OF CAR THIEVES, OPTICAL ILLUSIONS, AND SOCIAL HOSTS: HOW *RANKIN'S GARAGE* IS CHANGING CANADIAN DUTY ANALYSES

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This article assesses the impact of the Supreme Court of Canada's decision in Rankin (Rankin's Garage & Sales) v JJ on subsequent analyses of the duty of care. The majority's decision, while purporting to apply a "rigorous" analysis of foreseeability, conflates the duty and remoteness elements of the negligence tort and arguably applies a subjective test of what the particular defendant would have foreseen. Subsequently, this has led some appellate courts to apply highly granular tests of foreseeability at the duty stage, concluding that the factual scenarios were "rare" when they are, in fact, relatively common. Should this tendency continue, both the normative role of the duty of care and the precedential value of prior duty decisions will be eroded. Ultimately, this has the potential to prolong litigation, as each new case will provide an opportunity to distinguish the facts as being rare and unforeseeable.

L'auteure propose une évaluation des répercussions de l'arrêt de la Cour suprême du Canada dans Rankin (Rankin's Garage & Sales) c JJ sur les analyses subséquentes de l'obligation de diligence. La décision majoritaire, tout en faisant valoir une analyse « rigoureuse » de la prévisibilité, confond les éléments d'obligation de diligence et d'éloignement du préjudice dans le cadre de la responsabilité délictuelle liée à la négligence, et semble réellement appliquer un critère subjectif pour déterminer ce que le défendeur aurait pu prévoir. Par la suite, cela a amené certaines cours d'appel à appliquer des critères de prévisibilité très détaillés à l'étape de l'obligation de diligence, concluant que les scénarios factuels étaient « rares », quand ils sont dans les faits assez communs. Si cette tendance continue, cela érodera le rôle normatif de l'obligation de diligence et la valeur de précédent de la jurisprudence sur cette obligation. Au bout du compte, cela pourrait prolonger les litiges, chaque nouvelle affaire donnant l'occasion d'écarter les précédents en déclarant les faits rares et imprévisibles.

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I. Introduction

In *Donoghue v Stevenson*,[2] Lord Atkin famously remarked, "[I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances." At the time, he was seeking to find a common element to the specific duties of care that had already been recognized (e.g., common carrier/passenger, innkeeper/guest, master/servant). If there were a general principle underlying all these cases, then it would be easier to explain when a proposed new duty should be recognized. Lord Atkin's neighbour principle indicated that a duty of care is owed to "persons who are so closely and directly affected by my act that I *ought reasonably to have them in contemplation* as being so affected when I am directing my mind to the acts or omissions which are called in question."[3] Thus, the focus of his general principle was whether, objectively speaking, the defendant's actions posed a foreseeable risk of injury to the plaintiff.

The neighbour principle gained prominence during the 1960s and 1970s, during which it was extended beyond personal injury and property damage to cover negligent misstatements causing economic loss,[4] as well

2 [1932] AC 562 at 580 (HL) [*Donoghue*].

3 *Ibid* (emphasis added).

4 *Hedley Byrne v Heller & Partners*, [1964] AC 465 (HL); *Hercules Managements Ltd v Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 SCR 165.

as certain omissions.[5] Its climax came in *Anns v Merton London Borough Council*,[6] in which a fairly broad *prima facie* test of foreseeability was limited only by a second stage of "any considerations which ought to negative, or to reduce or limit the scope of the duty or the class or person to whom it is owed or the damages to which a breach of it may give rise."[7] In the ensuing years, foreseeability became a low threshold, such that most novel duty cases were decided at the second, liability-limiting stage.

As this test came to be perceived as too pro-plaintiff and too reliant on nebulous policy factors to limit the scope of a proposed duty, the Commonwealth courts went on to develop new, increasingly complex "frameworks" for analyzing novel duties of care.[8] In Canada, the framework was provided in *Cooper v Hobart*,[9] and involves a preliminary stage of foreseeability and proximity (i.e., the relationship between the parties) and a secondary stage of so-called "residual" policy considerations. The secondary stage examines the implications of recognizing the proposed duty on "other legal obligations, the legal system and society more generally."[10]

The *Cooper* test has been fleshed out through a series of cases over the last two decades. During that time, the concept of proximity has risen to prominence and is the basis on which the Supreme Court of Canada is most likely to reject a proposed duty of care.[11] Proximity has proven especially popular for assessing proposed duties owed by police and public authorities.[12] Factors that are often considered under the heading

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5 *Home Office v Dorset Yacht*, [1970] AC 1004 (HL) (failure to adequately supervise young offenders at an open island institution, allowing some of them to escape and steal the plaintiff's boat).

6 [1978] AC 728 (HL).

7 *Ibid* at 752.

8 See especially *Caparo Industries plc v Dickman*, [1990] 2 AC 605 (HL), consisting of foreseeability, proximity and an assessment whether it is "fair, just and reasonable" to impose the new duty of care; and *Perre v Apand* [1999] HCA 36 which set out the "salient features" or "multi-factoral" approach. Nevertheless, the UK Supreme Court has recently disavowed the *Caparo* test, suggesting that the correct approach is to expand the duty of care incrementally and by analogy to existing categories. See especially *Robinson v Chief Constable of West Yorkshire Police*, [2018] UKSC 4 at paras 21–30.

9 2001 SCC 79 [*Cooper*].

10 *Ibid* at para 37.

11 See James Plunkett, *The Duty of Care in Negligence* (Oxford: Hart Publishing, 2018) at 187 [Plunkett]. Of the cases applying the *Anns/Cooper* test, 37% rejected duty at the proximity stage, while 32% rejected it at the policy stage. The duty of care was upheld in 42% of the cases.

12 See e.g. *Cooper*, *supra* note 9; *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; and *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5.

of proximity include the relevant statutory framework, representations, expectations, reliance, and the interests at stake.[13]

However, trends over the last several years suggest that the Canadian courts may be moving away from their general tests of duty toward a more fact-specific inquiry. This is evident even in cases where the *Cooper* test is formally followed. While it may be premature to make any major predictions based on these trends, it appears that the courts are analyzing the duty of care at a more granular level and are moving away from generally applicable principles. Ultimately, there may be an increasing tendency to assess the duty of care afresh in any given negligence claim, with earlier cases providing only non-binding analogies. This development has occurred in two main ways: through a narrower application of the established "categories" of duty at the proximity stage and through a highly fact-specific approach to foreseeability.[14] This paper is concerned with the latter phenomenon. While foreseeability was for many years such a low hurdle as to be largely irrelevant in Canadian duty discussions,[15] it now has the potential to be determinative in a larger proportion of cases. Yet, unlike proximity and residual policy considerations, which at least have the semblance of a principled structure and body of precedent underlying them, reasonable foreseeability is more easily manipulated by parties and the courts. What seems foreseeable to one person may not seem foreseeable to another, and appending the adjective "reasonable" does not necessarily make foreseeability more definite in this regard. Moreover, with a fact-specific foreseeability analysis taking on greater weight, the duty of care could lose its important role as a signal that negligence liability should be available in a given set of circumstances, and it could become entirely coextensive with the remoteness inquiry. Canadian negligence law would thereby lose a critical normative aspect.

This article has four main sections. In the first, I set out the historical role of foreseeability in the duty analysis, distinguishing it from foreseeability at the remoteness stage. Next, I discuss the 2018 Supreme Court of Canada decision in *Rankin (Rankin's Garage & Sales) v JJ*[16] and its conflation of these two elements. I then review some recent provincial Court of Appeal decisions that followed the *Rankin's Garage* approach, especially their

13 See *Cooper*, *supra* note 9 at para 34.

14 Particularly following the decisions in *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 and *688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 [*Maple Leaf Foods*].

