CANADA / JUDGMENT

McCormickv.Plambeck

2022 BCCA 219

COURT
British Columbia Court of Appeal

DECIDED
23 June 2022

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2022 BCCA 219 McCormick v. Plambeck

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McCormick v. Plambeck,

2022 BCCA 219

Date: 20220623

Docket: CA46961

Between:

Calder McCormick

Appellant

(Plaintiff)

And

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Alan Francis Coupland and Joy Coupland

Respondents

(Defendants)

And

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Megan Coupland, Andrew Coupland, Alan Francis Coupland and

Joy Coupland

Respondents

(Third Parties)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia,

dated June 12, 2020 (McCormick v. Plambeck, 2020 BCSC 881,

Vancouver Docket S148167).

Counsel for the Appellant:

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J.A. Doyle

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Place and Date of Hearing:

Vancouver, British Columbia

February 18, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2022

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Grauer

Summary:

The appellant attended a party at the home of the respondents where minors were permitted to consume alcohol and drugs. The appellant and a friend left the party on foot but later stole a vehicle which crashed, injuring the appellant. The trial judge dismissed the appellant's claim in negligence against the respondents on the basis that no duty of care was owed to him, as the harm which occurred was not reasonably foreseeable. He appeals on the basis that the trial judge erred in requiring the precise mechanism of the harm to the appellant to be foreseeable.

Held: Appeal dismissed. The trial judge did not improperly narrow the foreseeability analysis. The precise mechanism of injury need not be foreseeable, but the general mechanism must be. In this case, it was not reasonably foreseeable to the respondents that the appellant, who arrived and left on foot, would be injured by the dangerous operation of a motor vehicle.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] In broad terms, this appeal concerns social host liability for injuries sustained by a minor after leaving a party at which underage drinking and drug consumption had been allowed by adult hosts. More particularly, the appeal asks whether foreseeability of any type of personal injury suffices to establish a duty of care, or whether the general mechanism of injury must be foreseeable.

Background

[2] On the evening of September 15, 2012, the appellant, Calder McCormick, then 17, and his friend, Ryan Plambeck, aged 18, attended a party at the home of the respondents, Stephen Pearson and Lydia Pearson, who had agreed to let their daughters host a party for their friends. Sometime after 2:30 a.m., having left the party, the appellant and Ryan were driving too fast to navigate a bend in the road on Salt Spring Island. Their vehicle left the roadway and crashed into the woods, killing Ryan at the scene. The appellant was thrown from the vehicle and suffered life-altering injuries, including a severe traumatic brain injury that affects his memory, social cognition, and executive functioning.

[3] On the night of the party, the appellant and Ryan arrived at the Pearsons' house at about 10:30 p.m. They walked over from Ryan's house, which took 15 to 20 minutes. There were more than 65 attendees spread out over the main floor, basement level, and exterior of the residence. Inside, the guests were consuming beer, cider, coolers and hard liquor. Outside the residence, some attendees smoked cannabis. The Pearsons did not supply alcohol to any of the guests. Ms. Pearson circulated two or three times between 9:00 p.m. and 1:00 a.m., and her husband also circulated several times, but otherwise the respondents remained in their bedroom, relying on their daughters to supervise the party. On arrival, those who drove to the party surrendered their keys to one of the daughters who put them in a bowl that she gave to the respondents.

[4] The appellant did not drink alcohol or smoke cannabis before the party, and during the party drank only beer: McCormick v. Plambeck, 2020 BCSC 881 at para. 114. Ryan also consumed alcohol, but was not intoxicated: at para. 118.

[5] At 1:00 a.m., as scheduled, the respondents turned off the music and turned up the lights to signal that the party was over. Partygoers were told to call for rides. Some were picked up, some left on foot, and those who did not have a ride were driven home by Ms. Pearson.

[6] Neither of the respondents saw the appellant leave, but their daughter Elise was standing on the porch by the front door keeping tabs on people as they were leaving. She saw the appellant and Ryan with a group of people and overheard them talking about walking over to a nearby house. Both "seemed fine" to her: Trial Reasons at para. 124. The appellant and Ryan left the party on foot.

[7] At some point after leaving the party, Ryan and the appellant stole an unlocked 1992 Subaru. The owners were in the process of trying to sell the car, and had left the keys in the car to facilitate a potential buyer's test drive. Ryan and the appellant proceeded to take the car for what the judge described as a "joy ride" at para. 150. It was agreed that Ryan was driving. He had only an expired learner's license, and was driving in excess of the 70 km/h critical speed for the curve where the car left the road and crashed.

