IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Delfs v. Stricker,*
2022 BCSC 373

Date: 20220309
Docket: M55955
Registry: Vernon

Between:

Tanner Delfs

Plaintiff

And

Fred Stricker, Kim Stricker and Josh Stricker

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:	M.J. Yawney, Q.C. B. Conway
Counsel for Defendants:	D. Pick O.K. Rees
Place and Date of Trial:	Kelowna, B.C. November 17-19, 22-26, 29, and 30, 2021
Place and Date of Judgment:	Vernon, B.C. March 9, 2022

Table of Contents

I. Introduction

[1] On August 2, 2009, the plaintiff, Tanner Delfs, suffered a serious injury while riding as a passenger in a side-by-side all-terrain vehicle ("ATV") driven by his cousin, the defendant Josh Stricker. Mr. Delfs was nine years old at the time and Josh Stricker was 15. They are now 22 and 27 respectively. They were riding on a back-country trail near Fairmont Hot Springs, B.C. where Mr. Delfs' Aunt and Uncle (Josh's parents), the defendants Kim Stricker and Fred Stricker, have a recreational property. Fred Stricker was with them, leading the way on a motor bike, followed by Josh's friend, Matt Simpson, was who was riding a four-wheel ATV, sometimes called a quad (the "Quad"). Josh Stricker and Mr. Delfs were following behind Matt Simpson in a 2009 Polaris Ranger RZR (referred to as the "Razor" or "RZR").

[2] At some point well into the outing, an accident occurred that resulted in Mr. Delfs becoming impaled by a substantial tree branch that entered his body on his right side just below his rib cage and exited on his left side just below his armpit.

[3] Mr. Delfs was rushed to Invermere Hospital and then flown to Calgary Children's Hospital where he underwent major surgery to remove the branch and repair the extensive internal injuries. The event was horrifying and obviously traumatizing for the young Tanner Delfs, both physically and mentally.

[4] Today, more than 12 years after the accident, Mr. Delfs continues to suffer the effects of the accident. Most notably, he suffers from chronic pain in his abdomen and at the entry wound where the branch impaled him. He continues to experience psychological trauma from the event.

[5] Now an adult, he sues the Strickers in negligence seeking damages for pain and suffering, past and future loss of earning capacity, loss of housekeeping capacity, and cost of future case. He claims Josh Stricker was negligent in his operation of the RZR and Fred and Kim Stricker were negligent in their supervision of the off-road adventure, in permitting Josh Stricker to operate the RZR, in permitting Mr. Delfs to be a passenger in the RZR, and for failing to properly instruct and supervise Josh in the use and operation of the RZR.

[6] The Strickers, though concerned for and sympathetic to Mr. Delfs' circumstances, deny liability for the accident. They do not dispute that Mr. Delfs was seriously injured, but they argue this was a "freak accident" that was not brought about by the negligence of any of them.

[7] For the reasons that follow, I find the evidence does not establish negligence on the part of any of the Strickers and I would dismiss the action against them. However, in the event that a higher court might find I have erred in reaching this conclusion, and having regard to the hardship another trial would impose on the parties, I have made the findings of fact and assessed the quantum of damages that I would have awarded had I found the accident was caused by any of the defendants' negligence.

II. Facts

1. Lead-up to the Accident

[8] In August 2009, Tanner Delfs, along with his mother Natalie Delfs and his sister Madison Delfs travelled from their home in Calgary, Alberta to spend an extended weekend at the Strickers' recreational property near Fairmont Hot Springs, B.C. The two families were close, related by Natalie Delfs and Kim Stricker who are sisters. Also on the trip were Josh Stricker's friends Matthew Simpson, Sondra Pederson, and Rebecca Nilson. Mr. Delfs' father, Dwayne Delfs, did not go on the trip as he was working at the time.

[9] For convenience, I will refer to each of the Strickers and most of the Delfs by their first names to distinguish them from one another and I intend no disrespect in doing so. I will generally refer to Tanner Delfs as Mr. Delfs, although when identifying him in events that occurred when he was young, I will generally refer to him as Tanner.

[10] The recreational property is located in a gated community about halfway between Fairmont Hot Springs and Windermere. The Strickers purchased the property in 2007 and built the house on it. It is surrounded by trees and trails both

within and outside the gated area. The Delfs visited the property a number of times, both before and after the accident, though not recently.

[11] After breakfast on the second full day of the visit, Fred Stricker, Josh Stricker, and Matt Simpson were preparing to take an off-road trip on trails in the mountains to the east of the property. A windstorm passed through the area a few days earlier and the group was going out for some adventure and to clear the trail of fallen trees and branches left by the windstorm.

[12] Nine-year-old Tanner saw the trio preparing for the trip and asked if he could go. Fred told him he would need his mother's permission so he went inside to the basement bedroom where his mother was still sleeping. Natalie Delfs has no recollection of her son asking for her permission. She suffers from diabetes and was having a diabetic episode that morning. Her first memory of the morning was when her daughter, Madison Delfs, having observed her diabetic state, brought her some juice and candy to help bring her blood sugar up. This was after the group had left on their off-road outing.

[13] I find that Natalie was not aware of Tanner asking for her permission. However, I am satisfied that she would have given her permission had she understood what Tanner was asking. Tanner had been a passenger on the Quad several times prior to the day of the accident and he recalls being in the RZR with Fred driving at least once or twice. Natalie had never previously refused consent to Tanner riding on an ATV as a passenger with one of the Strickers, including Josh, except when the family had other plans. Further, when Natalie recovered from her diabetic episode and became aware Tanner had gone off with the group, she expressed no concern about this to Kim Stricker or anyone else.

[14] Tanner, having satisfied himself that he had his mother's permission, reported this to Fred and Kim. Kim ensured that Tanner was properly dressed for the trip, making sure he changed into long pants and closed shoes. Fred then suited Tanner up with a helmet, gloves, and chest protector.

[15] Fred packed his chainsaw in the rear storage compartment of the RZR and, once everyone was suited up, they headed out.

2. The RZR

[16] The RZR was still new to the Strickers on the day of the accident. They had purchased it from a dealer in High River, Alberta in the fall of 2008. Fred confirmed it was “hardly used” by the time of the accident and said it only had a “few hours” on it. He did not keep track of the hours and confirmed that “a few” in his mind did not mean only two or three, but he said it definitely had low hours.

[17] The RZR has the look of a dune buggy with side-by-side driver and passenger seats. Its operating features are more like a car than the Quad in that it has a steering wheel and pedals for the accelerator and brake. It has shoulder-strap seatbelts and a roll bar. Its sides are open but there are nets that attach to enclose the side openings.

[18] The RZR came with an owner’s manual. Fred testified that he might have read the first couple pages of it when he purchased the RZR but nothing more. He had operated a lot of off-road vehicles over the years and was familiar with them so he did not feel he needed the instruction. Josh did not read any portion of the owner’s manual.

[19] A copy of the 2009 RZR owner’s manual was introduced into evidence through Nicholas Langelaan, a Polaris dealer in Kelowna, B.C. It forms a significant part of the plaintiff’s case on the standard of care for both Josh as the operator of the RZR and Fred as the supervisor of the trip and the person who trained and allowed Josh to operate it.

[20] The owner’s manual includes a number of warnings and other operating advice as follows:

- Inside the front cover of the manual the following warning appears:

! WARNING

> Read, understand, and follow all of the instructions and safety precautions in this manual and on all product labels.
>
> Failure to follow the safety precautions could result in serious injury or death.
>
> The back page of the manual contains these warnings:
>
> **! WARNING**
>
> Improper vehicle use can result in SEVERE INJURY or DEATH
>
> NEVER Operate:
>
> - without first viewing safety video and quick start guide.
> - with more than one passenger.
> - Over hills steeper than 15 degrees.
>
> …
>
> ALWAYS:
>
> …
>
> - reduce speed and use extra caution when carrying a passenger.
>
> …
>
> - make sure passenger reads and understands all safety labels.
> - watch for branches or other hazards that could enter the vehicle.
>
> …
>
> LOCATE AND READ OWNER'S MANUAL. FOLLOW ALL INSTRUCTIONS AND WARNINGS. IF OWNERS MANUAL IS MISSING, CONTACT A POLARIS DEALER FOR A REPLACEMENT.

- Page 4 of the manual provides explanations for symbols in the manual, including that an exclamation mark inside a triangle indicates a potential safety hazard and the word "WARNING" indicates a hazardous situation which, if not avoided, may result in death or serious injury. (The exclamation marks quoted in the above headings are inside a triangle in the original manual.)

- Page 5 of the manual contains an exclamation mark inside a triangle with the following text below it:

> Failure to heed the warnings and safety precautions contained in this manual can result in severe injury or death. Your Polaris vehicle is not a toy and can be hazardous to operate. This vehicle handles differently than cars, trucks or other off-road vehicles. A collision or rollover can occur quickly, even during routine maneuvers like turning,

or driving on hills or over obstacles, if you fail to take proper precautions.

- Read this owner's manual. Understand all safety warnings, precautions and operating procedures before operating the vehicle. Keep this manual with the vehicle.
- Complete the New Operator Driving Procedures outlined on pages 54-55. …
- This vehicle is an ADULT VEHICLE ONLY. Operation is prohibited for anyone under 16 years of age or anyone without a valid driver's licence.

[Capitalized emphasis in original.]

- Page 10 of the manual contains several safety warnings including these:

Safety Warnings

Failure to operate this vehicle properly can result in a collision, loss of control, accident or overturn which may result in serious injury or death. Heed all safety warnings outlined in this section of the owner's manual. See the OPERATION section of the owner's manual for proper operating procedures.

Operating Without Instruction

Operating this vehicle without proper instruction increases the risk of an accident. The operator must understand how to operate the vehicle properly in different situations and on different types of terrain. Complete the New Operator Driving Procedures outlined on pages 54-55. …

Age Restrictions

This vehicle is an ADULT VEHICLE ONLY. Operation is prohibited for anyone under 16 years of age or anyone without a valid driver's licence. Never operate with a passenger under the age of 12. Make sure any passenger is tall enough to comfortably and safely reach the hand holds and place both feet on the floor.

- Page 12 of the manual warns against carrying a passenger until the driver has operated the vehicle for at least two hours and has "completed the New Operator Driving Procedures outlined on pages 54-55."

- Page 17 contains a "Safety Warning" about operating over obstacles:

Operating Over Obstacles

Improperly operating over obstacles could cause loss of control or overturn. Before operating in a new area check for obstacles. Never attempt to operate over large obstacles such as rocks or fallen trees.