15 See Lewis N Klar, "Judicial Activism in Private Law" (2001) 80:1&2 Can Bar Rev 215 at 221, where the author suggested, "One must go back in time to pre-*Anns* jurisprudence to find unforeseeable plaintiffs." With all plaintiffs being foreseeable, Klar argued, the *Anns* test was focused only on questions of policy.

16 2018 SCC 19 [*Rankin's Garage*].

tendency to focus on the defendant's subjective knowledge. Finally, I discuss the broader implications for the law of negligence and the practice of civil litigation.

II. Past Approaches to Foreseeability

There is perhaps no concept more central to the tort of negligence than foreseeability.[17] It plays a role in determinations of the duty of care, breach of the standard of care,[18] and remoteness. Under the conventional view, the foreseeability inquiry progresses through these elements from the general to the particular.[19] At the duty stage, the question is whether it was foreseeable that the defendant's negligence could cause injury of a given type to someone in the plaintiff's position; it is not necessary to show that the particular plaintiff or the precise series of events was foreseeable to the defendant.[20] Indeed, when Lord Atkin described the duty of care owed by manufacturers in *Donoghue*, he deliberately referred to a wide range of household products apart from ginger beer, including "a harmless proprietary medicine, an ointment, a soap, a cleaning fluid, or a cleaning powder."[21] The key for Lord Atkin was that negligent manufacture of these products could foreseeably cause *some kind* of physical injury to *someone* in the broad class of consumers: "everyone, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests."[22] This broad notion of foreseeability was affirmed in *Cooper*, where the court described situations in which the

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[17] See David G Owen, "Figuring Foreseeability" (2009) 44 Wake Forest L Rev 1277 [Owens].

[18] The potential to confuse foreseeability at various stages is illustrated by *Resurfice Corp v Hanke*, 2007 SCC 7. The plaintiff was badly burned when a water hose was placed into the gasoline tank of an ice-resurfacing machine, causing the gasoline to vaporize and catch on fire. The court affirmed the trial judge's conclusion that it was not reasonably foreseeable that an operator would confuse the gasoline tank and the water tank, and thus (in the trial judge's view) there was no "duty to warn" (*Hanke v Resurfice Corp*, 2003 ABQB 616 at para 58). While the Supreme Court's analysis is unclear on this point (it simply used the heading, "Foreseeability"), it seems that foreseeability here properly refers to the standard of care, not the duty of care. The manufacturer surely owed a duty of care to users, especially given the serious harms that could flow from confusing the tanks. It was because the manufacturer was aware of these risks that it clearly labeled one of the tanks, "gasoline only." In doing so, it met the standard of care in the circumstances.

[19] See *Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastien Pty Ltd*, [1983] 2 NSWLR 268 at 295–96 (HCA).

[20] This was affirmed by the Supreme Court of Canada in *Maple Leaf Foods*, *supra* note 14 at para 26 (Brown J, for the majority).

[21] *Donoghue*, *supra* note 2 at 583.

[22] *Ibid*.

defendant's act poses a foreseeable risk of harm to the plaintiff's person or property as a recognized "category" of duty in itself.[23]

More specific questions of foreseeability are not assessed until the remoteness stage, when courts examine whether the plaintiff's *actual injury* was so unforeseeable that it would be unfair to hold the defendant responsible.[24] For example, in *Mustapha v Culligan of Canada*,[25] where the plaintiff suffered severe psychiatric injury after seeing a dead fly in an unopened bottle of water, the Supreme Court of Canada concluded summarily (and, some would say, erroneously[26]) that a duty was owed. According to the court, the case involved the established duty category of manufacturer/consumer, in which it is assumed that the defendant's negligence poses a foreseeable risk of some injury to the plaintiff. Put another way, manufacturers of ingested products ought to foresee that consumers will be harmed if they prepare or package their products negligently. It was not until the remoteness stage that the plaintiff's objectively bizarre psychological reaction was found to be too unforeseeable to be recoverable.[27]

As discussed below, the Supreme Court of Canada's approach to foreseeability in *Rankin's Garage* has disrupted this framework and has effectively conflated foreseeability at the duty and remoteness stages. This problem is not, in itself, new to negligence law or scholarship. It is the basis of Buckland's famous statement that duty is "an unnecessary fifth wheel on the coach."[28] I do not intend to rehearse the history of that discussion

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[23] *Cooper*, *supra* note 9 at para 36.

[24] See *Nelson (City) v Marchi*, 2021 SCC 41 at para 97: "Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury."

[25] 2008 SCC 27 [*Mustapha*].

[26] That is, because the duty is only owed to those who *use or ingest* the defective product, or because the type of injury suffered by the plaintiff (psychiatric harm) is not the kind that is foreseeable from the negligent packaging of water. Indeed, the Court of Appeal for Ontario had analyzed duty in light of the jurisprudence on the negligent infliction of psychiatric harm: *Mustapha et al v Culligan of Canada Ltd* 2006 CanLII 41807 (ONCA), 84 OR (3d) 457.

[27] One might also say that the plaintiff's psychological injury fell outside the "scope" of the duty that the defendant owed to consumers. However, this was not how the Supreme Court of Canada characterized the case. For a critique of the "scope of duty" concept, including its potential overlap with the elements of fault and remoteness, see Plunkett, *supra* note 11 at 128–31.

[28] WW Buckland, "The Duty to Take Care" (1935) 51 Law Q Rev 637 at 639. See also Percy Winfield, "Duty in Tortious Negligence" (1934) 34:1 Colum L Rev 41 at 43, where duty was described as "superfluous."

here, as it has been impressively explored by several excellent scholars.[29] Suffice it to say that, if the foreseeability analysis at the duty stage is highly fact-specific, it overlaps completely with the remoteness inquiry and adds nothing to the law or practice of negligence litigation.[30]

But that approach, in my view, undersells the roles of both foreseeability and what is sometimes called the "notional" duty of care.[31] Lord Atkin's neighbour principle, while framed in terms of foreseeability (or "reasonable contemplation"), entails much more than a simple factual inquiry. Couched within Lord Atkin's notion of foreseeability were implications of physical and/or relational closeness, which is why the label, "neighbour," is so apt. Although his reference to persons "closely and directly affected" was translated into the separate notion of "proximity" in the later twentieth century, Lord Atkin did not posit foreseeability and closeness as independent elements of duty. Rather, they entailed one another: it is because of the physical or relational closeness between the parties that the defendant's carelessness poses a foreseeable risk of harm to the plaintiff and is precisely why society expects the defendant to take reasonable steps to avoid this harm.[32]

Moreover, Lord Atkin framed the neighbour principle in forward-looking terms: when the defendant is "directing [its] mind to the acts or omissions which are called in question," the defendant should contemplate those who might foreseeably be harmed. It is to those persons that the defendant owes a duty to take reasonable care, and to whom the defendant may be found liable if the harm materializes. The duty of care thus serves to delineate the scope of potential liability *ex ante*. That is why foreseeability at the duty stage is framed in general terms; we are essentially asking whether this situation is the type to which negligence liability may attach.

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[29] See especially Plunkett, *supra* note 11 at 96–103; JG Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31:5 Can Bar Rev 471 [Fleming]. See also Donal Nolan, "Deconstructing the Duty of Care" (2013) 129 Law Q Rev 559 at 564–66, which distinguishes between the functions of "factual duty" and "notional duty" [Nolan]. The former, he argues, is more appropriately conceived of as a matter of remoteness (at 573).

[30] It is worth noting here that the UK Supreme Court recently ruled that remoteness is a defence to negligence, which must be proved on a balance of probabilities by the defendant. This approach quite clearly posits different roles for duty and remoteness. See *Armstead v Royal & Sun Alliance Insurance Company Ltd*, [2024] UKSC 6 at para 62.

