must be apparent."[27] They must be stated with precision and established with evidence.[28]

31. The policy considerations which can negate a *prima facie* duty of care relate to broad societal and systemic issues and to the integrity of the justice system.[29] Examples include a concern about imposing indeterminate liability[30]; the need to avoid second-guessing the political decisions of public authorities[31]; protection of quasi-judicial decision making[32]; and the desire to avoid the distortion of other legal relations.[33]

32. Proposed policy considerations should be balanced with the goals of negligence law: compensation, fairness and deterrence.[34] Such a balance ensures that not all policy concerns will

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[25] *Cooper*, *supra* note 1 at para. 37.
[26] *J.J. v. C.C.*, 2016 ONCA 718 (CanLII) ["***ONCA Decision***"] at para. 61.
[27] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 48 ["***Hill***"].
[28] *Sauer v Canada (Attorney General)*, 2006 CanLII 74 (ON SC) at para. 1 ["***Sauer***"].
[29] See Linden, *Canadian Tort Law*, *supra* note 15 at 325, §9.65, citing S. Sugarman, "A New Approach to Tort Doctrine: Taking the Best From the Civil Law and Common Law of Canada" (2002), 17 S.C.L.R. (2d) 375, at 388.
[30] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 43 citing Cardozo C.J. in Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) , at 444. Linden in *Canadian Tort Law*, *supra* 15 at 325.
[31] *Cooper*, *supra* note 1 at para. 52.
[32] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para. 45.
[33] *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 (CanLII) at para. 80
[34] Linden, *Canadian Tort Law*, *supra* 15 at 325, 9.66; *Clements v. Clements*, 2012 SCC 32 at para. 19.

negate a *prima facie* duty of care. Rather, only "serious and overriding" considerations will suffice.[35]

33. The Appellant raises a speculative and imprecise policy concern to negate a *prima facie* duty of care: "the need to condemn criminal acts."[36] Specifically, the Appellant suggests first that the Respondents' criminal behaviour should negate the Appellant's duty of care; and second that the Respondents' minor status should not militate against negating the duty of care because the Respondents were engaging in an "adult activity."[37]

34. The Appellant offers no evidence or argument for *how* and *why* minors engaged in an "adult activity" is a policy consideration relevant to negating a *prima facie* duty of care. To rely on the sporadically-evolving adult activities doctrine as part of an analysis to negate a duty of care is contrary to the goal of the second stage of the *Anns-Cooper* test: a restrictive safeguard focusing on systemic societal issues and the integrity of the justice system.

35. JFCY respectfully submits that there are no serious and overriding policy considerations in the circumstances of this case to justify the denial of a *prima facie* duty of care. JFCY does not dispute, however, that driving a car as an unlicensed minor, stealing a car or driving a stolen car may have an effect on the apportionment of liability, as it did in this case.

PART IV. SUBMISSIONS ON COSTS

36. JFCY seeks no costs on this appeal and asks that no costs be ordered against it.

PART V. ORDER REQUESTED

37. JFCY takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of September, 2017.

Mary Birdsell/Bryn Gray/Carole Piovesan
Co-Counsel for the Intervener, Justice for Children and Youth

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[35] *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115 (CanLII) at para. 79; Linden, *Canadian Tort Law*, *supra* 15 at 326, 9.66.
[36] Factum of the Appellant at para. 114.
[37] Factum of the Appellant at paras. 113-118.

PART VI. TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced
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