2025-2026 Tort Law Moot Competition

Moot Problem

The following are the reasons and judgment of the Court of Appeal for Ontario. The decision of the Court of Appeal for Ontario ("ONCA") is now appealed to the Supreme Moot Court of Canada ("SMCC"). The Appellant is Smith & Wesson Corp., and the Respondents are Samantha Price, Skye McLeod, Kenneth Price, Claire Smith, Patrick McLeod, and Jane McLeod.

Both Courts have jurisdiction over all issues raised in their respective decisions. The standard of review adopted by the ONCA is correct and is not the subject of appeal. Participants must not make submissions on the standard of review.

Although the underlying action was brought as a proposed class proceeding, issues relating to class action certification under the *Class Proceedings Act* are not within the scope of this moot. Participants must not make submissions on the certification criteria, the bifurcation of the certification motion, or the motion judge's or Court of Appeal's treatment of certification. The motion before the lower court was brought under Rule 21 of the *Ontario Rules of Civil Procedure*. However, the legal test for a *Rule* 21 motion is not in issue on this appeal. Participants must not make submissions on the *Rule* 21 framework or its application. The claims related to strict liability and public nuisance are not relevant to this appeal. Participants must also refrain from making submissions on costs, remedies, interest, or procedural fairness. These issues are not within the scope of the appeal.

While participants are encouraged to draw on relevant jurisprudence and legal principles beyond those cited in the ONCA's reasons, they must not introduce new causes of action or raise arguments that were not addressed or contemplated in the lower court's decision.

The SMCC has granted leave to appeal to the Appellant, Smith & Wesson Corp., and will hear submissions on the following tort law issues only:

1. Did the manufacturer owe a novel or established duty of care to the victims? Apply the Anns/Cooper test.
2. Should the manufacturer's failure to implement authorized user technology constitute a breach of the standard of care?
3. Should the criminal misuse and/or theft of firearm by a third party break the chain of causation?

COURT OF APPEAL FOR ONTARIO

CITATION: Price v. Smith & Wesson Corporation, 2025 ONCA 452
DATE: 20250623
DOCKET: C69226, COA-24-CV-0859 & COA-24-CV-0927

Hourigan, Wilson and Pomerance JJ.A.

BETWEEN

Samantha Price Skye McLeod, Kenneth Price, Claire Smith, Patrick McLeod, and Jane McLeod

Plaintiffs
(Appellants/Respondents)

and

Smith & Wesson Corp.

Defendant
(Respondent/Appellant)

Linda Rothstein, Odette Soriano, Malcolm N. Ruby, Adam Bazak, Michel W. Drapeau and Joshua Juneau, for the appellants (C69226 & COA-24-CV-0927)/ respondents (COA-24-CV-0859) Samantha Price Skye McLeod, Kenneth Price, Claire Smith, Patrick McLeod, and Jane McLeod

Scott Maidment, Jennifer Dent, Francesca D'Aquila-Kelly and Emily Hush, for the respondent (C69226 & COA-24-CV-0927)/appellant (COA-24-CV-0859) Smith & Wesson Corp.

Heard: December 9, 2024

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated December 3 and 4, 2020, with reasons reported at 2021 ONSC 1114, 154 O.R. (3d) 675.

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated March 5, 2024, with reasons reported at 2024 ONSC 1368.

Wilson J.A.:

A. OVERVIEW

[1] In July 2018, Faisal Hussain shot 15 people who were enjoying a summer evening on Toronto's Danforth Avenue, killing two of them. He used a gun manufactured by Smith & Wesson to do it. Some of the victims and their families brought a class action against Smith & Wesson for failing to implement technology to prevent unauthorized use of the gun. Had Smith & Wesson implemented that technology, the plaintiffs say, Hussain would not have been able to use it. Their claim failed at the certification stage.

[2] The motion judge bifurcated the plaintiffs' certification motion. During the first phase, which also included a motion to strike by the defendant under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the motion judge dismissed the plaintiffs' claims based in strict liability and nuisance, but determined that their negligence claim satisfied the cause of action criterion for certification. During the second phase, he concluded that the plaintiffs had not satisfied the common issues criterion set out in s. 5(1)(c) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and declined to certify their claim.

[3] Both parties appeal. The defendant contends that the negligence claim has no reasonable prospect of success and should have been struck at the first phase.

The plaintiffs argue that their strict liability and public nuisance claims are not doomed to fail, and that their action satisfies the common issues criterion.

[4] For the reasons that follow, I would dismiss both the defendant's and the plaintiffs' appeals from the first phase of the certification motion and the r. 21 motion. The plaintiffs' negligence claim is not doomed to fail, but their claims in strict liability and public nuisance are. I would allow the plaintiffs' appeal from the second phase of the certification motion and certify their claim in negligence as a class action.

B. FACTUAL SUMMARY AND PROCEDURAL HISTORY

[5] Faisal Hussain went to Danforth Avenue on a July 2018 evening, armed with a stolen M&P®40 handgun manufactured by the defendant. He shot at pedestrians and people coming out of shops and restaurants. He killed two people and injured 13 more. When the police arrived, Hussain exchanged gunfire with them before taking his own life.

[6] According to the pleadings, the defendant made the M&P®40 available for sale in Canada in 2013. It is a semiautomatic pistol designed for military and police use, so it is built to harm or kill people, not for hunting. A Saskatchewan gun dealer reported the M&P®40 that Hussain used as stolen in 2015. It had no features that would prevent an unauthorized user from firing it.

[7] But the plaintiffs allege that the defendant may have been able to implement those features—in fact, it had preliminarily agreed with the United States government to do so in 2000, as part of a settlement of civil claims in the United States arising out of gun violence. In that agreement (the "Agreement"), the defendant acknowledged that more than 200,000 firearms were stolen each year in the United States, and committed to incorporating authorized user technology in newly designed handguns by March 2003. The preamble to the Agreement described one of its purposes as "to reduce the criminal misuse of firearms".

[8] The defendant never complied with the Agreement. In 2005, the United States Congress passed legislation that effectively immunized gun manufacturers from civil liability to victims arising from the unauthorized use of a firearm. Yet the danger of unauthorized firearm use did not recede. In 2012, the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") released a report discussing the "substantial threat to public safety and to law enforcement" posed by lost and stolen firearms.

[9] According to the pleadings, the statistics in both the United States and Canada echoed that report: thousands of handguns recovered by police in the United States in connection with crimes had been reported lost or stolen. More than 75 percent of them were handguns, and Smith & Wesson was their most common manufacturer. In Canada, the rate of gun theft in break-and-enters more than tripled between 2009 and 2017, and nearly 3,500 firearms were stolen

between 2013 and 2017. A 43 percent increase in gun-related violence accompanied that figure.

[10] The plaintiffs commenced a class action in 2019. They pleaded that these facts, if true, established claims in negligence, strict liability, and public nuisance. The defendant, their claim asserts, was aware of foreseeable harm to innocent third parties—like the plaintiffs—if it did not implement authorized user technology. It could have implemented that technology, but chose not to.

[11] The motion judge bifurcated the certification motion. At the first phase, the defendant also moved under r. 21 of the *Rules of Civil Procedure* to strike the plaintiffs' claim and dismiss their action. In the February 11, 2021 decision, the motion judge struck the claims for strict liability and public nuisance, concluding that it was plain and obvious that they were doomed to fail, but determined that the plaintiffs' claim in negligence disclosed an arguable cause of action and satisfied the cause of action criterion for certification.

[12] At the second phase of the certification motion, the plaintiffs were required to satisfy the remaining four certification criteria set out in s. 5(1) of the *Class Proceedings Act*. In the March 5, 2024 decision, the motion judge found that the plaintiffs failed to satisfy the proposed common issues criterion, and dismissed the certification motion.