[31] See Plunkett, *supra* note 11, chs 5–6; Nolan, *supra* note 29 at 567–70.

[32] Nevertheless, it is clear that foreseeability and proximity are now considered to be two separate elements of the duty analysis, with proximity involving questions of policy, "in the broad sense of that word." See *Cooper*, *supra* note 9 at para 30. In light of this jurisprudence, I have deliberately treated the two elements separately.

This more general, forward-looking framework gives the duty of care its moral or social force. To use *Donoghue v Stevenson* as an example, a manufacturer of ginger beer owes a duty of care to those who might foreseeably consume it and become ill if it is tainted by a harmful substance. The defendant must take reasonable steps to avoid that harm to that class of potential plaintiffs. Judicial recognition of this duty puts manufacturers on notice of their potential liability and will hopefully encourage them to improve their bottling processes to prevent the entry of mollusks or other contaminants. They know, *ex ante*, the potential scope of their liability; in turn, potential consumers know that they will be able to sue if the manufacturer fails to meet the standard of a reasonable ginger beer manufacturer and they suffer foreseeable harm as a result. Put another way, the common law courts have determined that manufacturer/consumer is a relationship that is subject to the law of negligence and the rights and obligations it entails.

Of course, this does not mean that liability always flows from this relationship; some injuries, like the one in *Mustapha*, might be so far-fetched or "remote" that the court considers it unfair to hold the defendant liable for them. But that does not affect the existence of the duty of care that a manufacturer generally owes toward consumers, either on the facts of the case or more broadly in society. As a duty category, manufacturer/consumer is well established and its existence is not up for debate just because the particular plaintiff suffers a bizarre injury.

Thus, the developments following *Rankin's Garage* will primarily be troubling for those who see the duty of care as performing an independent function in the law of negligence, whether that is labelled as moral, notional, normative, or social. The duty of care helps the courts, as an extension of society, to define the boundaries of negligence liability; we know which types of situations are normally subject to liability (e.g. foreseeable physical harm or property damage) and which types normally are not (e.g. pure economic loss, omissions).[33] When novel duties of care are alleged, the courts can make decisions whether to extend liability based on analogies to existing duty and no-duty categories and on the social conclusions that those categories signal. The courts do this without reference to the factual minutiae of any given case; indeed, if the duty of care were determined at a granular level in each case, it would cease to have any precedential value in the law or moral value in society.

David Owen thus explains why it is important to maintain the duty of care as the primary threshold question in the tort of negligence:

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33 Plunkett, *supra* note 11 at 114–117.

> As broad-based rules of law, duty (and no-duty) rulings by courts contain much more intrinsic power than do breach and [remoteness] rulings, for duty rulings far more prominently telegraph rules across the legal landscape that help lawyers and their clients understand the law. Since pure duty/no-duty rulings are exceptional, they deserve the widespread dissemination they receive, and converting important rulings of this type to case-specific breach and [remoteness] decisions drains them of their power to effectively communicate important information on the scope of law throughout the legal world.[34]

The majority's opinion in *Rankin's Garage* diminishes duty's role in defining the boundaries of liability in negligence and makes it challenging to know whether negligence liability can potentially apply in a given relationship or circumstance. The analysis depends too heavily on the characteristics of the individual defendant and plaintiff, the allegedly negligent act, and the particular way that the harm occurred. These factors can only be examined after the fact and so provide little by way of guidance to defendants, comfort to plaintiffs, or certainty to the law. The highly fact-specific approach in *Rankin's Garage* threatens to impair the precedential value of duty decisions and accelerate the re-fragmentation of duty into the "wilderness of single instances"[35] that Lord Atkin had hoped to draw together.

III. The Decision in *Rankin's Garage*

The series of events in *Rankin's Garage* was not wholly uncommon. Late one night, after they had been drinking, the plaintiff teenager and a friend stole a car from the defendant's garage business. The car had been left unlocked overnight with the keys in the ashtray. The friend, who had no driver's licence or driving experience, drove the car and caused a crash in which the plaintiff was catastrophically injured. In concluding that the defendant did not owe the plaintiff a duty of care, the majority of the Supreme Court of Canada reasoned that, although theft of an unlocked car was foreseeable, it was not foreseeable that theft would be perpetrated *by a minor* and that the car would be operated in an unsafe manner.[36] In the sections that follow, I will identify the ways in which the majority's decision is contrary to established jurisprudence and inaccurate as a matter of both law and fact.

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34 Owen, *supra* note 17 at 1304.

35 So wrote the commentator in "The Duty of Care towards One's Neighbour" (1883) 18 LJ 618 at 619: "The Law in regard to Negligence is the most uncultivated part of the 'wilderness of single instances' of which our law consists." The reference is to Tennyson's *Aylmer's Field* (1864).

36 *Rankin's Garage*, *supra* note 16 at paras 33–34.

A) The Decision Applies Corrective Justice Theory Too Narrowly

The majority explained that it was important to "fram[e] the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation."[37] It would not be fair, the majority reasoned, to impose liability on a defendant for a harm that it had no reason to foresee.

In this portion of the judgment, Justice Karakatsanis expressly referred to Ernest Weinrib's corrective justice theory. She described Weinrib as explaining that "the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff."[38] She went on, "[t]he foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury)."[39] This is an accurate statement of Weinrib's theory insofar as it goes. It is in the application of this principle that the majority's decision ventures into the territory normally covered by remoteness and then declares the factual scenario to be unforeseeable even though it is relatively commonplace in Canada.

While the majority did not cite *Palsgraf v Long Island Railroad Company*,[40] even casual readers of Weinrib will know that the case is central to his theory of corrective justice.[41] Without setting out Weinrib's theory in detail here, its essence is that corrective justice is fundamentally correlative: the duty of care binds the defendant and plaintiff as doer and sufferer of the *same injustice*. In *Palsgraf*, the railway employee who negligently pushed a passenger aboard a moving train committed a wrong toward that passenger (who was foreseeably at risk of harm), but not toward the plaintiff, who was standing at the other end of the platform. Chief Judge Cardozo explained, "Relatively to her it was not negligence at all."[42] He went on to define the duty of care in terms of foreseeability: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of

37 *Ibid* at para 25.

38 *Ibid* at para 24, referring to Ernest J Weinrib's "The Disintegration of Duty" (2006) 31 Adv Q 212 [Weinrib, "Disintegration of Duty"].

39 *Ibid* at para 25. See Weinrib, "Disintegration of Duty", *supra* note 38 at 218–19: "Duty connects the defendant as a wrongdoer to the plaintiff as a member of the class of persons wrongfully put at risk."

40 248 NY 339 [*Palsgraf*].

41 See Ernest J Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995), ch 6 [Weinrib, "Private Law"].

42 *Palsgraf*, *supra* note 40 at 341.

apprehension."[43] Discussing *Palsgraf*, Weinrib explains how the notion of foreseeability binds the plaintiff and defendant together: "The imperiling of the foreseeably affected class of persons is the reason for considering the defendant's act negligent; it also must be the reason for thinking that the plaintiff has been wronged. Only if the plaintiff is among that class does the reason for thinking of the defendant's act as wrongful pertain to the plaintiff."[44]

Purporting to apply Weinrib's theory, the majority in *Rankin's Garage* reasoned that the primary wrong of leaving cars unlocked was a wrong toward the car owners, who might suffer property damage. It was not a wrong toward possible car thieves or those the thieves might injure. While the majority was willing to accept that theft of unlocked vehicles from the defendant's lot was reasonably foreseeable, it suggested that this only gave rise to a duty of care between the garage and the owners of the vehicles that were left unlocked.[45] This is an overly narrow interpretation. The vehicle owners undoubtedly had an interest in the security of their vehicles and would have had an action against the garage if their vehicles had been stolen and damaged. However, it does not follow that they are the only parties to whom the garage owed a duty of care.