At Trial

[8] The appellant sued the estate of Ryan Plambeck, the Pearsons, and the owners of the Subaru in negligence. By the time the case reached trial, the appellant had settled his claims against Ryan's estate and the owners of the Subaru. The main issues at trial were whether the Pearsons owed the appellant a duty of care, and whether they had breached that duty by allowing him to make his own way home when the party ended.

[9] The judge found that there was a culture on Salt Spring Island of underage drinking and drug use, and that some parents hosted parties for their older teenagers at which drinking and drug consumption were allowed. Although contrary to s. 33 of the Liquor Control and Licensing Act, S.B.C. 2015, c. 19, which prohibits permitting a minor other than one's own children to consume alcohol, the respondents were among those parents on Salt Spring Island who viewed allowing such parties to occur "at home" under their supervision to be preferable to allowing them to take place at beaches and other locations where attendees would be more likely to drink and drive. That concern was reflected in the notice sent out by the Pearsons' daughters inviting people to the party, which asked them not to drink and drive and included a link to a video describing the dangers of drinking and driving. The respondents expected that parents would come to pick up attendees who did not live close enough to walk home when the party ended and that a few attendees might stay over.

[10] The judge recognized that the appellant's claim would require the court to extend the ambit of a duty of care previously recognized in the jurisprudence: at para. 175. He noted that the Supreme Court of Canada had rejected the existence of a general duty of care between a

social host and users of public highways injured by an adult party guest in Childs v. Desormeaux, 2006 SCC 18. The judge understood the appellant to be distinguishing his case from Childs based on the more proximate relationship that exists between adults and minors when the adults assume a supervisory role over minors invited to their home.

[11] In addressing the assertion of a novel duty of care, the judge applied the Anns/Cooper test for determining whether a duty of care in negligence arises: Anns v. Merton London Borough Council, [1978] A.C. 728 [H.L.]; Kamloops v. Nielsen, [1984] 2 S.C.R. 2; Cooper v. Hobart, 2001 SCC 79. The test has two main parts. Under the first, the plaintiff must establish a prima facie duty of care owed by the defendant based on two elements:

1) whether the injury was reasonably foreseeable; and

2) whether there was sufficient proximity between the plaintiff and defendant such that there is a duty on the defendant to act.

Once the plaintiff establishes a prima facie duty of care, under the second part of the test the burden shifts to the defendant to establish residual policy considerations that negate the imposition of a duty of care.

[12] The judge concluded the appellant could not establish a prima facie duty of care under the first part of the Anns/Cooper test because, when the appellant and Ryan left the Pearsons' home on foot, it was not foreseeable that they would suffer personal injury or that they would steal a car and drive it unsafely. The judge found sufficient proximity, saying:

> [248] The Pearsons permitted minors to come to their home, and acquiesced in the use of marijuana and the consumption of alcohol at their home. They accept that they could have refused entry to their home of anyone they did not wish to attend the party and that they had the ability to prohibit excessive drinking. The Pearsons did assert some supervisory role and made some attempt to control the activities of the attendees at the party. Thus, they asserted some paternalistic relationship with the guests of the party.

[Emphasis added.]

[13] Having concluded that a prima facie duty of care had not been established under the first part of the Anns/Cooper test, the judge declined to consider whether any duty would be negated by policy considerations under the second part of the test. He did, however, consider the standard of care, concluding that even if the Pearsons owed a duty of care to minors attending the party, they had met the requisite standard by taking keys away from those who drove to the party, asking attendees who needed a ride to call their parents, driving those who needed rides, allowing some attendees to stay over, and letting those who walked to the party walk home from the party: at paras. 275-278.

On Appeal

[14] On appeal, the appellant identifies a number of errors in support of two main grounds of appeal: that the judge erred in finding that the Pearsons did not owe the appellant a duty of care, and in finding that even if a duty of care existed, the Pearsons had met that standard.

[15] The appellant argues that the judge fell into error in his assessment of whether a duty of care existed because he considered it necessary for the precise sequence of events leading to the appellant's injuries to be foreseeable. The appellant also contends the judge considered three irrelevant factors in his foreseeability analysis: the absence of outward signs of the appellant's and Ryan's intoxication; the culture of drug and alcohol consumption on Salt Spring Island; and the stealing of the car.