C. ISSUES ON APPEAL

[13] The plaintiffs and defendant appeal. The issues raised and my conclusions may be summarized as follows:

1. Did the motion judge err in not striking the claim in negligence?

   No. The motion judge correctly held that the plaintiffs' claim discloses a cause of action in negligence, and that it was capable of success. His decision not to strike the negligence claim is fortified by a full *Anns/Cooper* analysis, which establishes that the defendant could reasonably have foreseen that its handguns might be stolen and used to harm other people. Further, the foreseeability of that injury put the parties in a proximate relationship, and no policy considerations negate the resulting duty of care.

2. Did the motion judge err in striking the claim in strict liability?

   No. It is plain and obvious that a strict liability claim does not extend to the facts of this case. It is inappropriate to extend the law of strict liability to this product manufacturer, particularly when the damages were caused by a third party while committing a crime.

3. Did the motion judge err in striking the claim in public nuisance?

   No. The motion judge correctly held that it was plain and obvious that selling firearms does not sound in public nuisance. Firearm manufacturing is a regulated and permitted activity. There is a difference between manufacturing firearms, which cannot constitute a public nuisance, and the actions of people who misuse firearms, which could constitute a public nuisance.

4. If the negligence claim was not properly struck, did the motion judge err in not certifying the action because the common issues criterion for certification was not met?

Yes. The motion judge erred in principle by imposing a standard that required the plaintiffs to prove their case on the merits at the certification stage. The plaintiffs' claim in negligence should be certified as a class proceeding.

D. ISSUE #1: THE NEGLIGENCE CLAIM

(1) Overview

[14] The first phase of the certification motion addressed the defendant's r. 21 motion and the cause of action criterion for certification. The motion judge concluded that the plaintiffs' claim disclosed a cause of action in negligence, and so satisfied the cause of action criterion under s. 5(1)(a) of the *Class Proceedings Act*.

[15] The defendant appeals. It argues that the motion judge took a "shortcut" by recognizing a duty of care based on established categories which are not analogous to the relationship in this case. It says that this case involves a novel duty of care, so the motion judge should have conducted a full *Anns/Cooper* analysis to determine whether relational proximity and reasonable foreseeability are present, and whether any residual policy considerations would negate a *prima facie* duty of care: see *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. The defendant asserts that it owed the plaintiffs no duty of care in designing and manufacturing the gun, so the negligence action is bound to fail and must be dismissed.

[16] The plaintiffs respond that the motion judge correctly held that it was not plain and obvious that the defendant owed no such duty to the plaintiffs.

[17] The correctness standard of review applies on a motion determining whether a claim discloses a reasonable cause of action: *Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at para. 26. Applying the *Anns/Cooper* framework below, I agree with the motion judge that the plaintiffs' claim discloses a cause of action in negligence that satisfies the cause of action criterion.

(2) Analysis

(a) The Governing Principles on a Motion to Strike

[18] The test applied on a motion to strike a pleading is the same test used to determine whether pleadings satisfy the cause of action criterion under s. 5(1)(a) of the *Class Proceedings Act*: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63. That test asks whether it is plain and obvious, assuming the facts pleaded are true, that the plaintiff's claim cannot succeed: *Pro-Sys*, at para. 63.

[19] Rule 21.01(1)(b) provides a tool to eliminate cases at an early stage that have no possibility of success. There is no evidence on a r. 21 motion—it is determined based on the pleadings alone, with the pleaded material facts usually accepted as true: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22. The threshold to strike a claim is high, and the court must

read the claim “as generously as possible” because it is preferable to dispose of cases on their merits: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 88, *per* Karakatsanis J. (dissenting, but not on this point). That is especially so when it comes to novel claims. “The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed”, so courts “must be generous and err on the side of permitting a novel but arguable claim to proceed to trial”: *Imperial Tobacco Canada Ltd.*, at para. 21.

(b) The Motion Judge’s Reasons

[20] Although the motion judge’s decision that the plaintiffs’ claim disclosed a cause of action in negligence is reviewable on a correctness standard, it is helpful to review his reasons in more detail. Before doing so, however, I briefly outline the duty of care framework that governed his analysis. I return to this framework in more detail below.

[21] As the motion judge correctly observed, the existence of a relationship that involves a duty of care lies at the root of negligence law in Canada. To determine whether a duty of care exists, the *Anns/Cooper* framework applies. It inquires into whether the plaintiff’s claim: (a) falls within or is analogous to an established duty of care, or (b) is based on a novel duty: *Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at paras. 17-18. In some cases, a relationship will fall within, or be analogous to, a category that has already been judicially

recognized as giving rise to a duty of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 5. In other cases, however, there will be no established or analogous category, so the court must undertake a full duty of care analysis: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 29.

[22] To defeat a motion to strike and satisfy the cause of action criterion, the action as pleaded must: (a) fall within an established or analogous category of duty of care, or (b) plead material facts which show that the relationship between plaintiff and defendant establishes a duty of care. The applicable framework has three elements—proximity, reasonable foreseeability of harm, and the absence of countervailing public policy considerations—and is commonly referred to as the "*Anns/Cooper* test": e.g., *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55, at para. 16.

[23] The motion judge found that the action as pleaded fell within two recognized categories of negligence: the goods dangerous *per se* category, and the product liability category. He therefore concluded that it was not plain and obvious that the action had no prospect of success.

[24] First, the motion judge held that the plaintiffs advanced a negligence claim that fell within the "goods dangerous *per se*", or just "dangerous goods", category. He observed that the law lords in the seminal case of *Donoghue v. Stevenson*,

[1932] A.C. 562 (Eng. H.L.), referred approvingly to the category. He based his analysis on two cases referenced in *Donoghue*: *Dixon v. Bell* (1816), 105 E.R. 1023 (Eng. K.B.), and *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640 (P.C.).

[25] In *Dixon*, the defendant sent his "servant"—who was a child—to bring him a loaded gun. The servant mistakenly shot the gun at the plaintiff's child and injured him. Lord Ellenborough C.J. held that an action could lie against the defendant.

[26] In *Dominion Natural Gas*, a gas company installed a "supply plant" in a blacksmith's shop, but set it up so that the gas vented into the shop itself as opposed to the outside air. The gas caught fire and caused an explosion that killed one plaintiff and injured another, both of whom worked in the shop. Lord Dunedin held, at p. 646, that "in the case of articles dangerous in themselves, … there is a peculiar duty to take precaution imposed upon those who send for or instal such articles when it is necessarily the case that others will come within their proximity".

[27] The second category on which the motion judge relied was "products liability". He described it as a duty on manufacturers "in designing [a] product to avoid safety risks and to make the product reasonably safe for its intended purposes".

[28] With one exception, each of the cases the motion judge cited in support of this category holds that a manufacturer owes a duty to the foreseeable user of their product. Specifically, the motion judge relied on cases about the duty owed by a

drug manufacturer to consumers (*Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, 27 C.P.C. (7th) 32); a propane tank manufacturer to homeowners (*Kreutner v. Waterloo Oxford Cooperative Inc.* (2000), 50 O.R. (3d) 140 (C.A.); a fireplace manufacturer to homeowners (*Cantlie v. Canadian Heating Products Inc*, 2017 BCSC 286); and a garden and lawn riding mower manufacturer to mower users (*Nicholson v. John Deere Ltd.* (1986), 58 O.R. (2d) 53 (H.C.), aff'd (1989), 68 O.R. (2d) 191 (C.A.)). The one exception is the duty that automobile manufacturers owe to other users of the road injured by their negligent manufacturing: *Rentway Canada Ltd./Ltée v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150 (Ont. H.C.), aff'd [1994] O.J. No. 50 (C.A.); *Gallant v. Beitz* (1983), 42 O.R. (2d) 86 (H.C.).

[29] This court's last—and most comprehensive—word on the products liability category postdates the motion judge's reasons. It refers to the category in the more restricted manner I just described, namely as "the duty of care owed by a manufacturer to the ultimate consumer or user of its product": *Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135, 32 C.C.L.I. (6th) 4, at para. 53. *Burr* was about a manufacturer and the foreseeable user of its product, i.e. the manufacturer of an exploding heat recovery ventilator and a homeowner whose residence was damaged as a result.