> Always follow the proper procedures outlined in this manual when operating over obstacles.

- Page 23 repeats the warning that the vehicle should never be operated by persons under the age of 16 or persons without a valid driver's licence. Page 24 warns in capital letters: "NEVER CARRY A PASSENGER UNDER AGE 12".

- Page 25 cautions:

> **ALWAYS**:
> - reduce speed and use extra caution when carrying a passenger.
> - make sure passenger reads and understands all safety labels.
> - watch for branches or other hazards that could enter the vehicle.

- Page 58 warns that when driving uphill to "Always check the terrain carefully before ascending a hill." The plaintiff relies on this passage since the Josh was driving the RZR on an incline when the accident occurred, but it is evident from the full content of this page that the caution being relayed is to ensure the terrain is suitable for climbing uphill without risk of the RZR slipping or rolling.

- Page 61 contains warnings about "Driving Over Obstacles". It contains a diagram of a RZR about to cross over a log and lists this advice:

> Follow these precautions when operating over obstacles:
>
> 1. Always check for obstacles before operating in a new area;
> 2. Look ahead and learn the terrain. Be constantly alert for hazards such as logs, rocks and low hanging branches;
> 3. Travel slowly and use extra caution when operating on unfamiliar terrain. Not all obstacles are immediately visible;
> 4. Avoid operation over large obstacles such as rocks and fallen trees. If unavoidable, use extreme caution and operate slowly;
> 5. Always have a passenger dismount and move away from the vehicle before operating over an obstacle that could cause an overturn.

[21] Safety warning stickers are also placed on the dash of new RZRs. It is not disputed that these warning decals likely appeared on the Strickers' RZR. These

decals include warnings about the age restriction for operators and passengers of the RZR and a warning that improper use of the vehicle “can result in SEVERE INJURY or DEATH.”

3. Fred’s Experience and Supervision

[22] Fred Stricker has been operating off-road vehicles since he was 14 years old. He has experience with dirt bikes, quads, jeeps, and RZRs. He had not driven this RZR much before the day of the accident but he had driven others.

[23] I accept the defendants’ evidence, and find as a fact, that Fred took safety seriously when it came to operating off-road vehicles. As mentioned, he had specific rules about wearing safety gear. He instructed Josh and others on the proper use of ATVs and set safety rules that he expected to be followed. I am satisfied that Josh followed these rules. Josh was not permitted to operate an ATV beyond the confines of the gated community unless Fred was accompanying him. Josh testified that Fred always accompanied him when he went outside the gated community and was never allowed to go alone. Josh was not cross-examined.

4. Josh’s Experience with ATVs

[24] Josh started operating off-road vehicles when he was about six years old. By the time of the accident, he had regularly operated ATVs, with both automatic and manual transmissions, and dirt bikes. Fred testified Josh had no problem operating these vehicles and, apart from the accident at issue here, has never had any incidents or accidents while operating ATVs. Fred considered that Josh, at 15 years of age, operated ATVs better than most adults. Neither Tanner nor any of his family members had expressed any concern about Josh’s competency with ATVs before the accident or suggested they ever saw him driving carelessly or recklessly.

[25] I find as a fact that Josh was a good, responsible, and mature kid, as both Fred and Kim testified, and this was not challenged on cross-examination. I also accept that Fred taught Josh to drive the RZR in 2009 and had observed Josh operating it without any concern about his competency in driving it.

[26] However, I also find as a fact that Josh had little experience driving the RZR as it was still new to the Strickers with “only a few hours” on it. I also find that whatever training Fred gave Josh on the RZR was not based on advice in the owner’s manual since neither of them had read it.

5. The Accident

[27] Fred led the way throughout the trip as he knew the route and, being in front, he could set the pace for the boys. He had travelled the planned route a few times before, including once or twice with Josh.

[28] After leaving the Strickers’ property, the group travelled east on a forest service road into the mountains and then turned south towards Fairmont. The terrain consisted of both flat portions and areas with changing elevation, going up and down. The path was wide enough for pick-up trucks, which Fred testified he had seen on the trail before. Josh testified on discovery (read in by the plaintiff) that in the area where the accident occurred, one could probably reach out from either side of the RZR and touch the trees with an extended arm.

[29] The group stopped a couple of times so Fred could check in with the boys and clear debris from the trail. There were fallen branches throughout the trail and, on at least one occasion, Fred used his chainsaw to cut up debris to clear it away.

[30] The accident happened about an hour into the trip. Following one of their stops, Fred continued to lead the way, followed by Matt on the Quad and Josh and Tanner in the RZR. After this, the evidence of exactly how the accident occurred is somewhat inconsistent.

[31] I pause at this point to observe that I found all the witnesses to be credible. Each was recalling events that took place more than 12 years before trial. Not only has the passage of time impacted their recall of events, but the trauma of the accident itself, as will become apparent, has undoubtedly impacted their specific recollections. Hence the inconsistencies. I question the reliability of some aspects of each witness’ account on the basis of other evidence or logic, but I found all of them

to be sincere and each tried to recount events truthfully to the best of their recollection.

[32] Mr. Delfs testified the RZR was going around a corner and moving uphill when the accident happened. He and Josh had lost sight of Fred and Matt and he felt that Josh was driving “fast” around a corner to try to catch up to them. On discovery, though, he testified he could not remember having the sense that Josh was speeding.

[33] Mr. Delfs recalls that as they rounded the corner, the RZR hit something and became stuck. He testified they were perched on a log or a tree. He recalls looking down at some point to see the wheel (presumably the front right wheel) over the tree or log and recalls the passenger side of the RZR being perched up.

[34] Josh confirmed in his evidence that they had lost sight of Fred and Matt. He testified he was accelerating up the hill when the RZR came to an abrupt stop and became stuck on something. At trial he said the trail had appeared to be clear of debris. On discovery, he said he did not know if he drove over a log but suggested that “the tree or branch stopped us in place”. As mentioned, Josh was not cross-examined at trial. Counsel for Mr. Delfs suggested that there is no inconsistency between Josh’s testimony in court and the discovery evidence that was read in. Based on this, I take Josh’s evidence to be that a tree or branch stopped the RZR in its place but the trail ahead of him had appeared to be clear of debris.

[35] I find it is unlikely that the RZR was stuck on a log in the manner recalled by Mr. Delfs at trial. Both Fred and Matt had passed by the location where the accident occurred and were not obstructed by a fallen tree or log. Neither recalls seeing a log or tree as they passed the area or when they returned after the accident. On discovery, Mr. Delfs had recalled seeing a tree or a branch on the ground before RZR went over it but he could not be sure because “[i]t happened really fast”.

[36] Fred did not observe the accident but when he drove the RZR away from the accident scene, he encountered no resistance in moving it. He started out by going

in reverse. This suggests the RZR was not perched on a tree or log since one would expect Fred would have to free the vehicle from the log before he could move it, or, at least, there would have been a noticeable drop or bump as he backed the RZR off a log. However, Fred experienced no such resistance.

[37] Nevertheless, it is common ground that the RZR struck something, stopping its forward progress. Mr. Delfs testified that Josh "gunned it" in an effort to free the RZR from being stuck and he then felt a very sharp pain in his stomach. He looked down to see "a lot of blood" and a "good sized branch" that had impaled him just below the ribs on the right side of his body. The branch passed through his body with a sharp end exiting and sticking out of him just below his left armpit. The thick end of the stick was still protruding from the entry wound.

[38] Mr. Delfs showed the Court the scar from where the branch had entered his body. Dr. Michael Negraeff, an expert in pain management who examined Mr. Delfs, estimated the entry wound scar to be approximately 5 by 10 cm, which seems about right based on the Court's brief view of it. This suggests a good-sized puncture wound. Dr. Negraeff described the exit would scar, which the Court did not see, to be approximately 8 cm long.

[39] Tanner then felt the RZR jolt and roll back, at which point the branch was pulled partially out of his body, taking with it part of his intestines. The branch remained in Tanner, including the sharp end sticking out from his left side, but was pulled out to some degree by the jolt backwards.

[40] Mr. Delfs described seeing his stomach pulled out of his body and falling to the ground next to the RZR, still attached by the intestines. I have no doubt this recollection is sincere but I find it is not plausible. It is, however, the image that is burned in Mr. Delfs' mind by the trauma of the accident and seeing his intestines pulled from his body.

[41] Josh testified that he did not try to gun the accelerator to free the RZR from whatever it was stuck on. His evidence was that Tanner became impaled in the

same motion that caused the RZR to come to an abrupt stop. He said he took his foot off the accelerator after he felt an impact or jostle of whatever it was that stopped them and put his foot on the brake. He then looked over at Tanner and saw the branch had impaled him.

[42] It is not in dispute that the RZR rolled back to some degree after Tanner was impaled. Josh testified that “something moved”. He could not say whether it was the RZR or the tree that moved. I infer and find as a fact that the RZR rolled back, as it was sitting on an incline, and this is what caused the branch to withdraw somewhat and pull out Tanner’s intestines.

[43] Josh put the RZR in park, got out of the vehicle, and ran up the trail yelling for Fred. Mr. Delfs testified that Josh disappeared around the corner. He cannot recall how long he was alone in the RZR. He recalls hearing only the sound of trees moving and feeling afraid that a bear might be attracted by the smell of his blood. He then recalls hearing the ATV and motor bike coming back down the path with Fred in the lead.

[44] When the accident occurred, Fred and Matt Simpson were ahead on the trail. Mr. Simpson testified that Fred suddenly stopped his motorbike, apparently noticing that Josh and Tanner were no longer behind them. They both shut off their vehicles to listen for the RZR and heard Josh yelling for Fred. They turned back and returned to the scene of the accident. Mr. Simpson estimates they were 30 seconds or possibly up to a minute away.

[45] Fred testified that he got back to the scene of the accident he saw the branch sticking out near Tanner’s left armpit and that Tanner’s intestines were in his lap. Mr. Simpson testified he has a vivid memory of seeing a bloody branch sticking up from the ground on an angle towards the front of the RZR.

[46] Fred testified there was not a lot of blood in the RZR. He took off his shirt, wrapped Tanner’s intestines in it, and gave that to Tanner to hold. He then got in the driver’s seat of the RZR, backed it up to a nearby junction, and headed quickly down

the mountain to find help. Josh got on the motorbike and he and Matt followed Fred as best they could, but they fell behind and lost sight of Fred who was moving quickly to get Tanner to help.

