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TORT LAW BULLETIN

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RANKIN v JJ: DOES A CAR GARAGE OWE A DUTY OF CARE TO SOMEONE INJURED FOLLOWING THE THEFT OF A VEHICLE FROM ITS PREMISES

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OVERVIEW

On May 11, 2018 the Supreme Court of Canada released its decision in *Rankin (Rankin's Garage & Sales) v J.J.* In this case, two minors aged 15 and 16 were looking to break into vehicles after smoking marijuana and drinking alcohol. C, one of the two minors, was able to find a vehicle unlocked with the keys inside at the commercial car garage owned by Rankin. C, who did not have a licence and had never driven a car before, stole the car, drove it onto the highway, lost control and crashed the vehicle. J, his passenger, suffered catastrophic injuries, and sued various defendants including Rankin. At trial and on appeal, it was held that Rankin owed J a duty of care of negligence, and was liable for J's injuries.

On appeal to the Supreme Court, the sole question was a legal one: was the risk of personal injury reasonably foreseeable in this case? In a 7-2 decision, the Supreme Court answered in the negative. As there was no reasonably foreseeable risk of personal injury, there was no duty of care owed by the Rankin to J.

Rankin is important for two reasons: first, the Supreme Court has created greater certainty with respect to how the term "reasonably foreseeable" is assessed with specific reference to personal injury cases. Second, it clarifies how defendants might avoid liability to third parties in the event of an incident.

LEGAL RULES & PRINCIPLES

The Supreme Court noted that there was no clear guidance in case law on whether a business owes a duty of care to a third party who is injured following the theft of a vehicle from its premises. The Court rejected including such a duty of care in the existing category

of “foreseeable physical injury”, and instead held that this duty must be a novel one. Given this, the Court moved to apply the *Anns/Cooper* test.

The *Anns/Cooper* test requires both reasonable foreseeability of the incident and sufficient proximity between the parties to establish a duty of care. Reasonable foreseeability is determined by considering whether the plaintiff has “offered facts to persuade the court that the risk of the type of damage that occurred as reasonably foreseeable to the class of plaintiff that was damaged.” In other words, reasonable foreseeability stems from the factual matrix surrounding the case, and whether those specific facts would lead one to conclude that the plaintiff, or someone in a similar position as the plaintiff, would suffer damage.

Proximity turns on whether parties are “sufficiently close and direct such that the defendant is under an obligation to be mindful of the plaintiff’s interests.” The proximity inquiry considers the “expectations, representations, reliance, and the property or other interests involved” between the parties. It is important to note that in cases of personal injury where there is very often no relationship between the parties, proximity will usually be established solely using reasonable foreseeability.

WHY THERE WAS NO DUTY OF CARE IN *RANKIN*

The Supreme Court spent most of its analysis on whether reasonable foreseeability could be found. It was not enough to determine that the theft of the vehicle was reasonably foreseeable. If the claim brought forward were for the property interest in the car, the theft being reasonably foreseeable would suffice. However, the claim in *Rankin* was for damages resulting from catastrophic injuries suffered by J. There needed to be evidence that both the theft of the vehicle and its unsafe operation were reasonably foreseeable. In other words, the proper question to be asked is whether it was reasonable for someone in the position of the defendant to foresee personal injury to a thief when considering the security of the vehicles stored at its lot.

There was ample evidence introduced at trial leading to the conclusion that theft was a common occurrence in the area. Various incidents had occurred in the past with theft of vehicles left on the lot and in the surrounding area. Police were routinely called to the area, and radio and newspaper articles often gave reminders to lock vehicles at night. However, there needed to be a foreseeable risk that if a car was stolen, it would be operated in an unsafe manner. Justice Karakatsanis, writing for the majority, makes this point clear:

> It does not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury. I do not accept that anyone that leaves a vehicle unlocked with the keys in it should always reasonably anticipate that someone could be injured if the vehicle were stolen. This would extend tort liability too far. Physical injury is only foreseeable when there is something in the facts that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner.

In *Rankin*, there were no additional facts to suggest that the stolen vehicles would be operated in a dangerous manner such that harm was reasonably foreseeable.

The Supreme Court considered three comparable cases in its decision where defendants were found liable. In *Kalogeropoulos*, a defendant left a vehicle running in an area with bars nearby just after closing time. A man returning from an evening of drinking stole the vehicle and crashed into a taxicab. A trial court found that it was reasonably foreseeable that if a vehicle were left with the doors unlocked and engine running, not only would the vehicle be stolen, but given the proximity to various bars it would be expected that damage would follow to a third party.

In *Cairns*, high school students stole car keys from a car dealership. The minors returned a few days later to steal two cars. One of the minors struck and killed a pedestrian. The Court found the dealership liable because it was aware that the likely thieves were minors without driving experience. Therefore it was reasonably foreseeable that they would return to steal a vehicle. This "connected the risk of theft to a risk of harm from an inexperienced driver fleeing the scene of the theft."

Finally, in the British Columbia case of *Provost v. Bolton*, an automobile dealership was found to have a duty of care (relying on the lower court decisions *Rankin*). In *Provost*, a vehicle was left running for 40 minutes in a populous area. The vehicle was stolen and an accident occurred while attempting to flee from police. Here, the link between the vehicle being stolen and harm to follow was based on evidence led regarding the risk of erratic driving that flows from fleeing the police in a stolen vehicle.

In each of these cases there was a connecting factor that allowed the Court to determine that physical harm was reasonably foreseeable because of vehicle theft. The Supreme Court distinguished these case as the parties in *Rankin* did not have a connecting factor to establish that personal harm was foreseeable from the theft of a vehicle.

CONCLUSION - MOVING FORWARD

The lower court decisions in *Rankin* were concerning from a liability insurance perspective, given the degree of damage exposure the business owner faced for what seemed like a relatively minor degree of responsibility. Leaving aside considerations of joint and several liability, the business owner in *Rankin* was assessed a higher degree of liability that both of the involved minors.

The Supreme Court's decision in *Rankin* has not precluded claims arising from comparable incidents, and businesses like the defendant in *Rankin* still need to guard against risks of injury caused by the intentional, reckless or criminal conduct of third parties. What the Court's decision does mean is that a duty of care, and possible liability exposure, is not presumptive, but must instead by proven by specific evidence of a risk of personal injury. Liability exposure will therefore depend heavily on the evidence available at trial.