[30] Given the motion judge's conclusion the plaintiffs' negligence claim came within two established categories, he found it unnecessary to undertake a full duty of care analysis.

(c) The *Anns/Cooper* Framework

[31] The parties in this case understand recent Supreme Court jurisprudence on the duty of care differently. The defendant insists that the motion judge's reliance on categories sits uneasily with *Livent*'s cautious approach to established categories, and that the plaintiffs' claim is otherwise doomed given the Supreme Court's approach to the foreseeability of harm flowing from theft in *Rankin*. The plaintiffs respond that *Livent* only applies to pure economic loss cases, and that *Rankin* maintains that duties of care are easier to establish in personal injury cases.

[32] I agree partly with each of them. But their disagreement suggests that some guidance on the duty of care analysis is necessary. As I explain below, *Livent*'s analytical caution with categories in the duty of care analysis applies generally, including to the personal injury context. *Rankin* confirms that approach. But importantly for purposes of this case, *Rankin* does not sever the longstanding connection between foreseeable bodily harm and proximity. As a general rule, if bodily harm is reasonably foreseeable, a duty of care will usually exist.

(i) *Livent* and *Rankin* counsel a cautious approach to categories

[33] The *Anns/Cooper* test proceeds in two stages. The first examines "reasonable foreseeability" and "proximity". Reasonable foreseeability asks whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence: *Livent*, at para. 32. Proximity asks whether the plaintiff and defendant are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law": *Livent*, at para. 25, quoting *Cooper*, at paras. 32, 34. The second stage examines whether any "residual policy considerations", external to the parties' relationship, negate the would-be duty of care: *Livent*, at para. 37.

[34] *Cooper* marked a change to the first stage of the analysis. Before then, foreseeability of harm sufficed on its own to ground a presumptive duty of care. That presumption could be rebutted by policy considerations, but foreseeability was enough to get to the second stage: *Cooper*, at para. 30. *Cooper* changed that by adding the proximity requirement.

[35] *Livent* reaffirmed the *Anns/Cooper* framework and the continued relevance of established categories in that analysis, but instructed lower courts to apply established categories carefully. Gascon and Brown JJ. cautioned against identifying established categories "in an overly broad manner": *Livent*, at para. 28. When asked to conclude that the relationship between the parties in a particular

case comes within an established category, courts must examine the factors that justified recognizing the duty in the first place, and consider whether the relationship at issue is truly analogous. Failing to do so risks short-circuiting *Anns*/*Cooper* by recognizing duties that raise new policy questions unanswered in earlier cases: *Livent*, at para. 28.

[36] The plaintiffs argue that *Livent*'s guidance on this point does not apply—at least not with full force—to the personal injury context. They say it applies only to pure economic loss cases, like *Livent* itself. They claim that to conclude otherwise is to "ignore[] key language" in *Rankin*.

[37] I disagree. In *Rankin*—itself a personal injury case—the Supreme Court followed *Livent* to hold that the category of "foreseeable physical injury" could not ground a duty of care on the facts at issue: *Rankin*, at para. 28. *Rankin* thus confirms that *Livent*'s cautious approach to category-based relationships not only applies beyond pure economic loss cases, but that it applies to personal injury cases too.

[38] *Livent* and *Rankin* represent an unwillingness to overextend a category-based approach to the duty of care analysis. In both cases, the court reasoned from first principles rather than preoccupying itself with whether the facts could be brought within an established category. That makes sense. Attention to the principles uniting the specific cases in which people owe each other a duty of care

was “the great achievement of Lord Atkin in *Donoghue v. Stevenson*”: *Rankin*, at para. 76, *per* Brown J. (dissenting, but not on this point). The *Anns*/*Cooper* test is the modern distillation of the first principles Lord Atkin articulated; the contemporary response to his famous question: “Who is my neighbour?” The *Anns*/*Cooper* test answers that your neighbour is anyone foreseeably harmed by your behaviour, and with whom you are in proximate relationship, so long as no policy considerations require otherwise.

[39] *Livent* and *Rankin* suggest that when in doubt, courts should answer Lord Atkin’s question by conducting the full *Anns*/*Cooper* analysis, not by trying to fit a new set of facts into an established category. Still, the category-based approach should not be abandoned, because sometimes there is no need to turn to first principles. Drivers, for example, owe other road users a duty of care, as doctors do their patients, and lawyers do their clients: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 25. But when an established category fits a new set of facts imperfectly, the court should undertake a full *Anns*/*Cooper* analysis, not try to awkwardly force the two together.

(ii) Foreseeable physical harm remains relevant post-*Rankin*

[40] The *Rankin* majority declined to apply the “foreseeable physical injury” category on the facts of that case. But that does not make foreseeable physical harm irrelevant to the duty of care analysis. Foreseeable physical harm remains at

the heart of the common law of negligence, and *Rankin* does not change that. Instead, it cautions against rote reliance on the concept when its factual foundations are absent—like in *Rankin* itself, where the harm at issue was not reasonably foreseeable. That has always been the case in negligence jurisprudence.

[41] That simple insight guides the *Anns-Cooper* analysis here. Because of that guiding role, I briefly foreshadow *Rankin*'s implications for the relevance of foreseeable physical harm. While I undertake the *Anns/Cooper* analysis in this case in further detail in the next part of these reasons, I highlight at this juncture that properly understanding *Rankin*'s implications resolves the negligence part of the appeal in a straightforward fashion. Reasonable foreseeability of physical harm is made out on the pleaded facts because of what guns do: once in the hands of unauthorized users, they are often used to harm other people. Proximity is made out because reasonable foreseeability is made out: as *Rankin* says, in cases of personal injury, reasonable foreseeability often entails proximity, with few exceptions. This case is not one of the exceptions, and no policy considerations negate the ensuing duty of care.

[42] For confirmation that *Rankin* maintains the significance of foreseeable physical harm, one need look no further than the end of the court's own foreseeability analysis. The court concludes that the harm at issue was not reasonably foreseeable. Karakatsanis J. explains, however, that "had there been

other evidence or circumstances making the risk of personal injury reasonably foreseeable, a duty of care would exist": *Rankin*, at para. 55. *Rankin* itself thus affirms the short distance between foreseeability of harm and the existence of a duty of care.

[43] It does so for good reason. Proximity is about determining who is "so closely and directly affected" by our behaviour that we must bear them in mind when we act: *Donoghue*, at p. 580. No better example exists than other people we foreseeably injure. If our behaviour foreseeably risks hurting someone else, of course we "ought reasonably to have them in contemplation": *Donoghue*, at p. 580. That is a basic building block of tort law. Our bodies are the means by which we do anything at all, so—with few exceptions—others are not entitled to act so as to foreseeably injure them: Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016), at p. 39. So if physical harm is reasonably foreseeable, the doer and sufferer of the harm are generally in a proximate relationship.

[44] The Supreme Court has long recognized the close connection between foreseeable harm and proximity. That close connection explains why, when the court rhetorically asked itself in *Cooper*, "[w]hat then are the categories in which proximity has been recognized?", it immediately answered, "[f]irst, <u>of course</u>, is the situation in which the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property": *Cooper*, at para. 36 (emphasis added).

[45] Three years after *Rankin*, the Supreme Court's unanimous judgment in *Marchi* confirmed that the link between foreseeable harm and proximity is alive and well. In *Marchi*, at paras. 30-31, the court held that the relationship between a municipality and someone injured in one of its parking stalls fit an established category, but was also "sufficiently close to satisfy a novel proximity analysis". Why? Because the case "involve[d] foreseeable physical harm to the plaintiff and therefore engage[d] one of the core interests protected by the law of negligence": *Marchi*, at para. 31. In support of that point, Karakatsanis and Martin JJ. cite *Cooper*, at para. 36—the passage quoted above in which the court recognized that "of course" foreseeable physical harm generates proximity.