[47] When Fred and Tanner arrived at the first house they came across, Fred shouted to the resident in the garden to call 911. She did and then gave her phone to Fred so that he could call Kim and Natalie. The paramedics arrived and began treating Tanner. Kim and Natalie arrived a few moments later with Madison.

[48] Tanner was taken to Invermere Hospital and, after receiving some initial treatment, was airlifted to Calgary Children's Hospital where he underwent extensive surgery to repair a major gastric laceration, a bowel evisceration, an injury to his left diaphragm, several fractured ribs, a collapsed left lung, and a pneumothorax with multiple lacerations. He was in surgery for many hours. He remained in Children's Hospital recovering for some 16 days. Natalie testified that Tanner was in an induced coma for several days following the surgery. She stayed in the hospital room with him, sleeping in a bed provided by the hospital.

[49] Mr. Delfs recalls having nightmares and visions during the post-operative period. He recalls thinking his room was changing, like a giant whirlpool into which he was being pulled. He recalls a vision that the hospital was on fire and yelling out loud. Natalie confirmed that she witnessed him as he was having these visions and hallucinations, one involving a bus crash, and that he cried out loud for help. She testified these hallucinations eased with the assistance of psychiatric help and as Tanner withdrew from the pain medication. However, Tanner continued to have visions and nightmares of the accident itself after he left the hospital. To this day, he struggles with flashbacks and nightmares about it.

[50] Following his release from hospital, Tanner attended at an outpatient clinic for wound care. The entry wound was left open after surgery and the wound care involved scraping the dead skin out of the wound with a surgical blade with no sedation. Mr. Delfs described this as extremely painful, a point confirmed by his mother who attended and observed all of these treatments. She testified that several

people had to hold Tanner down while he received the treatment. Mr. Delfs' father, Dwayne Delfs, described the wound care experience as "horrible -- horrible for all of us". Tanner received this treatment each day for three weeks after his release from the hospital.

[51] Tanner returned to school in the fall of 2009, albeit with a late start due to his recovery. His school records show a higher number of absences for that school year, which was his first year in middle school. Of his 19 absences that year, 16 were in the first reporting period. Therefore, most of his absences were in the first part of the year because of his injuries rather than a pattern of missing school throughout the year.

III. Liability

1. Findings of Fact on How the Accident Happened

[52] Liability is a central issue in this case and it is strongly contested by the defence. The limitations of the evidence on how exactly Mr. Delfs came to be impaled by the branch makes findings on liability challenging.

[53] It is clear that the RZR hit something that impeded its forward progress and caused it to stop. What is not clear is whether Mr. Delfs became impaled by the branch in the same action that caused the vehicle to stop (as Josh's account suggests) or whether the vehicle was stopped and Mr. Delfs became impaled when Josh "gunned" the accelerator to dislodge the RZR from whatever it was stuck on (Mr. Delfs' account).

[54] In the immediate aftermath of the accident, none of the four witnesses on the adventure was concerned about surveying the landscape to determine the cause. Understandably, they were focused on getting Tanner off the mountain to medical help as quickly as possible. Josh was also traumatized and has little clear recollection of the details of the scene. Matt Simpson's evidence of a "bloody stick" projecting up from the ground towards the front of the RZR is the most detailed

account of what the RZR might have hit, but he was not able to say what was holding the stick to the ground or where it was coming from.

[55] No one returned to the scene of the accident afterwards to investigate.

[56] The defence suggests the branch entered the RZR through a seam in the area of the right front fender. Fred testified that when he first inspected the RZR about a week after the accident he found a gap where two pieces of the vehicle's body had split apart at a seam. A photo he took of this gap was entered as evidence. Fred testified that he was able to snap the parts back together by hand. He observed no other damage to the RZR. The defence contends the branch must have entered the RZR through this gap.

[57] Mr. Delfs' counsel disputes this, arguing the branch must have entered the vehicle through the open side. He argues the trajectory of the branch, passing through Tanner from his right side to his left, means that the branch could not have entered the vehicle by way of the broken seam in the right-front fender.

[58] There is no evidence from an engineer or accident reconstruction expert opining on how a branch might have entered the vehicle or whether the angle through which it passed Mr. Delfs might shed light on that question.

[59] Based on the evidence of the four witnesses, counsel for Mr. Delfs provides the following theory in his closing argument for how Tanner came to be impaled by the stick:

> 99. The above sequence of evidence supports an inference that is consistent with the RZR being driven forward over a fallen tree or log that had branches on it. When the RZR travelled over it, it rotated a branch or branches upward and they came into the vehicle from the side and impaled the plaintiff. When the RZR went backwards, after Josh looked over and realized what had happened to the plaintiff, he took his foot off the gas, being on an incline as he stated in his evidence, and the RZR went backwards to some extent and the branch that impaled the plaintiff rotated away from the plaintiff's body, breaking off inside him and pulling out. The only inference to draw is that the remainder of it that pulled out is what Matt saw when he came to the scene of the Accident.
>
> …

> 101. The plaintiff submits that the only reasonable inference to make in the circumstances, which is consistent with the evidence of the plaintiff, is that Josh drove onto a log or a tree that was on the trail, became stuck, gunned the engine and accelerated in the RZR, and as he did that, he rotated the tree and a branch came up and into the vehicle from the side.

[60] With respect, I do not agree the evidence necessarily leads to this inference. First, while it is certainly plausible, and perhaps even probable, that the branch was attached to something on the ground, it is unlikely that it was a tree or log of any substance. Perhaps it was attached to a larger branch but I am not able to find on the evidence that it was attached to a tree or log of such a size that it would halt the RZR's progress by blocking the wheels. I say this because, as I have said, no one else observed a tree or log of any size and Fred was able to reverse the RZR without encountering resistance.

[61] Second, even if the RZR had travelled over a tree or log (or even a more substantial branch) causing the tree or log to rotate, this does not explain how the branch would have entered the vehicle from the side rather than through the wheel well.

[62] Third, I am not able to determine what caused the stick to break off. The RZR rolled backwards to some degree after Tanner was impaled. I infer the branch must have been attached to, and then broken off of, something. However, I am not able to determine on the evidence whether the branch broke off inside Mr. Delfs or outside of the vehicle (such as in the broken seam in the wheel well). There is no medical evidence to explain how a branch of that size could have been forced to break inside the body.

[63] An equally plausible theory, in my view, is that the stick entered the vehicle through the seam in the front right fender of the RZR, as the defence suggests. However, I am not able to find the accident necessarily happened that way either.

[64] The defence argues the most reliable evidence of where the branch came from is Matt Simpson's observation of a bloody stick protruding up from the ground at an angle towards the front of the RZR. They argue, however, there is no evidence

the stick was attached to a log or that it came from the side of the road. I note, however, the stick must have been attached to something if it was protruding into the air from the ground. I am not able to determine whether the stick was protruding in this manner before the accident. None of the four witnesses recall seeing it before the accident. Mr. Delfs said he might have but could not say for sure as the accident happened so fast.

[65] The defendants point out that the burden of proof is on the plaintiff and it is not for the defendants to prove how the accident happened. They summarize their point in their written argument as follows:

> 40. This is where the Plaintiff's case falls short. There is no credible evidence (i.e. discounting Tanner's memory) that there was a hazard on the trail that ought to have been seen and avoided by Josh. The Plaintiff has offered a lot of speculation about the source of the branch including from a log on the path or from the side of the trail. But there is nothing concrete that pins down the location of the branch. Matt's evidence is as close as the Court can get.
>
> 41. The argument being made is that the branch existed, the branch was not seen or avoided by Josh, the branch caused the injury, ipso facto, Josh was negligent. But that avoids the requirement that the Plaintiff has the burden of proof. … There is evidence from four people who were at the scene and witness to the surroundings. Merely because none of them can pin point the source of the branch or how and why it penetrated the vehicle does not reverse the onus of proving negligence. The Plaintiff still has the burden of proving that the branch was there to be seen, was observable and recognizable as a hazard and should have been avoided by Josh.

[66] Doing what I can with the evidence, and being mindful that the plaintiff bears the burden of proof, I find that the RZR ran into some kind of debris on the trail. I do not accept the debris was a log or tree of a substantial size. In particular, I do not accept Mr. Delfs' recollection, although sincere, that the front right wheel was hanging over the side of a fallen log or tree.

[67] I do, however, find as a fact, that there was considerable debris, including branches, along the trail as a result of the windstorm. Some of these were of a substantial size given that Fred needed to use his chainsaw at least once to clear the debris away.

[68] I also find as a fact that Fred and Josh were aware there was considerable debris along the path that they expected or ought to have expected to encounter. As Fred stated in his discovery evidence (read in by the plaintiff): “There were trees and branches all over the place after the windstorm.” Thus, they ought to have been aware that they needed to exercise extra caution to watch out for such debris.

[69] Given these circumstances, I am satisfied there was probably some kind of debris on the ground that the RZR hit causing the branch to enter the vehicle and impale Tanner. Exactly how or where the branch entered the vehicle, though, cannot be explained on the evidence. All that can be concluded is that it was either forced into the vehicle’s right-front wheel well or it came through the side of the vehicle, by the RZR’s forward motion or by Josh’s efforts to free the stuck RZR from some unidentified obstruction.

[70] The facts as I have found them do not allow the Court to draw any more detailed inference than this. The question is whether these facts are sufficient to establish that Josh was negligent in causing the branch to enter the vehicle and whether Fred and/or Kim were negligent in having failed to properly train or supervise Josh in the operation of the RZR, including in circumstances where, as Fred stated, “[t]here were trees and debris all over the place.”

2. Analysis

Josh Stricker’s Duty and Standard of Care

[71] As the operator of the RZR, Josh owed Tanner a duty of care: *Parlby v. Starr*, 2017 BCSC 2353 at para. 164 [*Parlby*]. The standard of care described in *Parlby* is that of a reasonable motorist. The plaintiff adds to this, by analogy to snowmobiling, that operators of ATVs must exercise proper care in maintaining control of their machines: *Passerin v. Webb*, 2018 BCSC 289. I agree; however, I find Josh never lost control of the RZR.

[72] The parties generally agree the standard of care should be informed by cases involving ATVs, snowmobiles, and other motorized recreational sports. Both parties

have cited a number of such cases, and I commend counsel for their thorough research on the point. I am grateful to have had the benefit of this broad spectrum of authority to assist in understanding where the standard of care might lie for the present case. In the end, however, as counsel foreshadowed in their opening statements, these cases turn on their own of facts, none of which parallel or are even analogous to the unique facts of this case. Thus, only general principles can be discerned from these cases.