Ms. Palsgraf was considered an unforeseeable plaintiff because the employee who pushed a passenger onto a moving train could not reasonably foresee that his act would pose a risk of injury to someone standing at the other end of the platform. There was no reason to foresee a risk to anyone other than the passenger in question and those within a certain physical vicinity, because nothing suggested to the railway employee that the passenger was carrying a package containing explosives. The situation would presumably have been different if the package had been labelled as "dynamite" or "TNT." In those circumstances, the ambit of the risk would have been much greater, and Ms. Palsgraf may well have fallen within the scope of the defendant's duty.[46]

Applying this logic to the facts in *Rankin's Garage*, we must note that theft of a car is not a passive occurrence: the car must be stolen *by someone*,

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43 *Ibid* at 344.

44 Weinrib, "Disintegration of Duty", *supra* note 38 at 220–21.

45 *Rankin's Garage*, *supra* note 16 at para 26.

46 Despite Chief Judge Cardozo's lackadaisical description ("the fireworks when they fell exploded"), the explosion in *Palsgraf* was substantial. Eyewitness accounts indicated that the blast was heard blocks away, and that there was a fireball and a great deal of smoke. Part of the wooden platform was blown apart. A stampede ensued and 13 people were injured. Several, including Palsgraf, were taken to hospital by ambulance. The explosion made the front page of the New York Times: "Bomb Blast Injures 13 in Station Crowd" *New York Times* (25 August 1924) 1.

who will likely drive the stolen car away. If the majority was willing to concede that theft was foreseeable and that the vehicles might be damaged in a crash, surely, they must also have had to admit that the crash could cause physical injury to the thief or to someone else on the road. In other words, the majority in *Rankin's Garage* adopted an overly narrow view of those who would foreseeably be injured in the circumstances. Their flawed train of logic is discussed below.

B) The Decision Conflates Duty and Remoteness

The majority in *Rankin's Garage* reasoned that, before the duty of care could be expanded to include physical injury, there had to be some *extra* reason to foresee that the stolen vehicle would be driven dangerously. Justice Karakatsanis explained,

> 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 to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner.[47]

This naïve assumption about the driving habits of car thieves is discussed further below.

Justice Karakatsanis also explained that additional evidence would be needed to establish the foreseeability of theft by minors:

> Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by *minors*. Otherwise theft by a minor would always be foreseeable—even without any evidence to suggest that this risk was more than a mere possibility. This would fundamentally change tort law and could result in a significant expansion of liability.[48]

It is not self-evident why including minors among potential car thieves would "fundamentally change tort law." Further, it is not clear why this had to be determined at the reasonable foreseeability stage of the duty analysis. A court might well decide that there was insufficient proximity (especially if locking cars is considered an affirmative duty or duty to control), or that the theft was an intervening act, making the plaintiff's injuries too remote in law to be recoverable.[49] But to say that theft was foreseeable, but not

47 *Rankin's Garage*, *supra* note 16 at para 34.

48 *Ibid* at para 46.

49 As had been found in some prior stolen car cases, for example: *Spagnolo v Margesson's Sports Ltd* 1983 CanLII 1904 (ONCA), 145 DLR (3d) 381; *Moore v Fanning*

theft by minors, is inconsistent with the broad approach to foreseeability that is normally conducted at the duty stage.

Notably, the majority rejected the Court of Appeal for Ontario's analysis of foreseeability, where Justice Huscroft had concluded:

> In summary, Rankin's Garage was easily accessible by anyone. There was no evidence of any security measures designed to keep people off the property when the business was not open. Cars were left unlocked with the keys in them. The risk of theft was clear.
>
> In these circumstances, it was foreseeable that minors might take a car from Rankin's Garage that was made easily available to them. Evidence that a vehicle had been stolen from Rankin's Garage years earlier for joyriding, and that vehicle theft and mischief were common occurrences in the area, reinforces this conclusion. It is a matter of common sense that minors might harm themselves in joyriding, especially if they are impaired by alcohol or drugs.[50]

Justice Karakatsanis disagreed, writing:

> I cannot agree with my colleague's suggestion that because minors are reckless, "minors are no less likely to steal a car than any other individual" and therefore, theft by a minor is reasonably foreseeable. The inferential chain of reasoning is too weak—it is not enough to say that it is possible that unsupervised minors would be roaming the lot looking for unlocked vehicles.[51]

Through this insistence on specific evidence of possible theft by minors, the majority's decision in *Rankin's Garage* runs counter to the foreseeability analyses that have dominated duty jurisprudence since *Donoghue v Stevenson*. Foreseeability at the duty stage has not historically been a difficult hurdle for plaintiffs,[52] and has often been satisfied by what Justice Huscroft referred to as "common sense."[53] In this vein, it is not that hard to imagine that a lot full of unlocked cars will be a temptation to teenage joyriders, nor is it hard to imagine that teenagers will drive stolen cars in a careless manner.

1987 CanLII 4168 (ONSC), 60 OR (2d) 225 (HC).

50 *JJ v CC*, 2016 ONCA 718 at paras 52–53.

51 *Rankin's Garage*, *supra* note 16 at para 45, citing paragraph 83 of the Court of Appeal's decision.

52 See the dissenting opinion of Justice Brown in *Rankin's Garage*, *supra* note 16 at para 78.

53 *Ibid* at para 53. Recall Lord Atkin's speech in *Donoghue*, where he suggested that "everyone … knows" that individuals other than the immediate purchaser of a household item are likely to use it and be harmed if it is defective; *Donoghue*, *supra* note 2 at 583.

Instead of assessing foreseeability in a broad sense, the majority moved straight to the fact-specific concept of foreseeability that is usually reserved for the remoteness analysis. One might argue that this is inconsequential: if the plaintiff's claim will eventually be dismissed as being too remote, there is no point in finding a duty of care and examining the other elements of negligence.[54] However, as noted, this analysis undermines duty's normative function and the precedential value of duty decisions.

The conflation of duty and remoteness is also evident in other aspects of the decision. For instance, Justice Karakatsanis wrote, "The fact that something is *possible* does not mean that it is reasonably foreseeable."[55] This is a distinction that is classically considered in remoteness analyses, which seek to weed out consequences that are rare, but possible.[56] As described below, motor vehicle theft by minors is far from rare, so the majority's application of this principle to the facts in *Rankin's Garage* is misleading. Unfortunately, as we will see, Justice Karakatsanis' comment that theft by minors is "possible" but not "reasonably foreseeable" has been frequently cited and applied since *Rankin's Garage*. It has given the Canadian courts a linguistic formula by which to flatly rule out a range of fairly common occurrences as being insulated from negligence liability, under the guise of a "rigorous" factual analysis.

C) The Decision is Factually Inaccurate

Even if we were to accept that a more specific test of foreseeability applies at the duty stage, the majority's decision is simply wrong in its factual assumptions about motor vehicle theft. The majority concluded that theft by minors was "possible" but not "foreseeable," and that additional evidence would be required to show that minors would drive a stolen car recklessly. In fact, Statistics Canada reports that motor vehicle theft rates are *highest* among those aged 15-18 and gradually decline with age.[57] Further, a survey of young auto thieves found that their primary motivations were "joyriding" (93%), transportation (87%), and "for the thrill of it" (84%).[58] There is also ample evidence that teenage drivers, especially males, are risky drivers, particularly when they have been drinking and when they

54 As noted, scholars have argued for decades that, if duty is limited to this highly factual inquiry, it is superfluous to the other elements of negligence. See generally Plunkett, *supra* note 11, ch 4.

55 *Rankin's Garage*, *supra* note 16 at para 46.