[46] *Rankin* also clarifies, however, that foreseeable physical harm does not ground a duty of care by itself. As *Livent* instructs, courts must pay attention to whether a putative duty of care relationship is truly analogous to an established category, lest they blind themselves to the particular factors which justified recognizing that category in the first place. *Rankin* executes that guidance by declining to apply the category of foreseeable physical harm to a circumstance in which harm was not reasonably foreseeable.

[47] To determine whether one party owes another a duty of care in personal injury cases, courts must determine whether the physical harm is reasonably foreseeable, and if so, whether any policy considerations cut against recognizing a duty of care. If physical harm is reasonably foreseeable, proximity is generally

established: *Cooper*, at para. 36; *Rankin*, at para. 55; *Marchi*, at para. 31. But a duty of care is only established when the court takes the final step and determines that no policy considerations preclude its recognition.

(d) Application of the *Anns/Cooper* Framework

[48] Applying the *Anns/Cooper* framework in this case, it is not plain and obvious that the plaintiffs' negligence claim cannot succeed. When the facts pleaded are taken as true, the harm to the victims was reasonably foreseeable. There are few reasons to unlawfully possess a firearm other than to use it to hurt people. And because physical harm is reasonably foreseeable with the unlawful possession of a handgun, the defendant is in a proximate relationship with the victims. No policy considerations negate the ensuing duty of care.

[49] Given the novel facts of this case, it is helpful to undertake a full *Anns/Cooper* analysis. In doing so, however, I do not accept the defendant's submission that the motion judge erroneously took a "shortcut" to recognizing a duty of care by relying on established duty of care categories. Although neither of the categories on which he relied analogizes perfectly to the facts as pleaded, it is also not plain and obvious that the negligence claim is doomed to fail if based on those categories.

[50] Still, however, a full *Anns*/*Cooper* analysis is prudent to confirm that the facts pleaded disclose a cause of action. I underscore that the court is not deciding at

this stage whether the plaintiffs' negligence claim succeeds on the merits, but only whether the pleaded facts are capable of supporting a claim at law: *Bowman*, at paras. 38-39. As set out below, the full *Anns/Cooper* analysis confirms that it is not plain and obvious that the plaintiffs' claim cannot succeed.

(i) The harm to the victims was reasonably foreseeable

[51] At the first stage of the *Anns*/*Cooper* test, the court examines whether the alleged negligence imposes a reasonably foreseeable risk of the type of injury that occurred on a class of persons to which the plaintiffs belong. Here, the alleged negligence is the failure to install authorized user technology, the type of injury is harm from the unauthorized use of a firearm, and the plaintiffs belong to the class of third parties potentially harmed by the unauthorized use of firearms.

[52] Did the alleged negligence impose a reasonably foreseeable risk of harm on the class to which the plaintiffs belong? As I explain below, that depends on the answer to another question: was it reasonably foreseeable that firearms manufactured by the defendant might be stolen?

[53] The answer is yes on both counts. The defendant concedes in its written submissions that the plaintiffs "have pleaded material facts to establish that gun theft is foreseeable" (emphasis omitted). But that gives the game away: the risk that stolen firearms will be used to harm third parties is eminently foreseeable. So much so, the pleadings say, that the United States government secured the

defendant's agreement to implement authorized user technology to avoid precisely that possibility.[1] The Agreement's own preamble described one of its purposes as "to reduce the criminal misuse of firearms". The pleadings allege that the defendant obtained patents to implement the technology. Then, in 2012, the ATF released a report in 2012 detailing the continued danger that stolen guns posed. And amidst all of those events, the United States Congress passed legislation shielding firearm manufacturers from civil liability arising out of unauthorized or unlawful misuse of firearms. If that kind of misuse was foreseeable enough to prompt federal insulation from liability, it is difficult to see how the defendant could not reasonably have foreseen it.

[54] The defendant had agreed with one of the world's largest federal governments to implement technology to prevent the unauthorized use of firearms. It had obtained patents to do so. And it had the benefit of an expert regulator's report on the dangers associated with unauthorized use. On top of all of that, it received near-total immunity from associated liability under the aegis of United States federal legislation.

[55] Against that backdrop, a reasonable company in the defendant's position would have been aware of the connection between unauthorized firearm use and

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[1] The defendant makes a range of arguments against the relevance of the Agreement, but none of them speak to the reason the Agreement is relevant: its existence makes it clear that the defendant was able to reasonably foresee the risk of gun violence flowing from gun theft.

harm to third parties. It follows that the defendant should reasonably have foreseen the risk of harm to others posed by its manufacturing firearms without technology to prevent their unauthorized use.

[56] The clear connection between failing to prevent gun theft and a risk of harm to others distinguishes this case from *Rankin*. The difficulty for the plaintiff in *Rankin* was the absent link between the impugned risk of theft and the harm suffered by the plaintiff. It might have been reasonably foreseeable that failing to lock the cars at the garage generated a risk of theft, but "it [did] not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury": *Rankin*, at para. 34. That is, with respect to cars, personal injury does not foreseeably flow from theft: stolen cars might well be used in ways that do not harm anyone.

[57] Here, by contrast, it does automatically flow from evidence of the risk of theft that a gun manufacturer should have considered the risk of physical injury. There is not much reason to have a stolen gun besides to use it to hurt other people, and the pleadings, assumed to be true, bear that out. Unlike in *Rankin*, there is an obvious link here between the risk the defendant created and the harm the plaintiffs suffered as a result. And as Karakatsanis J. said in *Rankin*, "had there been other evidence or circumstances making the risk of personal injury reasonably foreseeable, a duty of care would exist": at para. 55. Because those other

circumstances exist here, it is not plain and obvious that reasonable foreseeability could not be established at trial.

(ii) The reasonable foreseeability of the harm generates proximity

[58] Because the harm to this class of plaintiffs was reasonably foreseeable, the parties stood in a relationship of proximity. This conclusion follows the reasoning in *Cooper*, *Rankin*, and *Marchi*, which all say that as a general rule, reasonably foreseeable bodily harm tends to ground proximity.

[59] This case is not an exception to that general rule. In *Rankin*, at para. 23, the court referred to *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, as an example of a case in which the connection between foreseeability and proximity does not hold. There, at para. 31, the court drew a distinction between claims based on an overt act of the defendant that directly caused foreseeable physical harm and claims alleging a failure to act:

> Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant* has *directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determined whether there is a nexus between the parties. [Emphasis in original.]

[60] This is not a case of liability for omission, as in *Childs*. The impugned act is manufacturing a firearm without technology to prevent its use if stolen. If that

counts as an omission, then all negligence can be so described: manufacturing ginger beer without a system to prevent snails from making it in; plowing roads without taking steps to ensure that the snowbanks are safe; driving a car without taking steps to avoid crossing the median. That description would distort the reality of this case just as much as it would distort those examples.

[61] Nor is it a problem that a third party—the user of the stolen firearm—necessarily mediates the relationship between plaintiffs and defendant. The law does not permit a defendant to resist a finding of proximity based on the foreseeable consequences of their own negligence. “If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence”: *Haynes v. Harwood*, [1935] 1 K.B. 146 (Eng. C.A.), at p. 156; see also *Martin v. McNamara Construction Company Limited and Walsheke*, [1955] O.R. 523 (C.A.), at p. 527. Because it is foreseeable that manufacturing firearms without authorized user technology creates a risk that third parties will use them to harm others, the defendant cannot rely on those third parties to vitiate proximity.

[62] The defendant complains that if proximity is made out here, then all manufacturers “owe a duty of care to prevent the commission of a crime against any person anywhere in any circumstances”. It suggests that proximity would exist between manufacturers and those harmed by almost any product, including cars, knives, power tools, and even cleaning agents.

[63] I do not accept this argument, because it ignores the unique foreseeability of violence resulting from gun theft. Cars, knives, power tools, and cleaning agents are different from the guns at issue in this case, whose primary purpose is to injure or kill others. That is what distinguishes this case from the defendant's examples and from *Rankin*. Given the unique purpose of firearms, when they are stolen, a risk of harm to others is almost always present. Based on the pleaded facts, it is not plain and obvious that there is insufficient proximity to support a *prima facie* duty of care.