[73] Based on these authorities, the parties appear *ad item* on the general elements of the standard of care. The defendants say that standard includes: driving at a reasonable speed, driving with due care and attention, maintaining control of the vehicle, keeping a lookout for hazards, and otherwise driving in a way that is not objectively unsafe. I do not understand the plaintiff to take a different view, other than to argue the owner's manual outlines the standard with more specificity.

[74] The defendants also concede, correctly in my view, that the standard of care to which Josh should be held is that of an adult since he was engaged in an "adult activity" when the accident occurred: *McErlean v. Sarel* (1987), 42 D.L.R. (4th) 577, 61 O.R. (2d) 396 (C.A.); *Pender v. Squires*, 2019 NLSC 101 at para. 67 [*Pender*].

[75] The plaintiff argues the standard of care should be informed by the owner's manual. He argues Josh's conduct fell short of that standard in that:

- Josh was not yet 16 years old, as prescribed by the manual;
- His passenger, for whom he was responsible, was not yet 12 years old, as prescribed by the manual;
- He had not been properly instructed or trained in the operation of the RZR;
- He had not been properly instructed in operating to avoid hazards or over obstacles;

- He failed to read the owner's manual to fully understand the RZR's safe operation;

- He failed to watch for branches or other hazards that could enter the vehicle;

- He failed to heed the warning in the manual to "[t]ravel slowly and use extra caution when operating on unfamiliar terrain" and to be aware that "[n]ot all obstacles are immediately visible"; and

- He failed to have his passenger "dismount and move away from the vehicle before operating over an obstacle that could cause an overturn."

Did Josh Stricker Fail to Meet the Standard of Care?

[76] Given my findings of fact on how the accident occurred (to the extent I am able to make findings), I conclude that the question of whether Josh failed to meet the standard of care depends on two potential acts or omissions. One is whether Josh kept a proper lookout for hazards, namely trees and branches that might enter the vehicle and injure Tanner. The other is whether using the accelerator in an effort to free the stuck vehicle was reasonable in the circumstances or whether it was foreseeable that doing so would injure Tanner.

[77] Before addressing these two points, I will first consider the plaintiff's arguments about the role of the owner's manual in setting the standard of care and assessing whether Josh fell below that standard.

[78] I accept the owner's manual can inform the standard of care, but I do not agree it dictates it. A failure to adhere to a guideline or purported requirement in the owner's manual does not necessarily mean the operator or an adult supervising that operator fell below a standard the law might set. Moreover, there must still be causation between the act said to be negligent and the injury.

[79] For example, I do not accept that an adult supervisor falls below the standard of care simply by allowing a 15-year-old to operate a RZR, contrary to the owner's

manual. The standard of care in those circumstances would have regard the experience, abilities, and maturity of the 15-year-old.

[80] The plaintiff relies on *Isildar v. Kanata Diving Supply*, [2008] O.J. No. 2406 (S.C.J.), where the operators of a Professional Association of Dive Instructors ("PADI") Advanced Open Water Diving Course were found negligent for failing to follow the PADI General Practices and Procedures Manual after a diver taking their course died during a deep-water dive. In that case, however, there was expert evidence confirming the industry standard for deep-water dive procedures which were consistent with the PADI manuals.

[81] In this case, the evidence of Nicholas Langelaan, the Polaris dealer in Kelowna, is the closest the evidence comes to describing an industry standard. Mr. Langelaan testified that he has never fully read the owner's manual for the RZR. Nor has he ever received an inquiry from a customer about any aspect of the manual, suggesting that customers do not commonly read owner's manuals. As Mr. Langelaan observed, if everyone read these manuals, he would expect at least one customer to have asked him about some aspect of it. I agree this is a reasonable inference.

[82] With regard to specific aspects of the manual, much was made at trial about the manual's 16-year-old age requirement. At 15, Josh was a year younger than the specified age. However, I find this was not a factor in the accident. Josh had considerable experience in operating motor vehicles, including ATVs, though comparatively little experience with the RZR. Since he lived in Alberta, he obtained his Class 7 Learner's Driver's Licence after his 14th birthday, about 16 months before the accident. Despite the age warnings in the owner's manual and the dashboard decals, I find the operator's skill level, experience, and maturity are more relevant factors than their specific age.

[83] I am also satisfied that it is common for persons under the age of 16 to operate ATVs, including vehicles such as RZRs. Josh had been operating ATVs since he was 6. Fred operated ATVs since he was 14. Mr. Langelaan began

operating dirt bikes and ATVs when he was 13. He said the RZR did not come out until he was about 16 or 17, but in his experience, he sees people under 16 in the bush driving them all the time. In *Pender*, a 15-year-old driver of an ATV was found negligent in its operation, but the court did not find that operating the vehicle at her age was, *per se,* the basis for negligence. The Court noted at para. 84: "the evidence is that many youths used ATVs and dirt bikes in the trail". Although the evidence in this case was not extensive, I am satisfied it is common for persons under the age of 16 to operate ATVs in the backcountry of British Columbia.

[84] To the extent that age might be an indicator of experience or maturity to operate the RZR, I accept the age "requirement" in the owner's manual may be relevant to assessing the standard of care. However, I am satisfied that Josh had considerable experience operating ATVs and other vehicles and he was a mature and responsible young man at 15.

[85] That said, I find as a fact that Josh had little experience driving the RZR. The vehicle was still new, and neither Fred nor Josh had any extensive experience driving it. Josh had been driving cars for at least 16 months and had been operating ATVs for almost a decade. The owner's manual specifies that the RZR "handles differently than cars, trucks or other off-road vehicles" and I find as a fact that neither Josh nor Fred was aware of this specific caution. However, that section of the manual does not explain <u>how</u> the RZR is materially different to a car in how it handles, other than to say that "a collision or a rollover can occur quickly, even during routine maneuvers like turning, or driving on hills or over obstacles". Nothing in this part of the manual suggests the difference in how the RZR handles compared to a car could lead to a branch entering the vehicle. Thus, even if Fred or Josh had read this warning in the owner's manual, I find it would not have led either of them to do anything differently to have avoided this accident.

[86] I find that Josh was reasonably trained by Fred in how to operate the RZR and he was comfortable in doing so. Fred admitted he did not specifically instruct Josh to stay away form debris like tree branches and trees on the trail that could

collide with or damage the RZR. He told him to “stay on the trail”, but he did not instruct Josh on how to safely navigate around or over objects encountered on the trail. Again, though, I am not able to find that this was a factor in the accident.

[87] Nor is the fact that Tanner was under 12 years old as a passenger in the RZR a factor into the accident. The owner’s manual suggests that the passenger’s feet should be able to reach the floor, apparently so the passenger can maintain stability and reach a grab-bar on the dash. However, there is no evidence that Mr. Delfs’ age or size were factors that caused his injuries.

[88] I am not able to find that Josh was driving at an excessive speed. Nor can I find on the evidence that the RZR’s speed impaired Josh’s ability to see what lay ahead on the trail or that it caused the branch to enter the vehicle. Tanner’s evidence at trial was that Josh was driving “fast” around the corner to catch up to Fred and Matt, but on discovery he could not recall having the sense that Josh was speeding.

[89] The owner’s manual warns to avoid operation “over large obstacles such as rocks and fallen trees” and, if such obstacles are unavoidable, to “use extreme caution and operate slowly”. However, whatever it was that blocked the RZR’s progress was not, in my view, a “large” obstacle. If it had been, I find that Fred, Matt, and even Josh would have noticed that at the time. As I have found earlier, I am not persuaded the RZR was perched on a fallen tree.

[90] Finally, I find the standard of care, to the extent it is informed by the owner’s manual, did not compel Josh to have Tanner exit the vehicle when it became stuck. The owner’s manual recommends having a passenger dismount “before operating over an obstacle <u>that could cause an overturn</u>” (emphasis added). An overturn was not a risk in these circumstances.

[91] The plaintiff also argues the standard of care should be informed by Mr. Langelaan’s evidence on cross-examination. Defence counsel put to Mr. Langelaan a portion of the owner’s manual that warns to watch for branches that

may enter the vehicle and suggested this refers to branches hanging from standing trees. Mr. Langelaan disagreed, stating that one should also watch for branches on the ground. He said, when operating in an off-road environment, one is on “unstable” ground and there are things moving all around. He said “unstable” may not be the right terminology, but I took his point to be that there are things on the ground that one might encounter in an off-road environment that one would not readily expect to see on an ordinary road, and these things could present hazards. This is another way of articulating that the operator should maintain a careful watch for debris. I accept Mr. Langelaan’s evidence on this point and I agree that a reasonable articulation of the standard of care in an off-road environment is to maintain the kind of lookout Mr. Langelaan suggests.

[92] With that, I return to the two questions I consider to be determinative of whether Josh was negligent in his operation of the RZR. The first is whether he kept a proper lookout in operating the RZR. As I have said, I am satisfied that Josh ran into some kind of debris on the trail that impeded the RZR’s forward progress and ultimately entered the vehicle impaling Tanner. I am also satisfied that Josh was under a duty that day to keep a particular lookout for such hazards since he was aware there was debris, including branches and trees, all over the trails from the windstorm.

[93] In the circumstances, though, I am not able to find that Josh was negligent in failing to keep a proper watch. I am satisfied that whatever the branch was attached to was not plainly visible as a hazard. In this respect, I note that both Fred and Matt passed by the same area just ahead of Josh without noticing any hazard. Nor did anyone observe a specific hazard when they returned to the scene of the accident. Matt observed the “bloody stick” protruding up from the ground but the evidence provides no explanation for how it got that way.

[94] The evidence does not establish that the hazard, whatever it was, ought reasonably to have been seen by keeping a proper lookout. I include in this the kind

of enhanced lookout that Mr. Langelaan described. As stated in the owner's manual: "[n]ot all obstacles are immediately visible."

[95] There are inherent dangers in taking a vehicle into an off-road area. The road conditions do not mirror those of well-maintained public roads and highways. As suggested in the owner's manual, operators of ATVs must be especially vigilant in watching for hazards in off-road environments, especially when carrying a passenger. However, deep in the bush, even on a well-used off-road trail, hazards are inevitable. The mere fact that the accident happened does not mean it happened negligently, and the mere fact that Josh hit a hazard deep in the bush does not, on its own, prove he was negligent in doing so. I find the evidence does not establish that the accident was caused by Josh failing to keep a proper lookout.

