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ARTICLE

Supreme Court of Canada Reinforces Reasonable Foreseeability of Harm as Critical Limiting Principle

A recent decision of the Supreme Court of Canada, *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19, reinforces that foreseeability of harm operates as a critical limiting principle in the law of negligence. The decision overturned a decision of the Ontario Court of Appeal previously reported on by BLG.

Background

In this case, a minor plaintiff (15 years old) suffered catastrophic injury following an accident in a stolen vehicle. The vehicle was being operated by a friend, also a minor (16 years old), who did not have a driver's licence or any driving experience. The teens stole the vehicle from Rankin's Garage & Sales — a business that serviced and sold cars and trucks. The garage property was not secured, and the two teens found the vehicle unlocked with its keys in the ashtray. The teens had consumed alcohol and marijuana earlier in the evening and planned to use the vehicle to pick up a friend in a nearby town.

The Trial Judge held that the garage owed a duty of care to the plaintiff and a jury apportioned 37 percent responsibility to the garage for the plaintiff's injuries. The Court of Appeal upheld the Trial Judge's finding that the garage owed a duty of care to the plaintiff. In particular, the Court of Appeal held that it was reasonably foreseeable that minors might steal an unlocked car with keys in it from Rankin's Garage and, further, that it was a "matter of common sense" that minors might injure themselves while operating the vehicle.

SCC Decision

A seven-judge majority of the Supreme Court overturned the decision of the Court of Appeal. The Majority emphasized the importance of framing the foreseeability inquiry with "sufficient analytical rigor" to connect the defendant's failure to take care (*e.g.*, leaving the vehicle unsecured) to the harm ultimately caused (*e.g.*, physical injury). Accordingly, in the context of this case, it was not enough to simply determine whether the theft of the vehicle was foreseeable. Further evidence of a connection between the theft and the unsafe operation of the stolen vehicle was necessary.

The Majority held that the evidence relating to the practices of Rankin's Garage or the history of theft in the area concerned the risk of theft but did not suggest that a stolen vehicle would be operated in an unsafe manner. The Majority emphasized that reasonable foreseeability is an objective test that is not to be conducted with the benefit of hindsight. The Majority warned that "Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur."

Following a review of lower court jurisprudence, the Majority rejected the suggestion that a foreseeable risk of injury automatically flows from a risk of theft. Such an approach would "extend tort liability too far." The Majority found that the Court of Appeal erred in relying on assumption or speculation (relating to the activities of minors) to connect the risk of theft to the risk of someone being physically injured. Rather, evidence of specific circumstances making it reasonably foreseeable that a stolen car might be driven in a way that would cause personal injury was required.

After finding that reasonable foreseeability was not established, the Majority went on to consider whether: (1) Rankin's Garage had a positive duty to secure the vehicles against theft by minors; and (2) illegal conduct could sever the proximate relationship between the parties or negate a duty of care. The Majority rejected the notion of a positive duty on a car garage to prevent harm, finding that analogies between car storage and alcohol service or between vehicles and firearms were misplaced. The Majority also noted that the fact that the plaintiff was a minor did not automatically create a positive duty to act. With respect to the second residual question, the Majority confirmed that "the notion that illegal or immoral conduct by the plaintiff precludes the existence of a duty of care has consistently been rejected," except in circumstances where the legislature has opted to modify the common law.

A two-judge minority would have upheld the Trial Judge's finding that Rankin's Garage owed a duty of care to the plaintiff and would not have required further evidence connecting the risk of theft to the harm suffered. In contrast to the Majority's comment that "analytical rigor" was required for a foreseeability analysis, the Minority preferred a view that reasonable foreseeability was a low threshold that would usually be satisfied where a plaintiff has suffered injury. The Minority would have found that the garage owner's testimony, that he had checked to make sure vehicles were safe from theft to avoid injuries that could be suffered by anyone who stole a vehicle, provided a sufficient evidentiary basis to satisfy the reasonable foreseeability test.

Takeaways

While the decision of the Majority in *Rankin* does not alter the law of negligence, it does in our view reinvigorate the role of reasonable foreseeability in determining whether a duty of care is owed between parties. To establish a duty, there must be some evidence to suggest that a person in the position of the defendant ought to have reasonably foreseen the risk of injury, not just the event from which it ultimately resulted. We expect *Rankin* to result in greater attention being paid to the foreseeability inquiry in future negligence cases.

From a risk management perspective, *Rankin* does not suggest that businesses, municipalities or other entities with care and control of vehicles may be less vigilant in their security measures. Rather, the decision emphasizes that these entities should take steps to consider the harm specific to their circumstances that could result from the theft of vehicles in their care and control. As an example, additional measures to mitigate the risk of theft may be required of entities storing vehicles which are not roadworthy or vehicles which require special training or experience to operate.

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