[64] Reasonable foreseeability of harm is not the only factor relevant to the existence of proximity. Others include "the expectations of the parties, representations, reliance and the nature of the property or interest involved": *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 50. It is not plain and obvious that the pleaded facts would not support a finding that, in addition to reasonable foreseeability of personal injury, other hallmarks of the proximity analysis are present.

[65] So even if proximity were not established solely because the harm to the plaintiffs was reasonably foreseeable, other proximity factors may also be relevant. The plaintiffs plead that the defendant agreed to implement technology to prevent unauthorized use of their firearms, but failed to comply with its commitment after it received legislative immunity. Moreover, the plaintiffs allege the defendant knew that weapons like the gun used in the Danforth shooting were inherently dangerous

and that there was widespread handgun diversion and use of diverted handguns to cause injury and death.

(iii) No policy considerations negate the duty of care

[66] *Rankin* does not relegate foreseeable physical harm to the sidelines of the duty of care analysis. It insists that the category not be applied blindly, so as to capture cases where harm is not reasonably foreseeable. And, together with *Livent*, it insists that policy considerations factor in eventually.

[67] *Livent* and *Rankin*, however, do not give policy considerations pride of place in the *Anns*/*Cooper* test. Quite the opposite—*Livent* specifically cautions against relying on them broadly. "The policy inquiry", Gascon and Brown JJ. explain, insulates defendants from liability "*despite* the proximate relationship between the parties, and *despite* the reasonably foreseeable quality of the plaintiff's injury … That it would limit liability in the face of findings of both proximity and reasonable foreseeability makes plain how narrowly it should be relied upon": *Livent*, at para. 41 (emphasis in original; citations omitted). So policy considerations should negate a duty of care "[o]nly in rare cases", like "those concerning decisions of governmental policy or quasi-judicial bodies": *Livent*, at para. 41 (citations omitted).

[68] This is not one of those rare cases. The defendant submits that finding a duty of care will result in "indeterminate and unreasonable liability to a limitless population". That argument runs headlong into *Livent*'s caution that "indeterminate

liability should not be confused with significant liability": at para. 43. The defendant's potential liability is certainly significant, but it is no less determinate than that arising from the duty that all drivers owe to other users of the road. The class to whom each duty is owed is well-defined and unambiguous. Someone is either injured in a car accident or not; someone is either injured by a stolen gun or not. It may not be clear in advance who will eventually belong to either class, but that is no more a barrier when it comes to guns than when it comes to cars.

[69] Nor does it matter that firearms are heavily regulated by statute. The defendant argues that it does, claiming that Parliament chose not to prohibit guns without authorized user technology in the *Criminal Code*, R.S.C. 1985, c. C-46, or the *Firearms Act*, S.C. 1995, c. 39. Because those statutes regulate firearms extensively, the defendant argues that this omission reflects a policy choice that negates any *prima facie* duty of care. But it cites no authority for the proposition that broad industrial regulation forecloses any duty of care not created by statute. Nor could it: the argument is no more persuasive than the suggestion that by omitting any prohibition of negligently designed drugs from the *Food and Drugs Act*, R.S.C. 1985, c. F-27, Parliament foreclosed any duty of care owed by drug manufacturers to consumers.

[70] In light of the foregoing, it is not plain and obvious at this stage of the proceedings that policy considerations would negate a *prima facie* duty of care.

(iv) Conclusion: The negligence claim is not doomed to fail

[71] The motion judge correctly held that the plaintiffs' claim discloses a cause of action in negligence and therefore satisfies the cause of action criterion in s. 5(1)(a) of the *Class Proceedings Act*.

[72] The motion judge was not tasked with deciding whether the claim would be successful on its merits. He had to decide whether the claim was capable of success. His decision not to strike the negligence claim is fortified by a full *Anns/Cooper* analysis. When the facts of the case are subjected to that analysis, it is not plain and obvious that the defendant owed the plaintiffs no duty of care. The defendant could reasonably have foreseen that the handguns it manufactured might be stolen, and that if they were, they might be used to harm other people. The foreseeability of that injury placed the defendant and the plaintiffs in a proximate relationship. And no policy considerations negate the resulting duty of care. At the very least, it is not plain and obvious that these conclusions are false. It follows that the plaintiffs' claim in negligence is not doomed to fail.

E. ISSUE #2: THE STRICT LIABILITY CLAIM

[73] The motion judge struck the plaintiffs' claim for strict liability, concluding it was plain and obvious the claim was doomed to fail because products liability is a matter of negligence and not strict liability.

[74] The plaintiffs appeal. They argue that the motion judge erred in concluding that the doctrine of strict liability does not apply to products liability claims. They assert that the doctrine could incrementally expand to cover their claim. The defendant responds that Canadian law has foreclosed the application of strict liability in tort to defective product claims, and that recognizing such a claim in this case would radically change the law.

[75] The motion judge's determination of whether a claim discloses a reasonable cause of action is, as outlined above, reviewed on the correctness standard: *Bowman*, at para. 26. A claim will be struck if it is plain and obvious that it cannot succeed: *Pro-Sys*, at para. 63.

[76] The motion judge made no error. It is plain and obvious that the rule of strict liability developed in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K.H.L.), does not extend to this case. That rule imposes liability on a defendant's "non-natural use" of land: *Rylands*, at p. 339; see also *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181, at p. 1189. The claim at issue in this case has nothing to do with the defendant's use of land. The plaintiffs argue that the rule in *Rylands* could evolve to apply to include non-land-based claims, but that would represent a significant, rather than incremental, departure from the existing jurisprudence, which treats products liability as a matter of negligence, not strict liability. In *Smith v. Inco Limited*, 2011 ONCA 628, 107 O.R. (3d) 321, at para. 93, this court declined to take a similarly "bold step" of extending *Rylands*' reach to

impose strict liability for ultra-hazardous activities, noting that those who engage in dangerous activities are subject to negligence actions.

[77] There are sound reasons not to impose strict liability on manufacturers. They cannot guarantee that all items are incapable of harming people, particularly when they are not used in accordance with instructions. A manufacturer who produces a product does not insure someone who suffers injury while using it: *Daishowa-Marubeni International Ltd. v. Toshiba International Corporation*, 2010 ABQB 627, 501 A.R. 178, at para. 40.

[78] These facts provide no basis to extend the law of strict liability to product manufacturers, particularly when the damages are caused by a third party in the course of committing a crime. The motion judge was correct to strike the strict liability claim.

F. ISSUE #3: THE PUBLIC NUISANCE CLAIM

[79] The motion judge struck the plaintiffs' public nuisance claim, concluding the defendant could not be found liable in public nuisance for manufacturing and distributing its products when a third party misuses the product and harms people.

[80] The plaintiffs appeal. They argue that the motion judge erred by applying the wrong legal test and failing to meaningfully engage with the pleadings and policy issues at play, including the possible incremental development of the law. The defendant disagrees. It argues that public nuisance has never been applied to hold

a manufacturer liable for a risk to public health and safety that may result from the criminal misuse of its products.

[81] Again, the standard of review on this issue is correctness: *Bowman*, at para. 26. If it is plain and obvious the claim cannot succeed, it will be struck: *Pro-Sys*, at para. 63.

[82] I agree with the motion judge that the public nuisance claim should be struck. Public nuisance claims are rooted in the denial of the public's right to enjoy public areas. As the motion judge correctly noted, a public nuisance is an activity that "unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": *Ryan v. Victoria*, [1999] 1 S.C.R. 201, at para. 52, quoting Lewis N. Klar, *Tort Law*, 2nd ed. (Scarborough, Ont.: Carswell, 1996), at p. 525.

[83] The motion judge referred to a text which explains that public nuisance includes two broad categories: (i) interference with the rights of the public which everybody shares, such as blocking access to a public park, protest marches, or polluting the air; and (ii) widespread interference with the use and enjoyment of private land: Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law Inc., 2011), at pp. 397-98.