[96] On second question, whether Josh was negligent in using the accelerator in an effort to dislodge the RZR, I am again not able to find his conduct fell below the standard of care. With clear hindsight, one might say the reasonable course of action would have been to exit the RZR to investigate what it was stuck on before attempting to free it by using the vehicle's power. However, I heard no evidence that this is the standard that would be expected when operating an ATV in an off-road environment. Attempting to use the accelerator seems like a natural response for a driver's first attempt to free a stuck vehicle. There is nothing in the evidence, including in the owner's manual, to suggest this is a dangerous or careless action.

[97] Liability must be grounded in wrongful conduct. I am not able to find on the evidence that Josh's conduct was wrongful. In *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 24 [*Rankin*], Karakatsanis J. stated for the majority:

> [24] When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged": A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 322 (emphasis added). This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of

> care analysis is a search for **the connection between the wrong and the injury** suffered by the plaintiff: p. 150; see also *Anns*, at pp. 751-52; *Childs*, at para. 25.
>
> [Underline emphasis in original; bold emphasis added.]

In my respectful view, what is missing from the evidence in this case is the wrongful act.

[98] Also missing, as this passage from *Rankin* suggests, is the foreseeability of the type of damage. I find it is not reasonably foreseeable that using the accelerator in an effort to free a stuck RZR would cause a branch to either break through the frame of the RZR or enter through its open side and injure the passenger, let alone impale him. Damage is foreseeable if it is of the "type" or "kind" that a reasonable person might foresee, even if the specifics of the accident were not foreseen: *Abdi v. Burnaby (City)*, 2020 BCCA 125 at para. 107. I am not persuaded that even the type or kind of damage (a large branch entering the vehicle) is a foreseeable consequence of using the accelerator to free a stuck vehicle.

[99] I appreciate the plaintiff is in a very difficult position to prove the specific cause of the impalement. The event happened very quickly and a long time ago. It was in a remote area that all four witnesses (understandably) left very quickly without having surveyed the scene for a cause. No one returned to investigate. There was no accident reconstruction team that investigated. In these circumstances, there is a certain attraction to assuming from the very fact of the accident that it must have been caused by negligent operation of the vehicle. As the plaintiff argued:

> 100. …[R]egardless of whether it was a branch or a tree that Josh attempted to drive over or whether it was a branch fallen on the ground, or a branch connected to a standing tree, Josh drove into the hazard and his conduct in operating the RZR caused it to enter the vehicle and impale the plaintiff. This is not simply circumstantial evidence.

[100] This may well be true, but it does not prove negligence unless the hazard into which Josh drove is one that he ought reasonably to have seen if he was keeping a proper lookout for hazards or if it was reasonably foreseeable that using the

accelerator to free the stuck vehicle would cause the branch to enter the vehicle. I am not persuaded of either scenario.

[101] The plaintiff relies on *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424 where the plaintiff made a family compensation claim over the death of her husband in a motor vehicle accident. The husband and friend had gone on a hunting trip from which they did not return. Their bodies were found two weeks later inside a badly-damaged truck that had been driven off Highway 3 east of Hope, B.C. during a severe rain and wind storm. The court considered whether an inference of negligence on the part of the driver could be drawn from the circumstantial evidence of the vehicle having left the road. Speaking for the court, Major J. said at para. 27 that the trier of fact should:

> [27] … weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[102] The court rejected the inference of negligence in that case, finding that the "bald proposition" that the vehicle left the roadway is not *prima facie* proof of negligence on a balance of probabilities and to find otherwise would improperly "subject the defendant to strict liability in cases such as the present one."

[103] I find the same to be true of this case. The fact that Mr. Delfs became impaled by a branch assumes the branch constituted an identifiable hazard that either ought to have been seen or that was reasonably foreseeable to injure Tanner if Josh used the accelerator to try to free the stuck vehicle. I find that neither of these has been established as a *prima facie* case on a balance of probabilities.

[104] I therefore find that the evidence in this case does not establish that Josh failed to meet the standard of care required of him as an adult operating an off-road side-by-side ATV and I would dismiss the claim against him.

Fred and Kim Stricker's Duty and Standard of Care

[105] The plaintiff argues that Fred Stricker and Kim Stricker failed in their duty to supervise Josh and, more broadly, to ensure Mr. Delfs' safety by: failing to read and adhere to the owner's manual; failing to properly train and instruct Josh in accordance with the owner's manual, including on avoidance of or navigation around hazards such as branches and trees; and by failing to properly supervise Josh on the day of the accident.

[106] The parties generally agree on the standard of care for parents supervising a child in an activity such as using an ATV. Both cite *Ryan v. Hickson* (1974), 55 D.L.R. (3d) 196, 7 O.R. (2d) 352 (H.C.) and *J.G. (Dependent Adult) v. Strathcona (County)*, 2004 ABQB 378 at para. 152 [*J.G.*], which set out the elements of the standard of care for parents supervising minors operating snowmobiles. Those elements are consolidated as follows:

- the child is properly and thoroughly trained in the use of the vehicle, with particular regard to using it safely and carefully;
- instruction included how to avoid the dangers inherent in the activity in light of the conditions, the difficulty of the route, and any latent dangers thereon;
- the child is of an age, character, maturity, and intelligence such that the parent might safely assume the child would apprehend and obey the parents' instructions;
- the child is physically capable of safely following the instructions and competent to safely operate the vehicle;
- the activity was suitable to the age, mental and physical condition, and capabilities of the plaintiff;
- the equipment was in good mechanical condition; and
- there was appropriate supervision in relation to the inherent dangers involved.

[107] With regard to the maturity of the child and the expectation they will obey the rules, the court in *J.G.* added a caveat that one must keep in mind "adolescent boys' propensity for mischief, excitement, and irresponsible use of motorized vehicles and sometimes lack of good and mature judgment": at para. 153. Whether this is a fair assessment of adolescent boys or an unfair stereotype can be left for another day. I am satisfied that Josh, even at 15, was sufficiently mature that the Strickers could reasonably expect he would obey the rules. Indeed, his track record supports this conclusion.

Did the Strickers Fail to Meet their Standard of Care?

[108] I am satisfied that the Strickers met the standard of care imposed upon them to both supervise Josh and to ensure Tanner was safe. As I have said above, I am satisfied that Josh was mature, of good character, and intelligent, such that the Strickers could assume he would obey instructions given to him. He was physically capable of safely following those instructions and operating ATVs, including the RZR, as his long history with ATVs demonstrates.

[109] I am also satisfied that Josh was properly and thoroughly trained in the use of ATVs in general. I find that Fred trained Josh on the use of the RZR and was satisfied that Josh was sufficiently mature, capable, and experienced enough to handle it. Given Josh's previous experience with ATVs and the fact he had his learner's driver's licence for about 16 months by the time of the accident, I find he was sufficiently familiar and comfortable with the operation of the RZR that the extent of his training from Fred was adequate to meet the standard.

[110] Regardless, I am not able to find the extent of Josh's training on the RZR was a cause of the accident. As I have found earlier, the evidence does not establish that Josh's operation of the RZR fell below the expected standard of care. I cannot find anything about the adequacy of Fred's training of Josh on the RZR that caused the accident.

[111] I am also satisfied that Fred exercised reasonable care in supervising the trip. I accept it was reasonable for him to be in lead, even though it meant he could not

keep a constant watch on the boys in the other vehicles. Being in front allowed him to watch out for any dangerous segments of the path and set the pace for the riders to ensure no one went too fast.

[112] Kim Stricker played little, if any, part in the ATV activity and left most matters regarding the ATVs to Fred. This was reasonable given Fred's experience with ATVs and off-roading. She played a small part in preparing Tanner for the trip, including ensuring he was wearing long pants and closed shoes but otherwise left it to Fred to look out for his safety. As in *J.G.* at para. 187, it was reasonable for Kim to defer to Fred on these matters.

[113] Finally, the plaintiff argues Fred and Kim failed to meet the standard of care by allowing a nine-year-old to be a passenger in the RZR when the owner's manual specified that passengers should not be under 12. As I have found above, Mr. Delfs' age was not a factor in the injuries he suffered and there is no evidence that the injury would not have happened or would have been materially different if he was a larger child of 12 years. Thus, to the extent it might be said that the Strickers were negligent for allowing a nine-year-old to be a passenger in the RZR, this was not the cause of Mr. Delfs' injuries.

3. Conclusion on Liability

[114] There is no question that, through not fault of his own, Mr. Delfs suffered a grievous and horrifying injury during the ATV adventure with his cousin and uncle. This was a sad and deeply unfortunate accident that was the result of adventuring into the backwoods on motorized vehicles, an activity that carries inherent risks. As I describe in the next section of these reasons, it is also clear that Mr. Delfs continues to live with the effects of this injury, both physically and mentally, more than a dozen years after the fact. However, I am unable to find on the evidence that the accident was caused by negligence on behalf of any of the defendants and I would therefore dismiss the plaintiff's case.

IV. Damages (in the event of error on liability)

[115] While I have found the action should be dismissed on the issue of liability, I have determined that I should fully address the question of damages in the event a higher court might find my conclusion on liability to be in error. As counsel pointed out, there is little in the way of precedent to guide the standard of care for these unique facts. Moreover, this has been a difficult trial for the parties and their family members, all of whom are based in Calgary and had to travel to Kelowna to testify. The expert witnesses are also from Vancouver and Calgary. In addition, this trial has caused hardship for many of the witnesses, particularly Mr. Delfs, which leads me to conclude that I should make findings on damages to prevent the parties from having to undergo a new trial if I am found to be wrong on liability. I will do so now.

1. Tanner Delfs Before the Accident

[116] Mr. Delfs was born and raised in Calgary, where he still lives. His mother, Natalie, worked for a time as a policy service coordinator for an insurance broker but she was mostly a stay-at-home mom. His father, Dwayne, works in the software management business and, while his work often took him out of town, he has remained close to Mr. Delfs. Mr. Delfs is and always has been close to his older sister, Madison, as they have been an important part of each other's lives growing up and now.

[117] Mr. Delfs had some early challenges with school, both academically and socially, but he ultimately thrived. As an elementary school student, he struggled with math, science, and exam-writing. He was given an Individual Education Plan ("IEP"), which remained with him throughout his elementary and high school years and assisted him in those aspects of his education he found particularly challenging. As a younger student, he liked to help his teachers and enjoyed spending time with them. He was a cooperative student at school and he liked being with other kids. He shared his ideas in class, participated in discussions, had friends, and got along with other students. He passed each grade and graduated high school on time and with his peers.

[118] Socially, Mr. Delfs had a something of rough go at school, at least in his early years. He was a victim of homophobic bullying from a very young age. He had a high-pitched voice, for which he was harassed by other kids who told him he was gay. This bullying continued through to grade 9, when Mr. Delfs came out as gay. Once that happened, the bullying stopped since, as Mr. Delfs said, the bullies had no reason to harass him anymore.