56 As in *The Wagon Mound (No 1)*, [1961] AC 388 (UKPC).

57 This age group accounted for 3 in 10 solved vehicle thefts identified by police. Mia Dauvergne, "Motor vehicle theft in Canada, 2007" (12 Mar 2009) 85-002-X, online: <https://tinyurl.com/4x2n8smw>.

58 Jeff Anderson & Rick Linden, "Why Steal Cars? A Study of Young Offenders Involved in Auto Theft" (2014) 56:2 Can J Corr 241 at 252.

have other teenage passengers.[59] While this statistical evidence may not have been before the court, I would venture to guess that this information would not come as a surprise to many people who are not Supreme Court justices.

D) The Decision Creates an Apparently Subjective Test of Foreseeability

Another risk lurking in the majority's decision is that it runs close to creating a subjective test of foreseeability. For instance, Justice Karakatsanis noted that, although theft and mischief were common in the area, there was no history of theft from the defendant's premises.[60] In other words, there was no reason for the *particular* defendant to believe that its lot would be a target of teenage car thieves. This seems to stray from the objective test, which would presumably be framed along the lines of, "Would a reasonable car lot owner foresee that unlocked cars with their keys inside could be stolen?"

The objective test of foreseeability in negligence is longstanding. It was famously set out in *Vaughan v Menlove*,[61] where the defendant argued unsuccessfully that he should avoid liability for negligently building a hayrick close to his neighbour's property so long as "he acted bona fide to the best of his judgment." In rejecting this subjective standard, the court explained that it would be so variable "as to afford no rule at all."[62] To put it in moral terms, part of the "pact" of living in the modern world is that we expect each other to exercise a certain level of prudence and care, even if it means that we, ourselves, will sometimes be found liable for harms that we did not foresee but that a reasonably prudent person would have foreseen.[63] That is why the test is framed in terms of what was *reasonably foreseeable*, not what was foreseen by the particular defendant.

As discussed below, the *Rankin's Garage* majority's inclination to assess foreseeability based on the defendant's subjective knowledge or

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59 The research is voluminous. See e.g. Allan F Williams, "Teenage Drivers: Patterns of Risk" (2003) 34:1 J Safety Research 5; Allan F Williams, Bethany A West & Ruth A Shults, "Fatal Crashes of 16- to 17-Year Old Drivers Involving Alcohol, Nighttime Driving, and Passengers" (2012) 13:1 Traffic Inj Prev 1; Marie Claude Ouimet, Anuj K Pradhan & Ashley Brooks-Russell, "Young Drivers and Their Passengers: A Systematic Review of Epidemiological Studies on Crash Risk" (2015) 57:1 (Suppl) J Adolescent Health S24.

60 *Rankin's Garage*, *supra* note 16 at para 66.

61 (1837) 132 ER 490 (CP) at 492. The hayrick caught fire and burned down two of the neighbour's cottages.

62 *Ibid* at 493.

63 See Owen, *supra* note 17 at 1288.

experience has been picked up in subsequent cases and is one of the most troubling aspects of the decision.

E) The Decision Renders Categories of Duty Irrelevant (Justice Brown's dissent)

It is hard not to sense a note of exasperation in Justice Brown's dissenting opinion in *Rankin's Garage*. From a factual standpoint, Justice Brown suggested that the majority's reasoning exhibited a "certain unreality";[64] in his view (correct from a statistical standpoint), minors are among the most likely to steal cars and to drive them recklessly. More important, as a former tort law professor, Justice Brown seemed frustrated with the majority's approach to the duty of care. He concluded that a full *Cooper* analysis was unnecessary, as the case fell within the established duty category of "foreseeable physical injury", a category that was expressly recognized by the court in *Cooper*. It was not necessary to foresee exactly *how* the injury might occur, just that unlocked cars with their keys inside are at risk of theft and will foreseeably be driven by the thieves, causing physical injury.

Justice Brown contended that, contrary to the majority's approach, both Supreme Court precedent and academic authors indicate that foreseeability at the duty stage should be considered at a general or conceptual level, rather than a fact-specific one.[65] He argued that the majority's decision effectively eliminated "foreseeable physical injury" as a recognized duty category, despite its longevity.[66] By insisting that the duty be defined in a highly fact-specific way, the majority neutralized the value of Lord Atkin's inductive reasoning in *Donoghue*. (Recall that Lord Atkin wrote, "in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."[67])

In a critical paragraph about the category of "foreseeable physical injury," Justice Brown wrote:

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64 *Rankin's Garage*, *supra* note 16 at para 83.

65 *Ibid* at para 74.

66 Interestingly, the UK Supreme Court reinforced this longstanding category in *Robinson v Chief Constable of West Yorkshire*, [2018] UKSC 4, where the plaintiff, an elderly woman, was knocked to the sidewalk by police as they attempted to arrest a fleeing suspect. The court rejected the defendant's argument that police were immune from liability as a matter of policy, finding that the claim was a straightforward instance of a defendant causing physical injury through its positive actions. Resort to the *Caparo* test for novel duties was thus unnecessary.

67 *Donoghue*, *supra* note 2 at 580.

> An additional difficulty with the majority's view … is that it does not explain where this category will henceforward *ever* apply. The majority relies upon a few more narrowly stated "categories" of duties—physician to patient, manufacturer to consumer, and motorist to highway user—as demonstrative of the need to define duties which involve physical injury with some particularity … . [T]he necessary implication of the majority's reliance upon them to reject the applicability of the category of foreseeable physical injury in this case is that the category of foreseeable physical injury can *never* be applied, lest courts risk "subsum[ing]" these others. The majority's approach thereby risks rendering meaningless a long-established category of relationships which have been found to give rise to a duty of care and undermining the viability of the categorical approach altogether.[68]

In short, the majority's approach hearkens back to the situation that existed prior to *Donoghue*, where there was a growing catalogue of highly specific duty or no-duty situations, without an underlying principle holding them together.[69]

One might argue that Justice Brown made the opposite error here and adopted an overly broad interpretation of the duty category of "foreseeable physical injury." The defendant in *Rankin's Garage* did not cause foreseeable physical injury to the plaintiff in the same way as, for example, a negligent driver, a manufacturer of a dangerous product, or a surgeon who negligently performs an operation. Rather, the defendant created a situation in which a third party (a car thief) could cause foreseeable physical injury to other road users and failed to take reasonable steps to prevent this from happening. The case might, thus, be better framed as being within the "duty to control" category. Nevertheless, Justice Brown is correct to criticize the majority for converting certain *instances* of foreseeable physical injury into discrete duty categories with no common underlying principles. This approach does indeed create the risk that "foreseeable physical injury" will no longer stand as a recognized category on its own and that a full *Cooper* test will be considered necessary in a growing number of fact-specific scenarios.

F) Rankin's Garage in the Context of Other Canadian Duty Decisions

Even prior to *Rankin's Garage*, the Canadian courts were exceptional in their willingness to reject novel duties of care at the foreseeability stage,

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68 *Rankin's Garage*, *supra* note 16 at para 75.

69 Justice Brown , in his majority decision in *Maple Leaf Foods*, *supra* note 14 at para 24, seems to have attempted to restore the more general test of foreseeability at the duty stage.

compared to their Commonwealth counterparts.[70] This was notably the case in *Childs v Desormeaux*,[71] where the Supreme Court of Canada concluded that it was not foreseeable to hosts of a BYOB party that a particular guest would drive while impaired. Even though he had prior impaired driving convictions and a propensity to drink to excess at their home, and even though his blood-alcohol concentration (BAC) on the evening in question was 0.235% when the hosts walked him to his car (Canada's criminal BAC limit is a relatively high 0.08%), the court concluded that it was not reasonably foreseeable to the hosts that he would pose a risk of harm to other motorists.