[84] The motion judge correctly held that it was plain and obvious that selling firearms—even firearms without authorized user technology—does not sound in

public nuisance. Firearm manufacturing is regulated in Ontario and is a permitted activity. There is a difference between manufacturing firearms, which cannot be seen as public nuisance, and the actions of people who misuse the guns, which could constitute public nuisance. It is one thing to impose negligence-based liability on gun manufacturers for the reasonably foreseeable consequences of third parties' use of firearms. It is quite another to impose liability in public nuisance, which does not inquire into foreseeability, proximity, or whether the defendant breached an applicable standard of care. Doing so, the motion judge rightly held, would radically transform the law governing liability for negligent manufacturing, not incrementally develop it. The motion judge made no error in striking the public nuisance claim.

G. ISSUE #4: THE REMAINING CERTIFICATION CRITERIA

(1) Overview

[85] As noted above, the motion judge bifurcated the plaintiffs' certification motion. At the second stage, the plaintiffs were required to satisfy the remaining certification criteria in s. 5(1) of the *Class Proceedings Act*:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> …
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.[2]

[86] No one disputed that there was an identifiable class, so s. 5(1)(b) was satisfied. The motion judge concluded that had the plaintiffs satisfied the common issues criterion under s. 5(1)(c), the preferable procedure criterion in s. 5(1)(d) would also be satisfied. Finally, he found that the litigation plan filed under s. 5(1)(e) was unworkable, but explained that if the other certification criteria had been satisfied, he would have certified the action as a class action and proceeded to determine the litigation plan.

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[2] The *Class Proceedings Act* was amended in 2020. The former Act continues to apply to cases started before October 1, 2020, including this case: see *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, 492 D.L.R. (4th) 294, at para. 4. The certification criteria in s. 5 remain unchanged.

[87] The motion judge concluded, however, that the plaintiffs did not satisfy the common issues criterion in s. 5(1)(c), so he dismissed the certification motion. The plaintiffs appeal.

[88] The plaintiffs argue that the motion judge articulated and applied the wrong legal test under s. 5(1)(c). They say that he failed to adhere to the low threshold for common issues and instead waded into the merits of the case. The defendant disagrees. It argues that the plaintiffs failed to establish any basis in fact for the existence or commonality of the common issues.

[89] The standard of review is not in dispute. This court reviews the identification of the legal test for certifying common issues on a correctness standard, and the determination of whether the evidence satisfies that test on a more deferential standard. Appellate intervention on the latter question is restricted to “matters of general principle” or palpable and overriding error: *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682, at para. 37; *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at para. 115, leave to appeal refused, [2017] S.C.C.A. No. 341. As I explain below, this case warrants intervention because the motion judge erred in principle by applying a merits-based test to his common issue analysis.

(2) Analysis

(a) The Governing Principles for Certification

[90] On a certification motion, the court does not reach the merits of the case: *Bowman*, at para. 25; *Pro-Sys*, at paras. 102-05. Instead, it asks whether there is "some basis in fact" for each of the certification criteria, other than the cause of action criterion: *Pro-Sys*, at para. 99. The "some basis in fact" standard sets a low bar. It "is entirely different from requiring proof of the claim", and "merely asks whether there is some minimal evidence in support of it": *Lilleyman*, at para. 74 (emphasis added).

[91] Because the standard is so low, expert evidence is not always required on a certification motion. And if the parties do lead expert evidence, the court does not resolve competing expert opinions, weigh them, or otherwise analyze the merits: *Pro-Sys*, at paras. 102, 126; *Lilleyman*, at para. 74.

(b) The Plaintiffs' Proposed Common Issues and Evidence

[92] To succeed on the common issues criterion, the plaintiffs were required to establish that there is some basis in fact for the claim in negligence. The theory of the plaintiffs' case is that the defendant knew of the risks associated with the unauthorized use of firearms, and had agreed to implement and obtained patents for authorized user technology, yet manufactured and exported guns that did not have the technology. That, the plaintiffs say, gives rise to negligence.

[93] The plaintiffs set out the common issues as follows:

1. Was the defendant negligent in failing to incorporate authorized user technology in the handgun used in the Danforth shooting?
2. Did the failure to incorporate authorized user technology in the handgun cause, contribute to, or individually harm or increase the risk of harm to the members of Classes 1 and 2?[3]
3. Is the defendant liable to family members within the meaning of s. 61 of the *Family Law Act,* R.S.O. 1990, c. F.3, of all persons in Classes 1 and 2?
4. Is this an appropriate case to award punitive damages against the defendant?
5. Is this an appropriate case for the court to order an aggregate assessment of damages under s. 24 of the *Class Proceedings Act*?

[94] The first two issues are the central ones for the purpose of the certification motion. On appeal, the plaintiffs focused their submissions on those two issues, but also sought certification of the third and fourth. They did not seek to certify the fifth issue.[4]

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[3] The plaintiffs seek certification of three classes. Class 1 includes persons shot and injured or killed; Class 2 includes other injured persons; and Class 3 includes family members of persons in Classes 1 and 2.
[4] In their notice of appeal, the plaintiffs seek certification of the common issues set out in Schedule A to their notice. Schedule A lists only the first four issues.

[95] In support of the certification motion, the plaintiffs served affidavits from several experts: Najma Ahmed, a surgeon with experience in the study, treatment and prevention of gunshot wounds; Ralph Blake Brown, an academic who has published articles on the history of firearm policy in Canada; Mark A. Chapman, a lawyer who practices in the field of American patent law; Peter J. Edmonson, an electrical engineer who works with patents; Pamela Goode, a retired lawyer who worked in the area of firearms in Canada; Joshua C. Harrison, an engineer and lawyer with expertise in firearms safety; and Jooyoung Kim Lee, a professor of sociology whose area of focus is gun violence. The defendant served no expert opinions, but did cross-examine the plaintiffs' experts.

[96] Two aspects of these experts' evidence are particularly germane to this issue. Dr. Harrison opined that the successful incorporation of an "internal locking mechanism" indicated that "the design and manufacture of such a feature was practicable in 2013 when the [M&P®40] was made available in Canada". He further advised that radio frequency identification ("RFID") technology is "a mature and practical technology that has been in widespread commercial use" since the mid-1980s. Dr. Edmonson had experience inventing, designing, building, and integrating electronic and communication applications into small hand-held devices. He opined that it was "highly feasible" for the defendant to have manufactured the M&P®40 with authorized user technology by 2013.

[97] Other evidence before the motion judge was also relevant to the certification motion. The defendant had previously acknowledged the widespread risk of harm caused by the use of guns by unauthorized users. And as discussed above, the defendant had signed the Agreement committing to including authorized user technology in the guns it designed and manufactured. It had also obtained several patents between 1998 and 2002 for electronic authorized user technology.

(c) The Motion Judge's Reasons and Errors

[98] The motion judge determined that the plaintiffs failed to satisfy the common issues criterion. He erred by applying a merits-based test in his analysis.

[99] All the plaintiffs had to do on the certification motion was show some basis in fact that the proposed common issues exist and that they extend across the proposed members of the class. The plaintiffs were not required to demonstrate that their negligence claim would ultimately be successful, or even that there was a *prima facie* case: *Lilleyman*, at paras. 71-77; see also Warren K. Winkler *et al.*, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), at p. 30. Rather, they had to show some basis in the evidence that the defendant's failure to include the authorized user technology constituted negligence and caused or increased the risk of harm to the members of the class. And that is very different than proving the case on a balance of probabilities at trial. All that is required to

succeed is “some evidentiary foundation” or “some minimal evidence”: *Lilleyman*, at paras. 71, 74.

[100] The motion judge failed to apply the some-basis-in-fact standard. Instead, he faulted the plaintiffs for failing to provide a broad range of additional expert evidence. In doing so, he scrutinized the evidence in the manner in which a judge might assess the merits of the claim to determine whether the plaintiffs had proven their case on a balance of probabilities.