[119] Despite the bullying and broader challenges Mr. Delfs had with anxiety, he maintained his attendance at school.

[120] As a young boy he enjoyed riding his bike in the community, playing with his sister and her friends, camping with his family, and visits to Drumheller, Alberta. Mr. Delfs also played some soccer, both for fun and on a team.

[121] As mentioned, Mr. Delfs struggled with anxiety from a young age. While the bullying was a contributing factor in this, the anxiety was more generalized. Natalie confirmed in cross-examination that Mr. Delfs suffered from anxiety attacks prior to the accident and suffered some physical conditions related to that anxiety. Apart from these, the evidence does not suggest Mr. Delfs had any other significant health problems prior to the accident.

2. Mr. Delfs' Injuries and Life After the Accident

[122] Earlier in these reasons I described the physical injuries Mr. Delfs suffered in the accident and the extensive surgery and out-patient wound care he underwent. Suffice it to say, his injuries were severe, extensive, and painful.

[123] When Mr. Delfs returned home from the hospital he was timid and protective of himself and his injuries. Natalie testified that he was particularly sensitive around the family dog because he was afraid the dog might jump on him and agitate his injuries. He was fearful of being in the car and often asked his mother to drive slowly. Dwayne testified that Mr. Delfs was withdrawn and suffered after he came home from the hospital and that it took a while for the "old Tanner" to return. He was slow to get back to physical activities such as riding his bike and scooter but

eventually did. He did not resume playing soccer on a team, which Dwayne (who had helped coach the team) attributes to Mr. Delfs' reluctance or inability to sustain physical contact due to his injuries. Mr. Delfs would never go swimming without a shirt after the accident as he was sensitive about the scars from the wound and his surgery.

[124] Following his outpatient wound care, Mr. Delfs was treated largely through the South Health Centre in Calgary and Calgary Children's Hospital, until he aged out of that care at 18 years old. He regularly attended medical appointments to manage his post-accident abdominal pain, which became chronic. Natalie testified he did not like going to these appointments but he attended them in her company. He also attended some counselling sessions, though Natalie was not in the room for those. On some occasions Natalie had to take Mr. Delfs to the emergency ward because of severe stomach pains.

[125] Mr. Delfs returned to school after the accident in September 2009, starting middle school in grade 5, but his injuries were still fresh and he lacked the stamina for full days. Bullying continued to be a challenge for Mr. Delfs until grade 9 but he saw a therapist about it in grade 6 or 7 and found this helpful. Coming out in grade 9 opened up more social opportunities for Mr. Delfs. He had more friends, joined the LGBTQ2 club at school when he was in grade 11 and, according to Dwayne Delfs, the First Nations club (Dwyane identifies is Metis). Overall, Mr. Delfs became more social and confident.

[126] Mr. Delfs has suffered from chronic abdominal pain since the accident. This is confirmed in the expert report of Dr. Negraeff and not disputed by the defendants' medical expert, Dr. Alto Lo, or the defendants. The defendants point out, however, that Mr. Delfs has seen some improvement by taking Pregabalin, a medication recommended by Dr. Negraeff.

[127] Though chronic, Mr. Delfs' pain is not constant. He testified that it comes and goes but can come on at any time (daily or weekly) as a stabbing pain. He is pain-free on some days but says it is infrequent that he goes a day without episodes of

pain. His pain is generally triggered when lifting heavier items or bending over to pick something up.

[128] Natalie testified she has regularly observed Mr. Delfs' episodes of abdominal pain, particularly when doing domestic work. She observes that his stamina is low and he is slow to complete household chores although he does eventually finish them. She can tell when he is in pain because his face winces or sometimes he doubles over.

[129] Mr. Delfs does house and yard work at home. He uses the lawnmower and weed whacker, rakes leaves, and shovels snow both by hand and with a snowblower. He said it takes him a long time to do these chores as he feels fatigue and pain in his stomach and back when he does so, but he pushes through to eventually complete the work.

[130] In connection with his chronic abdominal pain, Mr. Delfs has experienced difficulties with acid reflex. He takes Lansoprazole which helps. He experienced nausea in the years after the accident but does not recall any instances in the past year or so. He has also experienced digestive problems which the medical evidence attributes to anxiety rather than his abdominal pain.

[131] Mr. Delfs began experiencing migraine or migrainous headaches in the years following the accident. His medical records report a September 25, 2011 complaint of headaches associated with his abdominal pain. Mr. Delfs takes Flunarizine for the headaches which has helped with their severity and frequency though he still suffers from them. There is disagreement in the expert evidence as to whether the migraines are associated with the chronic pain caused by the accident.

[132] Mr. Delfs continued to have nightmares about the accident in the years that followed it. He received some therapy to assist with this. He testified that his memory of the accident "keyed into" his anxiety and he was more anxious at school after the accident than he had been before. His anxiety is agitated when he has an episode of abdominal pain. He takes Fluoxetine for anxiety and depression, which has been

effective in managing the symptoms. He described his sleep as “okay” but at times he wakes up during the night and is unable to get back to sleep. For a time this waking up was attributed to leg cramps that are not accident-related.

[133] Mr. Delfs still struggles with the memory of the accident, as clearly demonstrated by his genuine emotional reaction when testifying about it. He has flashbacks of the accident and it is “always sitting in the back of [his] head.” He has had to leave class on occasion as visions of the accident sometime arise.

[134] Mr. Delfs often speaks of the accident at fundraising events for STARS (Shock Trauma Air Rescue Service), the air ambulance service that flew him from Invermere Hospital to Calgary Children’s Hospital. The defendants suggest this indicates the trauma of recalling the accident is not as severe as his evidence might suggest, but I do not accept this. Mr. Delfs’ ability to speak of the accident to benefit an organization that likely helped save his life does not undermine the genuine challenges he has in reliving it in other circumstances.

[135] Mr. Delfs struggled to some extent with remembering to take his medications, but I find this was a product of his age rather than a resistance to them or an indication they are not needed. I accept it is not uncommon for young people to be less than perfect in remembering to take prescribed medications. He now has this in hand.

[136] In 2015, while in grade 10, Mr. Delfs worked part-time in the bakery department of Save-On-Foods. This was initially a good fit because he had an interest in cooking and baking, but he struggled with the physical elements of the job such as carrying trays and boxes. He found that lifting heavy baking sheets pulled on his stomach and caused him pain. As a result, his work pace slowed and he was let go from the job after only a few months.

[137] Shortly thereafter, he was hired as a cashier at Sobey’s grocery store where he worked 20–25 hours per week through to 2017. This job was better suited for him as it did not require much lifting. He encountered some stomach pain if he turned too

quickly when bagging groceries but overall this job was physically a better fit. He left that job on his own volition after about two years due to a conflict with his manager.

[138] He then took a job with Bed Bath & Beyond as a cashier and was eventually elevated to be a front-line supervisor. He started that job in 2017 and worked there for three years through his time at Mount Royal University. The job had some physical demands of lifting and moving around but it was unquestionably a success and a good part-time job for a student. Mr. Delfs received promotions and pay increases in that job.

[139] Mr. Delfs testified that he missed some work over the years due to the lingering chronic pain associated with his accident injuries. These aside, the evidence satisfies me that Mr. Delfs coped well with these part-time work environments after the Save-On-Foods job.

[140] As a middle school student, Mr. Delfs had some aspirations of becoming a chef. Because of this aspiration, and his overall interest in cooking and baking, he enrolled in cuisine classes around grade 10 and this expanded his knowledge and interest in food. However, he later learned that career would be unsuitable for him because his stomach could not withstand certain types of food and the physical work in a kitchen or bakery would be unsustainable with his chronic abdominal pain. He therefore decided to pursue work in a “helping profession”, in part to give back for the help he had received since the accident.

[141] Mr. Delfs graduated from high school in 2017 with a full high school diploma. He took a year away from a full education program to work at Bed Bath & Beyond and upgrade his math and English scores so he could qualify for a 2-year diploma program in social work at Mount Royal University. He was accepted to that program and started at Mount Royal in 2018. He elected to do the program in 2½ years so he could work part-time while attending school.

[142] He successfully completed the diploma program in December 2020 with a strong grade point average. He immediately began work at Janus Academy Society,

a school for kids with Autism spectrum diagnoses, which is where he now works as an educational assistant (formerly called a “behavioral therapist”). He helps the students with their schooling and some physical activities, but sometimes he is required to deal with aggression and has to restrain a student. Other times he needs to assist in lifting a student up who does a “flop” where they lie on the ground and will not get up. He must do this physical work sometimes daily, but it usually happens a couple times a week. He finds it difficult to do this physical work and it often brings on his abdominal pain. He has taken a few paid personal days off work because of this but has otherwise not missed any work at Janus Academy.

[143] Mr. Delfs works from 8:00 a.m. to 4:00 p.m. and is exhausted by the end of the day. When he gets home he frequently goes to his room in the basement area he rents from his parents and sleeps. His parents testified it is often difficult to wake him from these post-work naps, though not every day. I accept this as a fact. This evidence was corroborated by Madison Delfs who stops by the family home each day after work to pick up her dog and tries to say hello to Mr. Delfs if he is not sleeping.

[144] Given the physical demands of the job and his own exhaustion, Mr. Delfs took the summer of 2021 off work rather than take a summer placement with Janus Academy. He returned to Janus in September and plans to work there for the remainder of the school year. As of the trial, he was planning to re-enroll in Mount Royal University in September 2022 to complete a full bachelor’s degree in social work, which would be another two years of university. With a full degree, he believes he would qualify for a less physically-demanding job, such as a hospital counsellor, which would also be higher paying. Given Mr. Delfs’ good grades at Mount Royal and his work experience, it appears quite certain that he will complete his bachelor’s degree.

[145] In 2018, Mr. Delfs was involved in two relatively minor motor vehicle accidents. Both were rear-end collisions in the snow for which Mr. Delfs was at fault. He suffered some soft-tissue and a back injury in these accidents. While he tended

to downplay the significance of those injuries, it is evident that the back pain persists and, by definition, has become chronic. He also suffers from lower leg cramping which may or may not be related to the car accidents but is not related to the RZR accident. He acknowledged in cross-examination that his back pain sometimes contributes to his physical challenges with housework.

[146] When Mr. Delfs was 16 or 17, he was diagnosed with Wolff-Parkinson White syndrome which is a heart condition that causes a rapid heartbeat. He underwent two ablations, an invasive heart surgical procedure to correct these symptoms. He testified the problem has been corrected and he manages it today through exercise and monitoring his heart rate with an Apple watch.