[16] For the reasons that follow, I conclude that the judge was correct to find that the foreseeability element of the Anns/Cooper test was not made out, and therefore that a duty of care did not arise on the facts of this case.

Analysis

[17] Whether a duty of care exists is a question of law, reviewable on a standard of correctness: Galaske v. O'Donnell, [1994] 1 S.C.R. 670 at 690.

[18] The appellant submits that the judge began by asking the right question: "was physical injury reasonably foreseeable as a result of letting minors who have consumed alcohol and/or cannabis leave the Pearsons' premises on foot at night?": at para. 228. But the appellant says the judge then answered a different question, applying a far narrower conception of foreseeability, asking whether the Pearsons could foresee "that one or more of the party guests would steal a car and drive it unsafely": at para. 238.

[19] With respect, I do not agree that the judge did not answer what the appellant considers to be the right question. The judge posed the question precisely as framed by the appellant, saying:

> [228] Here, the impugned act was described as allowing intoxicated minors to venture off on foot from the party in the middle of the night. Applying Rankin, the question of foreseeability in this case must be framed in a way that links that act to the harm suffered by the plaintiff; in other words: was physical injury reasonably foreseeable as a result of letting minors who have consumed alcohol and/or marijuana leave the Pearsons' premises on foot at night?

[Emphasis added.]

The judge answered that question in the next paragraph of his reasons:

[229] As I have discussed above the Court in Rankin at para. 46 held that simply because something is possible does not mean it is foreseeable. The plaintiff submits that trips and falls, being hit by a car, fights and scuffles, and the hazards that accompany wandering on foot intoxicated were all foreseeable. I am unable to accept that contention. These harms may have all been possible, but my inquiry must focus on whether personal injury was foreseeable. I find that these harms were not foreseeable.

[Italics in original, underlining added.]

[20] The judge's conclusion--that physical injury to the appellant from walking home after consumption of alcohol was not foreseeable--rested heavily on his finding that the appellant was not visibly intoxicated when he left the party, and that there were no obvious signs to suggest that the appellant would suffer injury by walking home: at para. 230. The appellant says that whether he exhibited outward signs of intoxication is irrelevant to the foreseeability analysis. He recognizes that it was a factor considered by the Supreme Court of Canada in Childs, but distinguishes that case from the present one on the basis that the Liquor Control and Licensing Act prohibits any consumption of alcohol by minors. The appellant contends the prohibition reflects the legislature's awareness that any level of impairment makes minors vulnerable to an increased degree of recklessness and physical harm.

[21] I would not accede to this submission. Although a minor has neither the right to drink nor the same autonomy interest as an adult, their degree of intoxication is nonetheless a factor that should inform whether harm is reasonably foreseeable. A minor who leaves a party "falling down drunk" is patently more likely to suffer harm than a minor who has consumed very little and is in control of his faculties and reasoning processes. That is not to say that a lesser degree of impairment could not give rise to a duty of care where minors are involved. There is some force to the submission that minors are made more vulnerable by alcohol consumption than are mature adults. The bar for imposing a duty of care on an adult who hosts a party where minors are drinking may thus be lower than it is for those hosting adult guests, but the degree of impairment is not an irrelevant factor. In short, it informs both the nature and the likelihood of harm that can reasonably be anticipated.

[22] The appellant also challenges the judge's finding of fact that the appellant and Ryan were not materially impaired by their consumption of alcohol. The appellant argues that the judge's reliance on the appellant's previous levels of intoxication--for example saying that he "was no more, and likely a lot less intoxicated than he had been on many prior occasions" (at para. 141)--is illogical. I agree with the appellant that his condition on other nights of drinking could not be determinative of his level of impairment on the night in question. However, I understand the judge's references to the appellant's experience with drinking to form part of the analysis only to the extent that it led him to conclude that the appellant, being an experienced social drinker, would have exhibited few symptoms of alcohol impairment, as the judge found with respect to Ryan: at para. 158.

[23] In summary on this point, the judge addressed the question posed by the appellant, considering whether it was foreseeable that trips and falls, being hit by a car, fights and scuffles, and the hazards that accompany wandering on foot after consuming alcohol could lead to personal injury. The judge agreed that such injury was possible, but he did not agree that it was foreseeable given the appellant's level of intoxication. The judge was also alive to the appellant's argument that a minor impaired by alcohol could get into serious mischief, but he did not find the appellant was sufficiently impaired to be "incapable of responsible conduct": at para. 235.