[101] The motion judge noted that there was evidence that the defendant had agreed to implement the authorized user technology on all of its guns. He found that “there is some basis in fact that: (a) there was a risk of unauthorized use of lost or stolen weapons; (b) [the defendant] was aware of the risk; (c) [the defendant] had developed technologies to address the risk; (d) the technologies were feasible; and (e) implementing the technologies in Canada would have a limited impact on the utility of handguns to target shooters and collectors”. Despite these findings, however, he concluded that this evidence failed to satisfy the common issues criterion.

[102] He scrutinized the expert evidence on the first issue and found it deficient for the reasons I list below. Cumulatively, imposing these requirements on the plaintiffs amounted to a demand that they prove their case on the merits; far exceeding the some-basis-in-fact standard’s minimal requirements.

[103] The motion judge concluded that the plaintiffs had failed to establish the first common issue for the following reasons:

- The plaintiffs did not lead expert evidence to show that designing the M&P®40 with authorized user technology was feasible, nor that it could have been implemented at a reasonable cost;
- The plaintiffs did not provide a plausible methodology for proving their claim;
- The plaintiffs did not lead expert evidence explaining how authorized user technology would make the M&P®40 safer for intended consumers or non-consumers;
- The plaintiffs did not lead expert evidence that the defendant's prototypes were effective, nor that they would not impair the utility or safety of the M&P®40 if implemented;
- The plaintiffs did not lead expert evidence about whether a reasonably competent gun designer would incorporate authorized user technology; and
- The plaintiffs did not lead expert evidence that RFID or biometric technology was commercially viable, nor that it would not impair the utility or safety of the M&P®40 if implemented.

[104] The motion judge concluded that the plaintiffs had failed to establish the second common issue for the following reasons:

- The plaintiffs did not lead expert evidence to show that incorporating authorized user technology would reduce gun accidents or gun crimes;
- The plaintiffs did not lead expert evidence from a criminologist to show that authorized user technology reduces the nefarious use of firearms; and
- The plaintiffs did not lead expert evidence to explain how the absence of authorized user technology allowed Hussain to carry out the shooting.

[105] These demands for further expert evidence are too onerous at the certification stage. To succeed at trial, the plaintiffs might well have to lead expert evidence on some or all of these issues. But to satisfy their burden on the common issues criterion, all the plaintiffs had to do was produce "some minimal evidence" in support of their claim: *Lilleyman*, at para. 74. The shortcomings the motion judge found in their evidence far outstripped that requirement. The plaintiffs were not required to lead expert evidence on each and every possible issue that might arise at trial. Yet by faulting the plaintiffs for failing to produce a broad array of additional expert evidence, the motion judge effectively required just that. In doing so, he erred in principle.

[106] It is worth reiterating that a certification motion is not a summary judgment motion. It is unfair to impose a higher evidentiary burden on a plaintiff than the *Class Proceedings Act* requires. Motion judges and defence counsel should resist the temptation to jump to a substantive determination on the merits without a complete evidentiary record.

[107] Three other aspects of the motion judge's reasoning compound that error in principle. First, the motion judge criticized the plaintiffs for failing to offer an expert opinion on the risks and benefits of implementing authorized user technology. Yet he refused to require the defendant to produce information about the technical and commercial viability of authorized user technology, because in his view, that information was irrelevant to certification: see *Price v. Smith & Wesson Corp.*, 2023 ONSC 6062, at paras. 31, 43-47. Having declined to compel the defendant to produce that evidence because it was irrelevant, it was not open to the motion judge to fault the plaintiffs for failing to lead expert evidence on the same issue.

[108] Second, the motion judge erred in his limited consideration of the Agreement. He found that it did not provide a basis in fact for the plaintiffs' negligence claim. Instead, he concluded that to the extent it set standards for the safety of the firearms the defendant manufactures, it justified those standards on public policy grounds. The motion judge erred in so characterizing the Agreement. Because it suggested that the defendant could reasonably have foreseen the risk of harm at issue, and had undertaken to take steps to address it, the Agreement was evidence on which the plaintiffs could rely to show some basis in fact for their claim in negligence.

[109] Third, the motion judge erred by relying on his own research to yield evidence not proffered by the parties without giving them an opportunity to respond. The motion judge explained that he reviewed information from Statistics

Canada and found that gun violence is carried out equally by both authorized and unauthorized users of handguns. On appeal, the plaintiffs argue that he misinterpreted the data. Regardless, it was inappropriate for the motion judge to conduct his own research and to rely on it to decide the certification motion. Judges must rely on the record compiled for them by counsel. They may not undertake additional research to acquire further factual information.

[110] I therefore conclude that the motion judge erred in principle by misapplying the test for certification of the common issues.

(d) Application of the Proper Test

[111] Applying the correct legal test, I would certify the claim as a class action. The evidence shows some basis in fact to conclude (a) that the defendant was negligent in failing to incorporate authorized user technology in the gun used in the Danforth shooting, and (b) that the failure to incorporate authorized user technology in the gun caused harm to the members of Classes 1 and 2.

[112] Further, I am satisfied that there is some basis in fact to conclude (a) that the defendant is liable to family members within the meaning of s. 61 of the *Family Law Act*, and (b) that this is an appropriate case in which to award punitive damages.[5]

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[5] As noted above, on appeal, the plaintiffs did not seek to certify the fifth common issue.

[113] Before addressing each issue individually, I highlight again a particularly germane and unique feature of these facts. This case is a somewhat unusual products liability case in that it concerns a single act of one person using one gun. In some products liability cases, it is difficult to extrapolate from a defect found in one product to the rest of the products used by proposed class members: see *Hyundai Auto Canada Corp. v. Engen*, 2023 ABCA 85, 57 Alta. L.R. (7th) 317, at para. 25. But that is not true here, because all members of the class were harmed by the single unauthorized user of a single gun on a single occasion. This feature of the case has implications for whether negligence and causation are common issues. At the very least, it readily satisfies the requirement that these issues are necessary to the resolution of each class member's claim, because all of their claims arose from the same transaction.

(i) The first common issue should be certified

[114] The first common issue, as set out above, asks whether the defendant was negligent in failing to incorporate authorized user technology in the gun used in the Danforth shooting.

[115] The plaintiffs have met their onus for certification of this issue. As noted above, the motion judge found that there was some basis in fact that the defendant was aware of the risk associated with the unauthorized use of lost or stolen weapons, and that it had developed feasible technologies to address that risk.

These findings were rooted in the evidence, and they provide a sufficient basis to satisfy the common issues criterion on the first issue.

[116] The uncontroverted evidence is that years before introducing the M&P®40, the defendant publicly committed to including authorized user technology in its firearms to reduce their criminal misuse. But after legislation was passed largely immunizing the defendant from civil liability from the unauthorized use of its firearms, it continued to design and manufacture firearms, including the one used in the Danforth shooting, without any authorized user technology. Expert evidence—also uncontroverted—suggested that it was technically feasible to incorporate authorized user technology into the M&P®40 when it was made available in Canada.

[117] The defendant argues that this does not establish some basis in fact that it was negligent in failing to incorporate authorized user technology. It says that the expert evidence does not show that an M&P®40 with authorized user technology would (a) remain commercially viable, safe, and reliable, or (b) retain its utility for military and police use. And it adds that the Agreement was the product of litigation pressure, not a belief that authorized user technology was feasible or commercially viable.

[118] Like the motion judge's reasoning below, the defendant's argument sets too high a bar. The plaintiffs' expert evidence provides some basis in fact to conclude

that the defendant could feasibly have taken steps to address the risk posed by the unauthorized use of firearms, but elected not to. And the Agreement provides some basis in fact to conclude that the defendant itself believed it was capable of doing so. That is “some minimal evidence” that the defendant was negligent. The ultimate commercial viability and utility of an M&P®40 with authorized user technology may be relevant to a trial on the merits, but the plaintiffs need not establish it to cross the low threshold of the common issues criterion. Nor need they rule out other interpretations of the Agreement.