[147] Mr. Delfs struggles somewhat with more significant physical activity. His medical records indicate some issues with his weight in the past but he now eats a better diet and has dropped some weight. However, he has difficulty with endurance. He described a day-hike he took with Madison in Kananaskis during which he clearly struggled physically. Madison said he appeared to be in pain.

[148] I am satisfied on the basis of Mr. Delfs' testimony and the evidence of pain specialist Dr. Negraeff that Mr. Delfs' abdominal pain is a factor in his conditioning and his energy levels.

[149] Mr. Delfs continues to have a strong social life, going out with friends at least weekly, but at times he does not feel well enough to go out. He is still young, only 21 years old at trial and is still living in his parents' house. He hopes to eventually get married, have a family, and buy a home of his own. He worries about how the accident will affect him in the long-term, including his chronic pain and whether the memories and flashbacks of the accident will fade. He says they still have not gone away.

3. Expert Medical Evidence

[150] The plaintiff tendered reports of two medical doctors: Dr. Mitchell Spivak, a psychiatrist; and Dr. Michael Negraeff, an anesthesiologist with expertise in the

assessment and treatment of chronic pain conditions. The defendants also tendered a report of Ms. Daun Whitnack, an occupational therapist who provided a functional capacity evaluation of Mr. Delfs and recommendations and cost estimates for future care needs.

[151] The defendants tendered two responding reports. One from Dr. Alto Lo, a physiatrist who responded largely to Dr. Negraeff's report and to aspects of Ms. Whitnack's report. The other is a report by Ms. Sandra Lee, an occupational therapist who responded to Ms. Whitnack's report.

[152] I address the medical reports in this part of the reasons and will address the occupational therapy reports when dealing with costs of future care.

Dr. Mitchell Spivak

[153] Dr. Spivak was not Mr. Delfs' treating psychiatrist. He assessed Mr. Delfs for the purpose of providing an expert report for this case. He evaluated his medical records and conducted an in-person interview on January 21, 2019. His first report was prepared the following day and a second report, which considered additional medical records, is dated July 13, 2021.

[154] In his first report, Dr. Spivak described Mr. Delfs as having "developed significant anxiety and posttraumatic stress disorder symptoms" in the aftermath of his "extremely traumatic accident". I note that Dr. Spivak's assumptions about the accident include Mr. Delfs' recollection of his stomach being pulled out and falling to the ground, a recollection I have found to be genuine but inaccurate. However, since Mr. Delfs recalls the accident in those terms, I accept that it is reasonable to consider the psychological impacts of it through that lens as that is how Mr. Delfs truly sees it.

[155] Dr. Spivak opines that Mr. Delfs developed post-traumatic stress disorder in the aftermath of the accident. The defendants argue this is not strictly a diagnosis. They say Dr. Spivak reached this conclusion by relying on the diagnosis of Dr. Mahon, Mr. Delfs' treating psychologist, whose opinion is not in evidence except

by reference through Dr. Sprivak's second report. I disagree. Dr. Spivak's opinion is contained in his first report and the index of records reviewed for that report does not include any from Dr. Mahon. His second report states that "Mr. Delfs entered psychotherapy following my contact with him with Psychologist, Dr. M. Mahon." Clearly, then, Dr. Spivak's first report is not based on Dr. Mahon's diagnosis. It is based on the totality of the medical records he has listed and his interview with Mr. Delfs.

[156] The defence also argues that Dr. Spivak speaks only of "symptoms" of anxiety and depression and does not actually diagnose either. I agree that Dr. Spivak speaks only of symptoms when referring to depression but not anxiety. He opines that the accident either exacerbated a pre-existing generalized anxiety disorder or caused a "new disorder". I interpret this as stating that the anxiety caused by the accident is a disorder.

[157] Dr. Spivak states that Mr. Delfs' level of impairment is difficult to evaluate given that he experienced his most severe symptoms while in elementary and middle school, and these have improved with time. He states Mr. Delfs' symptom burden in the six or so years after the accident suggests a level of "moderate intensity" but opines his extensive interaction with mental health professionals over that period and the high dose of antidepressants that he remains on to this day suggest "significant psychological morbidity."

[158] With regard to his current condition, Dr. Spivak opines that Mr. Delfs' episodic flashbacks cause him a level of distress but his overall symptoms do not interfere with his day-to-day functioning or with his social, professional, or educational experience. He opines that Mr. Delfs' symptoms could be categorized as "mild to intermittent." However, he suggests the continued occurrence of flashbacks 10 years after the trauma indicates a chronic problem that "does not portend well for full resolution". He states Mr. Delfs will be prone to setbacks because of the psychological impacts of chronic pain and the fact he experienced significant anxiety and depression from the trauma during "important formative years". He stated that

Mr. Delfs is prone to “periods of more severe symptomatic manifestation as well as periods of some remission.” He opines that “regular contact with therapists may allow him to navigate these periods more effectively” and he recommends that Mr. Delfs would benefit from “intermittent contact with mental health professionals”.

[159] The defendants did not tender any expert psychiatric evidence to respond to Dr. Spivak’s opinion. Having considered Dr. Spivak’s report in light of all the evidence, including his cross-examination, I accept his opinions and his diagnoses as facts.

Dr. Michael Negraeff

[160] Dr. Negraeff is an anesthesiologist and chronic pain specialist. He is the Medical Director of the Transitional Pain Clinic at Vancouver General Hospital. He is a clinical member of the Faculty of Medicine at UBC where he has taught courses in fundamental pain management and chronic pain. He has worked all of his professional carer in the area of pain management and demonstrated an impressive understanding of chronic pain. His evidence was of considerable assistance to the Court in understanding the physiology of why a person may experience chronic pain indefinitely following a trauma even when there is no apparent anatomical reason for that pain to continue.

[161] Dr. Negraeff diagnosed Mr. Delfs as having chronic neuropathic pain in his abdomen and chest wall secondary to the entry wound and surgery. He opines that visceral (inside) hyperalgesia (no physiological explanation) is responsible for the abdominal pain, likely caused by a combination of scar tissue in the abdomen from the wounds and surgery, and central sensitization of the central nervous system causing greater pain experience for the given amount of trauma. To put this in the lay terms used by Dr. Negraeff, the central nervous system has become “stuck” or “hardwired” in a process of sending pain messages to the brain for the area where the trauma occurred, even though that area has physically healed apart from the scar tissue.

[162] Dr. Negraeff recommended Mr. Delfs try a medication called Pregabalin to assist with his chronic pain. Mr. Delfs took this advice and, in 2021, Dr. Negraeff provided a second report commenting on an improvement in, though not resolution of, Mr. Delfs' chronic pain with the benefit of Pregabalin. Mr. Delfs confirmed this improvement in his evidence.

[163] Dr. Negraeff also opines that "it would be reasonable to conclude" that Mr. Delfs' migrainous headaches relate to his "gastrointestinal symptoms" based on a migraine coded in the ICHD-3 (International Classification of Headache Disorders) that links "recurrent gastrointestinal disturbance" with migraine.

[164] He states that both the chronic abdominal pain based on the sensitization of the nervous system and the migraines can be brought about by post-traumatic stress disorder. He opines that Mr. Delfs' Post-traumatic stress disorder ("PTSD") likely has a bearing on his chronic abdominal pain and headaches.

[165] Dr. Negraeff opines that Mr. Delfs will experience "functional disability from his chronic pain" and there is a "real possibility that his symptoms will compromise his ability to carry out employment-related activities now and in the future." He states he has "some concern that full-time hours are not sustainable for him in the long run."

Dr. Alto Lo

[166] The defendants tendered a report by Dr. Lo, a physiatrist with expertise in the assessment, treatment, and rehabilitation of patients with impaired function. He provided a report dated September 29, 2021. His opinion is based solely on a review of Mr. Delfs' medical records. He did not conduct a physical examination of Mr. Delfs or otherwise meet or speak with him in preparing his report. The defendants applied in September 2021, just over two months before trial, for an order that Mr. Delfs attend for a physical exam with Dr. Lo but that application was dismissed.

[167] Based on his review of the records, Dr. Lo agreed with Dr. Negraeff's diagnosis that Mr. Delfs suffers chronic pain in the abdomen and at the entry wound,

and this is a result of the accident. He does not necessarily agree with the specific physiological cause of the chronic pain but does not disagree it exists and was caused by the RZR accident.

[168] Dr. Lo does not agree with Dr. Negraeff that Mr. Delfs' headaches are accident-related. In his opinion, if they were caused by the abdominal pain, he would have expected to see them appear within a year after the accident, not more than two years. He also suggests there is no physiological explanation to suggest chronic abdominal pain would cause migrainous headaches.

[169] Dr. Lo opined that the accident had significant psychological effect on Mr. Delfs and opined that his digestive problems are the result of anxiety and psychosocial stressors caused by the accident

[170] Apart from the headaches, the main difference of opinion between Dr. Negraeff and Dr. Lo is the prognosis for Mr. Delfs' ability to function at work and doing house and yard work due to his chronic pain. I will address this disagreement when dealing with Mr. Delfs' loss of future earning capacity.

4. Causation

[171] The plaintiff must establish on a balance of probabilities that one or more of the defendants' negligence caused or materially contributed to his injuries. The defendants' negligence need not be the sole cause of the injury as long as it is part of the cause beyond the minimalist range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9; *Blackwater v. Plint*, 2005 SCC 58 at para. 78 [*Blackwater*].

[172] The primary test for causation asks whether the plaintiff would have suffered the injuries but for the defendants' negligence. The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23. Plaintiffs must be placed in

the position they would have been if not for the defendant's negligence, no better or worse: *Blackwater* at para. 78.

[173] Since I have found the evidence does not establish that the accident was caused by negligence on the part of any of the defendants, causation obviously has not been established. However, in the event I am wrong in that conclusion, I make the following findings as to what injuries and conditions were caused by the accident.

[174] Clearly, the physical injuries described earlier, the scars from the wound and the surgery, and the psychological trauma in the aftermath of the accident were a direct result of it. Further, as the defendants acknowledge, Mr. Delfs' ongoing chronic abdominal and entry-wound pain was caused by the accident. So too is the now mild and intermittent anxiety and PTSD.

[175] I am satisfied that generalized anxiety was a pre-existing condition for Mr. Delfs but, as noted by Dr. Spivak, it is "unclear … to what extent it was impacting him at the time of the accident." Clearly, Mr. Delfs was an anxious kid, but, in my view, the evidence does not suggest his anxiety was extraordinary or that it would follow him throughout his adult life. I am satisfied the trauma of the accident severely exacerbated that condition and caused his PTSD.