[24] I return now to the criticism that the judge improperly narrowed the foreseeability analysis by asking whether the precise sequence of events of the appellant stealing a car and engaging in joy riding was foreseeable. The judge addressed that question at paras. 231-238, but he did so in response to the appellant's argument in the alternative that the theft of a car was foreseeable in the circumstances. The judge described that alternative argument, saying:

[231] Despite his argument that the foreseeability inquiry should focus on the foreseeability of his injury, rather than the theft of a car, he submits that the theft of a car was nevertheless foreseeable in the circumstances.

[25] In making that argument, the appellant relied on the evidence of several witnesses who testified to the local custom on Salt Spring Island of leaving vehicles unlocked with the keys inside, submitting it was reasonably foreseeable that an impaired party guest might take a car. The judge did not accept this submission, finding the custom of leaving keys in unlocked cars supported the contrary assumption: that cars were safe from theft in that community. Given his finding that the appellant was not intoxicated and was not incapable of responsible conduct, the judge concluded the Pearsons could not have foreseen that someone in the appellant's position would leave the party on foot and then steal a car.

[26] Having determined that the judge answered both questions as framed by the appellant at trial, it remains to assess whether he answered the foreseeability question correctly. The appellant says the judge was wrong to find it was not foreseeable that minors, whose judgment and capacities were impaired by alcohol, could be physically injured if they were allowed to walk home in the dark. However, even assuming that to be so, in my view it would not suffice to establish a duty of care on the facts of this case.

[27] The appellant's argument rests on the assumption that foreseeability of personal injury of any kind from walking home after consuming alcohol suffices to impose a duty of care and liability for any form of personal injury, even an injury caused by an unforeseen mechanism, such as a car accident. The appellant submits that if the class of harm--either personal injury or harm to property--is foreseeable, a duty of care exists and liability may follow for any harm falling within that class if the other elements of negligence can be established. In short, the appellant says the way the personal injury occurs does not matter and need not be foreseeable, as long as the class of harm is foreseeable.

[28] I cannot agree with this submission. Although the precise mechanism of injury need not be foreseeable, I conclude that the general mechanism must be.

[29] In my view, the foreseeability analysis involves more than merely asking whether personal injury as opposed to damage to property is foreseeable in relation to a particular class of plaintiff. The potential for occurrence of either type of harm cannot be assessed in the abstract, untethered from the circumstances and the way in which harm might occur. As the Court emphasized in Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19 [Rankin]:

[53] Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether a specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight.

[Italics in original, underlining added.]

[30] The duty of care analysis is a search for the connection between the alleged wrong (here, letting minors who have been drinking walk home on their own), and the harm (here, personal injuries sustained in a car crash). Reasonable foreseeability, like proximity, is a crucial limiting principle that ensures liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered: Rankin at para. 22. It is a practical impossibility to assess whether a class of harm could potentially occur without considering general mechanisms of injury. It follows that the foreseeability analysis asks whether someone in the defendant's position, prior to the incident occurring, ought reasonably to have foreseen the class of harm, to the class of plaintiff, through the general mechanism that caused the injury.

[31] In support of the submission that only the class of harm must be foreseeable, the appellant relied primarily on the distinction drawn in Rankin between the foreseeability of property loss (theft of an unlocked vehicle with the keys inside) and the foreseeability that the wrongful conduct of leaving keys in an unlocked car could lead to personal injury. However, Rankin must be read in the context of the live issue in that case.

[32] In Rankin, two minors who had been drinking alcohol and smoking cannabis entered the unsecured premises of a commercial car garage and stole an unlocked car using the keys they found in the ashtray. The driver, who did not have a licence and had never driven a car on the road before, crashed the vehicle; the passenger suffered a catastrophic brain injury. At trial, the issue was whether the garage owed a duty of care to the injured teen. While the Ontario Superior Court of Justice and the Ontario Court of Appeal both concluded that a duty of care was owed, this determination was overturned by the Supreme Court of Canada on the basis that bodily harm resulting from vehicle theft was not reasonably foreseeable.

[33] To the extent Rankin could be said to address whether the foreseeability of any kind of personal injury would support a duty of care in relation to all personal injury no matter how caused, in my view the reasoning is to the contrary. As this Court noted in Provost v. Dueck Downtown Chevrolet Buick GMC Limited, 2020 BCCA 86, the duty of care analysis in Rankin turned on whether there was sufficient evidence to establish that, in addition to the foreseeable risk of theft, there was a foreseeable risk of unsafe operation of the stolen vehicle and its attendant risk of personal injury to the class of plaintiff harmed: at para 50. In Rankin, the manner in which the harm occurred was a relevant consideration in the majority's assessment of reasonable foreseeability:

[34] I accept that the evidence could establish, as the jury found, that the defendant ought to have known of the risk of theft. However, 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 to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner.