As with *Rankin's Garage*, there were other legitimate reasons why the court might have negated the duty of care in the case. Indeed, the court explained at length why the relationship between social hosts and their guests is different from that between commercial hosts and their patrons, such that social hosts were not in a sufficiently proximate relationship to be subject to an affirmative duty to prevent their guests from harming themselves or others. Denying the duty based on a lack of foreseeability tended to undermine the credibility of the decision and the science of alcohol-related impairment. More pertinently to this paper, it opened the door for subsequent social host claims, including *Williams v Richard*,[72] discussed below, to be distinguished on their facts. The Court of Appeal for Ontario explained in *Williams* that social host claims will depend on "the host's knowledge of a guest's intoxication or future plans to engage in a potentially dangerous activity that subsequently causes harm."[73]

While this factual context is possibly relevant, the increasing specificity at which foreseeability is assessed has the potential to minimize the precedential effect that a duty determination normally provides; we cannot know whether any given social host owes a duty of care to any given guest or person the guest might injure without engaging in a relatively detailed analysis of the host's subjective knowledge in the circumstances or the way in which an intoxicated guest is ultimately injured. Every new case provides a fruitful set of potentially "unforeseeable" circumstances.

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[70] In fact, Plunkett's empirical analysis of duty decisions in the highest courts of Canada, Australia and England found that Canada was the *only* jurisdiction to strike down duties at the foreseeability stage. Plunkett, *supra* note 11 at 187.

[71] 2006 SCC 18.

[72] *Williams v Richard*, 2018 ONCA 889 [*Williams*].

[73] *Ibid* at para 24. The plaintiff will also need to establish proximity, which might include the host's creation of an inherently risky environment or paternalistic relationship with the drinker.

IV. Subsequent Cases and Trends

Since *Rankin's Garage*, the door has opened for defendants to argue on a more fact-specific basis that the plaintiff's injury, or the manner in which it occurred, was not reasonably foreseeable, so no duty of care was owed to the plaintiff.[74] Outlined below are four provincial appeal court decisions that illustrate this trend. In the first two cases, the court adopted the defendant's portrayal of the plaintiff's harm as being idiosyncratic or bizarre and thus beyond the scope of reasonable foreseeability, when it seems that a pre-*Rankin's Garage* court would have found otherwise. In the third case, the Court of Appeal for Ontario used the facts to distinguish the social host claim from that in *Childs* and allow it to proceed. The final case had a fortuitous combination of social hosts and car theft and so seemed almost destined for a *Rankin's Garage* analysis.

In *Babin v CJM Investments Ltd*,[75] the plaintiff was injured when he drove from one defendant's parking lot to the other's, not realizing, due to an optical illusion, that there was a steep slope between the lots. The defendant who owned the lower lot successfully moved for summary judgment, arguing that the plaintiff's injury was not reasonably foreseeable to it (although it may have been foreseeable to the defendant who owned the upper lot).

The court framed the duty question as "whether it was reasonably foreseeable that a person driving from the [upper] parking lot… into the [lower] parking lot… would incur personal injury after driving over an embankment which they did not see by virtue of an optical illusion."[76] It is hard to imagine a more specific way to frame the foreseeability issue (although, surprisingly, the parties referred the court to two other cases where the plaintiff was injured as a result of an optical illusion[77]). In the pre-*Rankin's Garage* era, we might have expected to see the question posed more generally: whether a commercial property owner ought to foresee physical injury due to dangers posed by the conditions of its property. In

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74 See, for example, *Bucknol v 2280882 Ontario Inc*, 2018 ONSC 5455 (not reasonably foreseeable to defendant licensed establishment that beer bottle would be thrown, injuring plaintiff's eye); *Pender v Squires*, 2019 NLSC 101 (not reasonably foreseeable to teenage boy that allowing teenage girls to drive his parents' ATV would lead to serious injury crash).

75 2019 NBCA 44.

76 *Ibid* at para 13.

77 *Botting v British Columbia*, 1996 CanLII 8642 (BCSC), 27 BCLR (3d) 106 (man died after falling into gap between two bridges, which appeared to be joined due to optical illusion; injury found to be reasonably foreseeable); *Aubrey v Longpré*, 2009 QCCA 1379 (boy biked into ditch which appeared to be a gentle slope; owner of lower property not found liable).

fact, most courts would probably have viewed the case as falling within an established category like occupier/invitee, such that a *Cooper* analysis was not even required.

The result in *Babin* may well be justifiable: the main fault may lie with the owner of the upper parking lot, which was in a better position to post a warning or erect a barrier. Nevertheless, the highly fact-specific question of foreseeability reflects a notable shift in the analysis of duty. What was once an easy hurdle for plaintiffs may become an opportunity for defendants to describe the circumstances surrounding the injury as highly peculiar and thereby relieve themselves from a duty of care altogether. This has the potential to erode the utility of established duty categories and to make each case a competition of particularized duty formulations.

Next, *Provost v Dueck Downtown Chevrolet Buick GMC Limited*[78] was, like *Rankin's Garage*, a case about the liability of a commercial car lot for the crash of a stolen vehicle. In *Provost*, the vehicle in question was left unlocked and running in front of the dealership, unattended, for about forty minutes before it was stolen by Bolton. Following a somewhat bungled police operation (at least two officers pursued the stolen vehicle even though they were ordered not to do so), Bolton caused a crash that seriously injured the plaintiff. He had already caused two other crashes during the pursuit, and the crash involving the plaintiff occurred about an hour after the initial theft.

The parties agreed that a full *Cooper* analysis was required and that the finding of "no duty" in *Rankin's Garage* was not determinative of their case. This in itself is telling: if *Rankin's Garage* is not sufficient precedent for a finding that there is no duty between a commercial car lot and a person injured when a vehicle is stolen from that lot, then it seems that the duty question will be up for grabs in nearly every case.[79] In any event, the British Columbia Court of Appeal agreed with the majority in *Rankin's Garage* that reasonable foreseeability would not be established simply because theft of the vehicle was foreseeable; rather, the plaintiff must also establish that it was reasonably foreseeable that the vehicle would be operated in a dangerous manner. As in *Rankin's Garage*, the court noted that erratic driving by a car thief was possible, but not reasonably foreseeable, as though it were somehow a peculiar occurrence.[80]

Leaving aside the rather naïve assumption that car thieves normally drive safely (a belief that seems to be common among Canadian judges),

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78 2020 BCCA 86 [*Provost*].

79 Granted, *Provost* involved an adult car thief.

80 *Provost*, *supra* note 78 at para 65.

the court went on to examine the evidence to assess whether someone in the defendant's position ought to have foreseen that the stolen vehicle would be driven dangerously. The plaintiff tendered various news articles and Statistics Canada reports, press releases from the Canadian Automobile Dealers Association (of which the defendant was a member), a report of Parliament's Standing Committee on Justice and Human Rights, and the testimony of several police officers about the driving behaviour of car thieves.[81]

The court went to considerable lengths to assess whether the defendants would have been aware of these publications. The only evidence that was found to assist the plaintiff in this regard was the police testimony, which the court was willing to accept "in a limited way to support a commonsense assessment of foreseeability."[82] Nevertheless, following *Rankin's Garage*, common sense was not sufficient for a finding of reasonable foreseeability. The court concluded "[W]hat is missing in this case is evidence of a connection between the fact of a theft and [dangerous or erratic driving] occurring more than an hour after the theft in response to active police engagement with the thief."[83] Moreover, the court found that it was reasonable for the defendants to expect that police would keep public safety paramount and would not engage in conduct that put other motorists at risk.[84]

This line of reasoning is baffling. Again, there may be other reasons to absolve the car dealership (e.g. proximity, policy, intervening acts), but to conclude that the harm was unforeseeable reflects a "certain unreality," in Justice Brown's words. One wonders how a plaintiff would successfully go about proving reasonable foreseeability in this case. Moreover, asking what publications the defendant might have read about the behaviour of car thieves seems close to creating a subjective foreseeability requirement.

