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A NEW DUTY OF CARE RECOGNIZED FOR AUTO DEALERS TO THIEVING, DELINQUENT MINORS

Richards Buell Sutton Insurance Newsletter

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A recent decision from the Ontario Court of Appeal affirmed that when it comes to tort law, “sentiment is not principle”: the duty of care operates independently of the illegal or immoral conduct of the injured party. In *J.J. v. C.C.*, 2016 ONCA 718 (“J.J.”), the Court found that the owner of a garage business owed a duty of care to a minor who was injured after participating in the theft of a vehicle from the owner’s premises. The case serves as a reminder to underwriters, adjusters and brokers that victims of a crime can still be liable in negligence and the categories of duty of care are never closed.

THE FACTS

The appellant, James Rankin owned a garage business that serviced and sold cars and trucks. One night in 2006, the respondent JJ, 15 years old, and his 16-year-old friend CC, who had been drinking and smoking marijuana, were walking around town with the intent of stealing items from unlocked cars. The boys ended up at Rankin’s garage which was unsecured and found an unlocked car with the keys in the ashtray. They stole the car and with CC driving and JJ as a passenger there was a serious accident. JJ suffered a catastrophic brain injury and sued Rankin, CC and CC’s mother, who had supplied the boys with alcohol, in negligence.

THE RULING

A trial was held before judge and jury. The trial judge, relying on jurisprudence, instructed the jury that Rankin owed a duty of care to JJ because “people [who] are entrusted with the possession of motor vehicles must assure themselves that youth... are not able to take possession of these dangerous objects.” The jury found Rankin, CC and CC’s mother all were negligent and that JJ contributed to the accident by willingly getting into a stolen car driven by CC, who he knew was drunk, unlicensed and inexperienced. The jury apportioned liability on Rankin at 37%, CC’s mother at 30%, CC at 23% and JJ at 10%.

A unanimous Court of Appeal upheld the judge’s instruction that Rankin owed a duty of care to the boys. While the court held the trial judge erred in concluding that a duty of care was established by prior cases it nevertheless found a new duty of care should be recognized through the application of the two-stage *Anns-*



Cooper analysis for finding a novel duty of care. Applying the two stage foreseeability and proximity analysis the court found it was reasonably foreseeable that minors might take a car from the garage if it was made easily available to them. In making this finding the court relied on the following facts:

- a vehicle had previously been stolen from Rankin's garage for joyriding;
- vehicle theft and mischief were common occurrences in the area;
- there was no evidence of any security measures at the garage; and
- cars onsite were often left unlocked with keys in them.

The court emphasized that this was not a car owner who carelessly left keys in the car at his home but a commercial garage that had control of many vehicles on an ongoing basis. At the second stage of the analysis, the court held that proximity was established because the appellant should have had minors like JJ in mind when implementing security measures at the garage. The court found no residual policy concerns to negate the duty of care.

The court's decision was influenced by the fact that Rankin had an interest in securing his own and others' vehicles, as bailee, while at his garage and how he could have done this by simply locking the vehicles and putting away their keys.

PRACTICAL CONSIDERATIONS

Underwriters and brokers should be cognizant of the new duty of care recognized in *J.J.* as, arguably, the duty could be imposed on any commercial enterprise that stores vehicles. Questionnaires and/or warranties may be pursued regarding vehicle security practices when insuring these entities. Having said this, new duty of care cases such as *J.J.* are often limited to their specific circumstances. The court recognized this when it noted the "duty in this case arises in circumstances that strictly limit its application".

Finally, Rankin has applied for leave to appeal to the Supreme Court of Canada. Accordingly, that court may have the final say on whether the new duty of care will be recognized. Regardless of the final outcome, *J.J.* serves as a reminder that the categories for finding a novel duty of care are always open.