[Emphasis added.]

[34] The appellant also relied on this Court's decision in Abdi v. Burnaby (City), 2020 BCCA 125 in support of the proposition that foreseeability of personal injury from any cause suffices to establish a duty of care. In that case, tenants of a residential property owned by the City of Burnaby held a party on the property at which they had an outdoor fire, despite having been previously informed by the City that such fires were contrary to the City's bylaws. The plaintiff, a guest at the party, was seriously injured when one of the tenants poured used motor oil on the fire, causing an explosion. She brought a claim in negligence against the tenants as well as the City of Burnaby.

[35] The City acknowledged that if the plaintiff had burned her hand directly in the fire, liability could be established because such an injury was foreseeable. But the City argued that it could not reasonably foresee that the defendant would throw motor oil onto the fire and cause an explosion. Justice Griffin, writing for the Court, rejected that distinction, finding that the proper question was whether the City ought to have reasonably foreseen that personal injury involving fire might be caused by their actions and omissions: Abdi at para. 10. She distinguished the general mechanism--injury by dangerous operation of an open fire--from the precise manner in which the harm occurred, saying:

[97] In discussing the concept of reasonable foreseeability, the majority in Rankin did not suggest that if the risk of a car accident and injury was reasonably foreseeable as a consequence of the car theft (for example, because of some prior knowledge that this had occurred on an earlier occasion), that the garage owner would need to foresee the precise manner in which the car accident and injury occurred. That kind of specificity would be

> analogous to what the City argues is necessary in the present case. To the contrary, in Rankin the majority focussed on whether the type of harm--personal injury as a result of dangerous operation of the vehicle--to the class of plaintiff damaged, was foreseeable, not whether the precise mechanism of injury was foreseeable.

[Italics in original; emphasis added.]

[36] To similar effect is Hughes v. Lord Advocate, [1963] A.C. 837 (H.L. (Sc.)). In that case, workmen left an unguarded manhole open while on a break. They had placed a tent over the manhole and surrounded it with paraffin lamps. Two boys came upon the tent and, being curious, entered it. They either knocked over or lowered one of the lamps into the hole, whereupon the lamp exploded, and the plaintiff fell into the hole and was severely burned. The defendants argued that the fact of the lamp being knocked over and causing an explosion was the true cause of the accident and, given that, the injuries suffered were not reasonably foreseeable. The House of Lords disagreed with that narrow approach. Lord Reid said, at 845:

It was argued that the appellant cannot recover because the damage which he suffered was of a kind which was not foreseeable. That was not the ground of judgment of the First Division or of the Lord Ordinary and the facts proved do not, in my judgment, support that argument. The appellant's injuries were mainly caused by burns, and it cannot be said that injuries from burns were unforeseeable. As a warning to traffic the workmen had set lighted red lamps round the tent which covered the manhole, and if boys did enter the dark tent it was very likely that they would take one of these lamps with them. If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.

[Emphasis added.]

[37] Hughes was cited with approval by the Manitoba Court of Appeal in School Division of Assiniboine South No. 3 v. Hoffer (1971), 21 D.L.R. (3d) 608 (Man. C.A.), aff'd (1973), 40 D.L.R. (3d) 480 (S.C.C.) [Assiniboine]. In that case, a father taught his 14-year-old son how to start a snowmobile without being seated on the machine. The snowmobile got away from him, crossed a parking lot, and struck a gas pipe on the outside of the school building. The gas from the pipes escaped, entered an air duct, made contact with a pilot light or furnace flame and exploded. The defendants argued that while damage was reasonably foreseeable, damage by explosion was not. The Court of Appeal disagreed, concluding that the damage was foreseeable as it was of the "type" or "complaint" that could be reasonably foreseen, even if the precise details of the accident could not be. Dickson J.A. writing for the Court said, at 614:

It is enough to fix liability in one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidents need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable. In the case at bar I would hold that the damage was of the type or kind which any reasonable person might foresee. Gas-riser pipes on the outside of Tuxedo buildings are common. Damage to such a pipe is not of a kind that no one could anticipate. When one permits a power toboggan to run at large, or when one fires a rifle blindly down a city street, one must not define narrowly the outer limits of reasonable provision. The ambit of foreseeable damages is indeed broad.