Next, in *Williams*, a social host case, the Court of Appeal for Ontario distinguished the facts of *Childs* and dismissed the defendant's summary judgment motion.[85] The host had served his friend/neighbour about fifteen cans of beer during a three-hour period after work, knowing that the friend would be driving his babysitter home afterward with his own children in the car. The host threatened to call the police, in accordance with a mutual pact the men had, and apparently received some weak

81 *Ibid* at para 54.

82 *Ibid* at para 64.

83 *Ibid.*

84 *Ibid* at para 69. The court noted that the vehicle was equipped with OnStar technology, which would assist in safely locating it following the theft and would reduce the need for police pursuit.

85 *Williams*, *supra* note 72.

assurance that the friend would not drive. He took no further steps to prevent his friend from driving, nor did he take action once he saw that the friend's vehicle was not in his driveway. The friend ultimately caused a crash in which he was ejected from his vehicle and perished.

The Court of Appeal for Ontario noted that social host cases tend to be determined on two main factors: whether the host was aware of the guest's intoxication and likelihood of engaging in a dangerous activity (the foreseeability analysis) and factors giving rise to a positive duty to act, such as the creation of a dangerous situation or a paternalistic relationship (the proximity analysis). In finding that summary dismissal of the claim was inappropriate, the court highlighted the circumstances that made *Williams* distinct from *Childs*, including the close interaction of the men throughout their drinking occasion, their habitual drinking patterns, and the likelihood that the host knew his guest would be driving soon after he left.[86] In this instance, the fact-specific foreseeability analysis was resolved in the plaintiff's favour.

Finally, in the 2022 case of *McCormick v Plambeck*,[87] the British Columbia Court of Appeal applied the majority's reasoning in *Rankin's Garage* to conclude that no duty of care was owed by adults who hosted a house party for over 65 underage guests, at which alcohol and cannabis were consumed. The plaintiff and a friend had arrived at and left the party on foot; however, on the way home, they found an unlocked car with its keys inside and stole it.[88] The friend drove the car and failed to safely navigate a curve in the road. The car left the road, and the plaintiff was thrown from the vehicle, suffering severe traumatic brain injury as a result.

The trial judge had found proximity based on the paternalistic relationship between the adult hosts and the teenage guests.[89] Nevertheless, both the trial judge and the British Columbia Court of Appeal concluded that the harm to the plaintiff was not foreseeable. This conclusion was based on several factors, including a finding that the driver in question did not appear to be intoxicated when he left the party and that the two teenagers left the party on foot. The courts reasoned that, even if some physical injury were foreseeable when teenagers who have been drinking

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86 *Ibid* at para 33.

87 2022 BCCA 219 [*Plambeck* BCCA].

88 The owners of the car were trying to sell it and had left the keys in the car to facilitate test drives. The plaintiff's claim against the car owners settled prior to trial. *Ibid* at paras 7–8.

89 *Ibid* at para 12, citing *McCormick v Plambeck*, 2020 BCSC 881 at para 248 [*Plambeck* BCSC].

are left to walk home in the dark,[90] it was not sufficient to show that physical injury, in general, was foreseeable. As the British Columbia Court of Appeal put it, "Although the *precise* mechanism of injury need not be foreseeable,… the *general* mechanism must be."[91] Later in the decision, the court defined this as meaning that, while it was not necessary to prove exactly how a crash might unfold (e.g. from the car leaving the road or colliding with another car), the "general mechanism" of being injured as a passenger in a motor vehicle being operated dangerously had to be foreseeable.[92]

The facts in *Plambeck* make it attractive to support this conclusion, and the result seems eminently defensible (though it could also have been based on the defendants' meeting the standard of care, lack of causation, or intervening act). However, the decisions are worrying with respect to some of their intermediate conclusions and the authorities on which the courts relied. For example, the trial judge had expressed doubt whether *any* physical injury to the plaintiff was foreseeable, apparently finding that the risks of trips and falls, fights, or getting hit by a car while walking home were "possible" but not foreseeable.[93] This is contrary to virtually all statistical evidence on alcohol-related injury.[94] Underage drinkers, in particular, are susceptible to greater injury due to their inexperience with alcohol and its effects.[95] Risks to underage drinkers are not so "far-fetched" that a reasonable host can simply "brush [them] aside."[96]

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90 A risk the trial judge was not willing to concede: *Plambeck* BCSC, *supra* note 89 at para 229.

91 *Plambeck* BCCA, *supra* note 87 at para 28.

92 *Ibid* at para 39.

93 The Court of Appeal did not express a firm opinion on this conclusion.

94 For instance, a recent meta-analysis found that a median of 27% of fatalities from violent and non-violent non-traffic injuries are attributable to excessive alcohol use: Hillel R Alpert, Mega E Slater, Young-Hee Yoon *et al*, "Alcohol Consumption and 15 Causes of Fatal Injuries: A Systematic Review and Meta-Analysis" (2022) 63:2 Am J Prev Med 286. Roughly 1/3 of fatally-injured pedestrians have blood-alcohol concentrations above 0.08%: Department of Transportation, *Traffic Safety Facts, 2015 Data: Pedestrians* (Washington: National Highway Traffic Safety Administration, 2017) at 6–7; Amin Mohamadi Hezaveh & Christopher Cherry, "Walking under the influence of alcohol: A case study of pedestrian crashes in Tennessee" (2018) 121 Accident Analysis & Prevention 64.

95 See recently, Biswadev Mitra, Hayley Ball, Georgina Lau, *et al*., "Alcohol-related trauma presentations among older teenagers" (2023) 35:2 Emerg Med Australasia 269, which studied alcohol-positive patients aged 16–19 at a major trauma centre in Australia. In addition to motor vehicle crashes, there was a prevalence of penetrating trauma, falls, and pedestrian crashes among the population. See also David A Sleet, Michael F Ballesteros & Nagesh N Borse, "A Review of Unintentional Injuries in Adolescents" (2010) 31 Annual Rev Pub Health 195.

96 As stated in *Mustapha*, *supra* note 25 at para 13, quoting from *The Wagon Mound (No 2)*, [1967] 1 AC 617 at 643 (PC).

Further, the authorities cited by the British Columbia Court of Appeal in its foreseeability analysis almost all relate to the remoteness stage of the negligence inquiry, suggesting that the court may not have even realized that these are different tests. Their citations included the famous case of *Hughes v Lord Advocate*,[97] where the House of Lords found that the plaintiff boy's burn injuries were a foreseeable result of the defendant's leaving an open manhole surrounded by paraffin lamps, even though the precise series of events (knocking one of the lamps into the manhole, causing an explosion) was unforeseeable. *Hughes* is authority for the principle that a loss will not be too remote as long as the "type of injury" was foreseeable.

Turning to Canadian law, the British Columbia Court of Appeal cited the memorable case of *School Division of Assiniboine South (No. 3) v Hoffer*,[98] where the defendant father had rigged a snowmobile so that his 14-year-old son could start it. Contrary to his father's instructions, the son started the snowmobile without the kickstand, causing it to run amok in a schoolyard, where it hit a gas riser pipe on the external wall of the school. The gas then escaped into an air duct, where it was ignited by a pilot light, causing an explosion at the school. The Manitoba Court of Appeal nevertheless found that this harm was foreseeable and was thus not too remote. Justice Dickson (as he then was) wrote:

> It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidents [sic] need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable…. When one permits a power toboggan to run at large… one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damage is indeed broad.[99]

Both *Hughes* and *Hoffer* adopted what appear to be very liberal interpretations of what is reasonably foreseeable, even though they applied them at the much narrower remoteness stage of the negligence analysis. If the defendant father in *Hoffer* had considered the foreseeable risks of allowing his 14-year-old to start a snowmobile, it is unlikely that he would have foreseen an explosion. Yet even that result was not considered too remote. This makes it all the more difficult to understand how the courts in *Rankin's Garage*, *Prevost*, and *Plambeck*, for example, concluded that the motor vehicle crashes in question were so unforeseeable that the

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97 [1963] AC 837 (HL) [*Hughes*].