[119] While the plaintiffs may not ultimately succeed on their claim, they meet the low bar for establishing some basis in fact for the first common issue: the defendant’s alleged negligence in failing to incorporate authorized user technology in the gun used at the Danforth shooting.

(ii) The second common issue should be certified

[120] The second common issue asks whether the failure to incorporate authorized user technology in the gun caused, contributed to, or individually harmed or increased the risk of harm to the members of Classes 1 and 2.

[121] A defendant’s negligence causes a plaintiff’s injury if, “but for” the negligent act, the injury would not have occurred: *Clements v. Clements*, 2012 SCC 32, [2023] 2 S.C.R. 181, at para. 8. The “but for” test is a matter of common sense,

and in particular, “[t]here is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury”: *Clements*, at para. 9.

[122] The evidence here provides “some basis in fact” to conclude that the defendant’s failure to implement authorized user technology caused the plaintiffs’ injury. The Agreement on its own provides “some minimal evidence”, and therefore “some basis in fact” (*Lilleyman*, at para. 74), to conclude that incorporating the technology would prevent unauthorized users from wielding handguns. Hussain was an unauthorized user, and had he been prevented from wielding the gun, he would not have been able to injure the class members.

[123] The Agreement describes its own purpose as “to reduce the criminal misuse of firearms, combat the illegal acquisition, possession and trafficking of firearms”, and “reduce the incidence of firearms accidents”. Presumably its signatories thought the technology it contemplated was at least possibly capable of fulfilling that purpose. Their willingness to sign it in light of that purpose is, at the risk of belabouring the low standard, “some minimal evidence” that the steps the defendant chose not to take might have prevented the plaintiffs’ injury. The common issues criterion requires no more than that.

[124] By signing the Agreement, the defendant acknowledged that the use of authorized user technology might prevent unauthorized users from wielding handguns. So there is some basis in fact to support that contention that had the

gun been outfitted with authorized user technology, Hussain might have been prevented from using the gun and causing the harm that he did. And if that is so, then the failure to include the technology on the gun was a but-for cause of the injuries and deaths that ensued.

[125] There is therefore some basis in fact to conclude that the failure to incorporate authorized user technology in the gun caused, contributed to individually harmed or increased the risk of harm to persons shot and injured or killed and other injured persons.

(iii) The third common issue should be certified

[126] The third common issue asks whether the defendant is liable to family members, within the meaning of s. 61 of the *Family Law Act*, of all persons in Classes 1 and 2.

[127] I would certify this issue. The plaintiffs sought certification of this issue in their notice of appeal, but made no written or oral submissions on it before this court. Nevertheless, given my conclusions on the first two common issues, I am satisfied that this issue should be certified as well.

[128] The motion judge did not certify the third issue because he determined that it was derivative of the first and second common issues, which he refused to certify. Unlike the motion judge, however, I have concluded that the first two issues should be certified. The motion judge also expressed concern that the *Family Law Act*

claims lacked commonality and were matters for individual issues trials, but I do not share those concerns. The claims asserted under the *Family Law Act* are derivative of the claims of the people who were injured or killed by the shooter. They also raise common issues on liability. Given that there is some basis in fact to conclude the defendant is liable to family members within the meaning of s. 61 of the *Family Law Act*, I would certify this issue.

(iv) The fourth common issue should be certified

[129] The fourth common issue asks whether this is an appropriate case to award punitive damages against the defendant.

[130] I would also certify this issue. While the parties again did not provide any written or oral submissions to this court on this issue, the plaintiffs sought its certification in their notice of appeal. I am satisfied the issue should be certified.

[131] The motion judge refused to certify this issue in part because he did not certify the others. He also reasoned that there was no basis in fact for a common issue about punitive damages because the plaintiffs did not point to material facts beyond the pleadings. He concluded that had he otherwise certified the action, he would not have certified the punitive damages common issue, but without prejudice to the plaintiffs reapplying to certify it after examinations for discovery.

[132] Given my conclusion and reasoning on the certification of the other issues, the motion judge's concerns about the absence of other common issues fall away.

And even if certification of a common issue on punitive damages requires material facts beyond the pleadings (a matter I need not resolve here), I am satisfied that the plaintiffs' evidence, through their experts and the Agreement, provides some basis in fact to conclude that this is an appropriate case to award punitive damages. The commitment to implementing authorized user technology, its apparent feasibility, and the retreat in the face of legislative immunity provide "some minimal evidence" that the defendant's conduct amounted to "malicious, oppressive and high-handed misconduct": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36. I would therefore certify the fourth common issue.

(v) The fifth common issue should not be certified

[133] The fifth common issue asks whether this is an appropriate case to order an aggregate assessment of damages under s. 24 of the *Class Proceedings Act*. The plaintiffs did not seek certification of this issue on appeal, so I would not certify it.

(e) Conclusion

[134] The plaintiffs satisfy the common issues criterion in s. 5(1)(c) of the *Class Proceedings Act* for the following four issues:

1. Was the defendant negligent in failing to incorporate authorized user technology in the handgun used in the Danforth shooting?

2. Did the failure to incorporate authorized user technology in the handgun cause, contribute to, or individually harm or increase the risk of harm to the members of Classes 1 and 2?
3. Is the defendant liable to family members within the meaning of s. 61 of the *Family Law Act,* R.S.O. 1990, c. F.3, of all persons in Classes 1 and 2?
4. Is this an appropriate case to award punitive damages against the defendant?

[135] The action should be certified. The remaining certification criteria are met. The cause of action criterion is satisfied for the reasons set out above, and the parties agree that the class definition criterion is met as well. The motion judge determined that the plaintiffs would have satisfied the preferable procedure criterion had they satisfied the common issues criterion, and I have concluded that they do.

[136] As for the representative plaintiff criterion, the motion judge found that the plaintiffs' litigation plan was unworkable, but that they had otherwise satisfied this requirement. He explained, however, that the litigation plan's deficiencies could be resolved "as late as after a common issues trial", and that he therefore would have treated the representative plaintiff criterion as satisfied. I agree. That approach adheres to this court's guidance that most litigation plans are "something of a work in progress" at their early stages: *Cloud v. Canada (Attorney General)* (2004), 73

O.R. (3d) 401 (C.A.), at para. 95, leave to appeal refused, [2005] S.C.C.A. No. 50. Because "it is almost inevitable that the litigation plan will be modified as the case proceeds", the motion judge rightly concluded that any issues in the current litigation plan can be resolved as the litigation proceeds: *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447, at para. 75. Here, the litigation plan can be developed and modified as part of the case management of the certified action.[6]

[137] The plaintiffs therefore meet the test for certification.

H. DISPOSITION

[138] I would dismiss the defendant's appeal of the order allowing the negligence claim to proceed, as well as the plaintiffs' appeal of the order striking the claims in strict liability and public nuisance. I would allow the plaintiff's appeal of the order dismissing the certification motion and certify the action in negligence under the *Class Proceedings Act*.

[139] With respect to the issue of costs, failing agreement between the parties, I would direct the parties and the Law Foundation of Ontario to make brief written submissions as to the costs before the motion judge and before this court. Those

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[6] This approach does not entail the kind of "conditional certification" that this court rejected in *Knisley v. Canada (Attorney General)*, 2025 ONCA 185, at paras. 28-40. As *Cloud* and *Keatley Surveying* show, there is nothing unusual about modifying a litigation plan after certifying a class action. Flexibility is inherent in litigation plans, even if it is not, as *Knisley* holds, inherent in some of the other criteria in s. 5(1) of the *Class Proceedings Act*.

submissions are to be served and filed by the plaintiffs and the Law Foundation of Ontario within 10 days of the release of these reasons. Responding submissions shall be served and filed within seven days of the receipt of the materials served by the plaintiffs and the Law Foundation of Ontario, and any reply submissions shall be served and filed within three days of the receipt of the responding submissions. All costs submissions shall be limited to five pages, plus a bill of costs.

Released: June 23, 2025 “C.W.H.”

“D.A. Wilson J.A.”
“I agree. C.W. Hourigan J.A.”
“I agree. R. Pomerance J.A.”