[Italics in original, underlining added.]

[38] The appellant's reading of the jurisprudence is based in part on the lack of clarity in the phrase "type of harm", which courts use to refer to both the class of harm (damage to property or personal injury) and to the way in which the harm occurred (for example unsafe operation of a vehicle, or an unfenced excavation). On close reading, I conclude the cases do not suggest that a duty of care can be based on a free-floating foreseeability of personal injury. To summarize, Rankin asked whether personal injury from dangerous operation of a stolen car was foreseeable; Abdi asked whether the City could have foreseen personal injury from operation of an open fire; Hughes asked whether risk of injury from boys playing with paraffin lamps was foreseeable; and Assiniboine asked whether damage to gas pipes on the outside of a building from a riderless snowmobile could be foreseen. In each case, foreseeability was not tied to the precise sequence of events, or to the extent of the injury or damage resulting. But foreseeability was tied to a general mechanism of injury: an open fire, paraffin lamps, dangerous operation of a motor vehicle, a careening riderless snowmobile.

[39] In the case at bar, the question is whether the respondents ought reasonably to have foreseen that the appellant, who had arrived at their home on foot and left the party on foot, would suffer personal injury from riding in a car being operated dangerously. If the Pearsons had reason to know that the appellant and Ryan were impaired and had access to a car, personal injury as a result of dangerous operation of a motor vehicle might have been foreseeable. It would not have been necessary for the respondents to foresee the precise mechanism of injury, whether due to the car leaving the road as it did, colliding with another car, or failing to avoid an object on the road. Nor would it have been necessary for the severity of the injuries to be foreseeable. But on the facts of this case, the foreseeability analysis must be rooted in the circumstances of a 17- and 18-year-old walking home from a party. I see no error in the judge's finding that it was not foreseeable that Ryan and the appellant could sustain personal injury from riding in a car being operated in a dangerous manner.

[40] I turn now to the two remaining "irrelevant considerations" the appellant says the judge incorporated into his foreseeability analysis: community standards and his finding that the appellant stole the Subaru.

[41] The judge recognized that the societal values and interests represented by the prohibition on underage drinking in the Liquor Control and Licensing Act can inform the first part of the Anns/Cooper test, i.e., whether there is a prima facie duty of care owed to minors who have been allowed to consume alcohol, but he found that those societal values and interests were "overwhelmed by the community standards on Salt Spring Island at the time of the accident" given that underage drinking was widespread and tolerated:

[220] The societal values and interests represented by the provisions of the Liquor Control and Licensing Act mentioned above can inform the first part of the Anns test, but it is well-established that a breach of statute does not create liability in negligence: The Queen (Can.) v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205 at 225.

[221] While I accept that the societal values and interests represented by the provisions of the Liquor Control and Licensing Act should be considered in applying the first part of the Anns test, I find that they are overwhelmed by the community standards on Salt Spring Island at the time of the accident.

[42] The appellant submits that the community attitudes to minors drinking were not relevant to the foreseeability analysis; it was an error for the judge to conclude that they were, and that they could relieve the respondents of a duty of care. If anything, the widespread consumption of alcohol and common experience with such parties would have put the respondents on notice of the types of risks that could follow from such parties. Although I agree with the latter submission, I conclude that, in any event, the judge's view of the lax community attitude towards underage drinking on Salt Spring Island formed no part of his analysis on foreseeability of the injury. Rather, I read his reasons as a conclusion that the statutory prohibition, although relevant, was not on its own sufficient to impose liability in negligence for allowing minors to drink, in light of the widespread practice of parents hosting parties at which underage drinking was allowed.

[43] Finally, the appellant argues the judge erred in finding that the appellant had stolen the Subaru when there was no basis in the evidence to make that finding. In my view, that inference was open to the judge on the record before him. Having said that, the finding was in any event immaterial to the judge's foreseeability analysis. The broad mechanism of injury the judge focused on was injury arising out of the dangerous operation of a motor vehicle. It is the foreseeability of that general mechanism that mattered, not which of the two boys stole the car or indeed whether the car was, in fact, stolen.

[44] In conclusion, I find that the judge did not give weight to irrelevant considerations in conducting the foreseeability analysis, and was correct to conclude that the harm suffered by the appellant was not foreseeable on the facts of this case.

Disposition

[45] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Grauer"

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Prepared on 29 October 2026 · Esheria