98 1971 CanLII 959 (MBCA), 21 DLR (3d) 608 (Man CA), aff'd orally without reasons 1973 CanLII 1313 (SCC), 40 DLR (3d) 480 [*Hoffer*].

99 *Ibid* at 614.

defendant did not even owe the plaintiffs a duty of care. How did we get from the first set of cases to the current understanding of foreseeability?

Analytically, this shift seems rooted in the specificity with which the courts define the harm. While the courts have maintained their historical stance that it is only the "general mechanism" of injury that must be foreseeable, they have started to add qualifiers to their descriptions of these mechanisms. Thus, it is not enough to foresee theft of a vehicle; one must foresee the demographics of the thieves, that the vehicle will be driven dangerously, or that the driver will be involved in a police chase.

One wonders, however, whether there is more going on beneath the surface of these decisions. Judges, like anyone else, have an intuitive reaction to whether a plaintiff should be able to recover in a given situation.[100] Whether consciously or subconsciously, they seek reasons to support that intuition. A realist might note that most of these appellate decisions involve car thieves and/or alcohol-related harms, about which people likely have moral intuitions regarding the appropriateness of recovery in tort. If that is the case, it seems preferable to openly discuss those moral reasons at the proximity or policy stage of the duty analysis, rather than assert—naïvely and inaccurately—that the harms were unforeseeable. The cases can also be framed as proposing affirmative duties to protect the plaintiffs from their own risky conduct. There is ample jurisprudence and commentary discussing when such duties are appropriate, but virtually none of the arguments are based on lack of foreseeability.[101]

Interestingly, the tendency to use foreseeability to mask what are in fact policy- or result-oriented decisions was criticized by Fleming back in 1953.[102] Discussing claims for the negligent infliction of psychiatric harm, Fleming explained that assessing liability in terms of whether the plaintiff's psychiatric harm was foreseeable "obscures [the] value judgment" of "whether society is prepared to burden members of the community with responsibility of accounting for such harm. Ought they to be under a legal obligation to observe care for the protection of others against the incidence of such risk?"[103] He preferred for these value judgments about psychiatric harm to be clearly and honestly articulated by the courts—a process for which other elements of the duty analysis are better suited.

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[100] Speaking anecdotally, when I discuss *Rankin's Garage* with my first-year law students, many of them share the majority's view that theft by minors is unforeseeable.

[101] I summarize the Canadian law, in which alcohol-related liability plays a prominent role, in "Affirmative Duties of Care: A Distinctly Canadian Contribution to the Law of Torts" (2018) 84 SCLR (2d) 101.

[102] Fleming, *supra* note 29.

[103] *Ibid* at 477.

V. Implications and Conclusion

The above cases suggest that duty analyses in Canadian negligence cases are becoming increasingly tethered to their factual circumstances.[104] While this is unlikely to affect the arguments in well-established types of claims (e.g., motor vehicle crashes, defective products), it may create a temptation to scrutinize or distinguish the alleged duty of care in less routine circumstances. This could result in a growing catalogue of duty and no-duty situations, without identifiable general principles holding them together.[105]

Indeed, there is some evidence that even well-established categories may be doubted by this new approach to foreseeability. In *Delfs v Stricker*,[106] for example, the child plaintiff was injured while riding as a passenger in an ATV driven by the teenage defendant. Driver/passenger seems to be one of the most well-established categories of duty known to negligence law. Nevertheless, the court found that the circumstances of the plaintiff's injury were so unusual that no duty of care was owed. Specifically, the plaintiff was impaled and disembowelled by a stick on which the ATV had apparently gotten stuck and which it eventually ran over. This was undoubtedly a rare occurrence that might have been considered too remote. Alternatively, the court could have concluded that there was nothing the defendant could have done to avoid the injury, i.e., that he had met the standard of care. But to conclude that there was no duty of care runs completely counter to established law. Will it now be open to any driver to argue that the circumstances of an accident were unforeseeable and that, thus, they owed no duty of care to their passengers? If so, we will lose both the precedential value of duty decisions and their ability to signal the types of obligations we owe one another.

Practically speaking, the implications of these developments are mixed. While the recent cases are more likely to favour defendants, the granular analysis of foreseeability may well serve to draw out litigation in general. In particular, since the courts seem to require the plaintiff to bring specific evidence to support their claim that the harm was reasonably foreseeable

[104] Nevertheless, there are scores of cases that still employ the traditional approach to foreseeability at the duty stage, or that focus on proximity instead. See especially *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St John's*, 2020 NLCA 27 at paras 276–82, stressing that the foreseeability test is objective and not, as the trial judge had found, "in the subjective view of the observer."

[105] See Weinrib, "Disintegration of Duty", *supra* note 38, who makes a similar point but on his perception that policy considerations had taken on too great a role in duty analyses. Ironically, Weinrib's article has been used to support the highly fact-specific analyses undertaken in cases like *Rankin's Garage*, *supra* note 16 at para 22.

[106] 2022 BCSC 373.

(rather than just rely on common sense), the cases may be deemed less appropriate for determination at a preliminary stage. Effectively, though not formally, duty will slide from a question of law to a mixed question of law and fact. At the same time, the weakening of duty/no duty precedents may encourage more defendants to litigate rather than offer to settle what would historically have been routine negligence cases. These developments could undermine the "shift in culture" recommended by the Supreme Court in *Hryniak v Mauldin*[107] to promote the timely resolution of civil disputes and could clog up the already stressed civil courts.

From a doctrinal perspective, the biggest implication of *Rankin's Garage* and its progeny is that there will not be much work left for the remoteness inquiry. This is illustrated in yet another recent stolen car case, *Richard v Manuel*.[108] There, the defendant taxi driver left his taxi unattended for seconds while he closed a garage door, during which interval it was stolen. The thief crashed the taxi into the plaintiff's home, causing personal injury and property damage. The motions judge granted summary judgment to the defendant, explaining:

> Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered, in this instance *the combined effect of theft of the vehicle, later loss of control of the vehicle by the thief operating it and the damage causing crash of it, unfortunately, into the uninsured home of the Plaintiff, Mr. Richard*.[109]

The court seems to be straining here to demonstrate just how fortuitous the series of events was—the type of analysis typically considered at the remoteness stage. It clearly does not assess foreseeability from a general or conceptual level, which would presumably be limited to asking whether theft of the vehicle might lead to physical injury or property damage. At such a level of particularity, many harms will be found unforeseeable.

More broadly, when combined with the Supreme Court of Canada's decisions in *Livent* and *Maple Leaf Foods*, which insist on a narrow interpretation of established duty categories, *Rankin's Garage* seems poised to disrupt duty analyses altogether, leaving Canada with a fragmented duty framework. Duty's role as a normative signal of the obligations we owe each other will be greatly diminished, and the boundaries of negligence liability will be constantly redrawn. While proximity is based on mostly rational principles (e.g. expectations, reliance, assumption of

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107 2014 SCC 7 at para 28.

108 2019 NBQB 79.

109 *Ibid* at para 43 (emphasis added).

responsibility), foreseeability is almost entirely in the mind of the beholder. As Fleming warned, foreseeability can be manipulated to mask normative or policy decisions about the appropriate scope of liability or, I would add, the decision-maker's moral intuitions about whether the plaintiff should recover. Leaving negligence liability to the whims of this idiosyncratic reasoning serves neither the parties, society, nor the law.