[176] I am not satisfied on a balance of probabilities that Mr. Delfs' migraines are caused by his gastrointestinal symptoms related to the accident. While I found Dr. Negraeff to be a highly credible and reliable witness on issues regrading chronic pain, his opinion on the cause of Mr. Delfs' migrainous headaches is somewhat tenuous, stating "it would be reasonable to conclude" that the headaches are linked to the gastrointestinal symptoms. Further, this is based on the ICHD-3 classification rather than particular expertise regarding an anatomical link between migraines and the gastrointestinal system. In my respectful view, the plaintiff has not proven that the headaches are caused by the accident.

[177] Mr. Delfs had problems falling asleep in the immediate aftermath of the accident due to fears of having nightmares about it. The evidence is not clear on how long this lasted but he testified his sleep is now “pretty good”. He says it sometimes takes him longer to fall asleep and he wakes in the middle of the night sometimes and has trouble getting back to sleep. He attributed these wake-ups to needing a drink of water, going to the bathroom, or cramps in his leg, none of which are caused by the accident. Sleep was a more significant factor in the aftermath of the trauma and, to this extent, a factor to consider in calculating non-pecuniary damages. However, I am not persuaded that he has significant accident-related sleep problems that persist.

5. Non-pecuniary Damages

[178] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation should be fair to all parties. Fairness is measured against awards made in comparable cases, but these serve only as a rough guide since each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189

[179] A common but non-exhaustive list of factors typically considered include the plaintiff’s age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff’s stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[180] The assessment of non-pecuniary damages is necessarily influenced by each plaintiff’s own experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[181] As described above, Mr. Delfs suffered a horrific injury at a very young and formative age. The physical nature of the injury was extensive causing severe internal damage to his stomach, bowel, diaphragm, chest, and lung. It is nothing short of astonishing that he survived. He underwent massive surgery to repair the damage and suffered through a traumatizing post-operative recovery period. He

endured three weeks of daily outpatient wound care that was excruciatingly painful. This was followed with many years of interactions with the health care system, something that was a constant feature in his young life.

[182] As severe and extensive as his physical injuries were, I must nevertheless account for the fact that the internal damage was successfully repaired by surgery. The evidence does not suggest any long-term physical dysfunction with Mr. Delfs' lung or gastrointestinal system. The difficulties he experiences relate to his chronic pain and anxiety. However, the surgery and the impalement left large and clearly visible scars that Mr. Delfs will live with for the rest of his life and scar tissue that contributes to his chronic pain.

[183] For more than 12 years, Mr. Delfs has lived with chronic abdominal pain resulting from the accident and, though it has recently improved with Pregabalin, it is not expected to subside and will affect his functioning throughout his life.

[184] Mr. Delfs has also suffered significant anxiety and PTSD as a result of the accident. He underwent extensive psychological treatment in the five or six years after the accident. Fluoxetine helps in managing his symptoms, but his trauma and chronic pain continue to cause him anxiety and he still has flashbacks of the accident. This is not surprising given the nature of the trauma he endured and the fact that, at a very young age, he saw his intestines pulled out of his body.

[185] As I have found earlier, generalized anxiety was a pre-existing condition for Mr. Delfs but the severity of that is difficult to determine. While I take this into account in assessing damages, I find the anxiety and PTSD caused by the accident severely exacerbated that condition such that it is the dominant cause.

[186] The defendants argue that some aspect of Mr. Delfs' anxiety arises from the relationship between the Delfs and the Strickers which has, unfortunately, soured because of this litigation. The evidence supports this and Dr. Spivak suggests it has "exacerbated his already fragile state". However, I find that it does not consume him in the same way that the trauma of the accident does. Mr. Delfs' flashbacks, for

example, are of the accident, not of interactions with his aunt and uncle. Based on Dr. Spivak's report, however, it cannot be denied that this is a factor in his anxiety. I agree with the defendants that this element of anxiety is not a reasonably foreseeable consequence of the accident and that should be factored into any award of damages. However, I consider this to be a comparatively minor part of Mr. Delfs' accident-induced anxiety.

[187] Finally, the defendants argue that Mr. Delfs' family history of anxiety and depression suggest a predisposition to that condition, so Mr. Delfs may have developed mental health issues regardless of the accident. I accept that some mental illnesses may follow a genetic path; however, apart from the generalized anxiety that Mr. Delfs actually experienced prior to the accident, the evidence here does not establish a measurable risk or real and substantial possibility that Mr. Delfs would have developed anxiety or depressive disorders even without the accident simply because of his family history. I therefore reject any inference to this effect.

[188] Mr. Delfs struggles with his energy level both at work and doing house and yard work. He pushes through the pain, but does so slowly and not infrequently trigging an abdominal pain episode. He is currently managing to work a full-time job but finds himself exhausted at the end of the day.

[189] The defence suggested Mr. Delfs' energy and endurance level may be related to the Wolff-Parkinson White Syndrome but there is no medical evidence opining this syndrome has ongoing effects on Mr. Delfs' endurance following the ablation surgeries.

[190] I accept that Mr. Delfs' back pain from the two recent motor vehicle accidents also causes him discomfort in doing house and yard work but I find it is a relatively small factor contributing to his physical limitations. Further, as I have found above, I find the plaintiff has not established that the headaches are caused by the accident so I do not include that in my assessment of non-pecuniary damages.

[191] Given the severity of the injury and its traumatic and lasting effects as outlined above, the plaintiff argues non-pecuniary damages should be assessed in the higher range. For reference, he cites *Wilhelmson v. Dumma*, 2017 BCSC 616 [*Wilhelmson*], where Justice Sharma identified $367,000 as the maximum available for non-pecuniary damages in 2017 dollars. Mr. Delfs seeks an award of $275,000, citing *Kelly v. Perth (County)*, 2014 ONSC 4151 [*Kelly*]; *Sangra (Litigation Guardian ad litem of) v. Lima*, 2015 BCSC 2350 [*Sangra*]; and *Bob v. Bellerose,* 2003 BCCA 371 [*Bob*]. *Wilhelmson* and *Bob* identify the upper limit for non-pecuniary damages but deal with injuries far more severe and debilitating than Mr. Delfs'. *Kelly* and *Sangra* have some parallels to this case with respect to the type of injuries suffered but both deal with a much larger list of injuries and many that are more severe than Mr. Delfs'. This is recognized, to some extent, in the plaintiff's argument that seeks a smaller award of non-pecuniary damages than in any of these cases.

[192] The defendants argue non-pecuniary damages should be in the range of $140,000 to $150,000. They cite *Goguen v. Di Maddalena*, 2018 BCSC 106; *Morris v. Gentry & ICBC,* 2005 BCSC 670; and *Hutton v. Breitkreutz*, 2015 BCSC 1164. These cases deal with minors who suffered injuries similar to those of Mr. Delfs. In this respect, I found them to be of more assistance than those cited by the plaintiff. However, none of the plaintiffs in these cases suffered the long list of injuries that Mr. Delfs did. Nor was the nature of the accident in any of these cases as horrific and traumatizing as that which Mr. Delfs experienced.

[193] Having regard to all the above, I would have awarded Mr. Delfs non-pecuniary damages in the amount of $200,000 had I found any of the defendants to be liable.

6. Loss of Housekeeping Capacity

[194] Mr. Delfs seeks an award of $50,000 for loss of housekeeping capacity. He does not explain how this number is arrived at, other than to say it is based on a reduced capital asset approach and takes account of the fact that he has a long life ahead of him and will face challenges in having a "fulsome life."

[195] It has long been recognized that damages may be awarded for loss of housekeeping capacity: *Kim v. Lin*, 2018 BCCA 77. It provides compensation for the value of the housekeeping the plaintiff would have done but was or will be incapable of performing because of the injuries: *Tench v. Van Bugnum*, 2019 BCSC 1877 at para. 225. It may be compensated by way of an award of pecuniary or non-pecuniary damages. However, in *McTavish v. McGillivray*, 2000 BCCA 164 at para. 69, the court suggested it may be best treated as a non-pecuniary loss if the plaintiff is still able to perform household tasks but with difficulty.

[196] Mr. Delfs is presently able to perform household tasks and yard work slowly and with some difficulty. At times, it causes an attack of his chronic abdominal pain. He pushes through these episodes and gets the work done eventually. This suggests any award for loss of housekeeping should be non-pecuniary. However, he is presently living in his parents' home such that house and yard work is shared. That will not always been the case and, as I discuss below, some element of house and yard work should be addressed in his cost of future care.

[197] Dr. Negraeff opines there is a real possibility that Mr. Delfs' chronic pain will affect his future ability to conduct house and yard work. Ms. Whitnack took this into account in recommending assistance with house and yard work as part of the cost of future care assessment. For this reason, the defendants argue there should be no separate award for loss of housekeeping capacity as that would amount to "double dipping". Justice Verhoeven cautioned about this in *Firman v.* Asadi, 2019 BCSC 270 at para. 236:

> [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made [as part of non-pecuniary damages].

[198] I find that the award I would have made for non-pecuniary damages and cost of future care would adequately address loss of housekeeping capacity and I would not have made an additional award for it under a separate head.

7. Loss of Earning Capacity

Past Loss of Earnings

[199] Mr. Delfs seeks a sum of $29,000 for past loss of earnings, calculated as follows:

- $5,000, based on loss of one shift per month while working part-time at Save-on-Foods, Sobeys, and Bed Bath & Beyond;
- $4,000 net for the time he missed at Janus Academy by taking the summer of 2021 off work; and
- $20,000 for past loss of opportunity to work as a chef in the food industry.

[200] The defendants argue Mr. Delfs should receive no compensation for lost time at his part-time jobs because there is no documented proof of time missed, such as employment records, time cards, or pay stubs. They argue the amount of $5,000 has been “pulled out of the air”. They suggest a part-time employee who misses one or two shifts a month would not have been valued in the way Mr. Delfs was by, at least, Bed Bath & Beyond.

[201] A past loss of earnings claim is based on what the plaintiff would have, not could have, earned but for the injuries. I accept Mr. Delfs’ evidence that he missed some work due to his abdominal pains. His evidence was that he recalls missing one or two shifts a month due to his pain, but this was an estimate. The $5,000 he claims purports to be based on missing one shift a month calculated on a $12.00 per hour minimum wage, but I note Mr. Delfs was earning $16.00 per hour by the time he left Bed Bath & Beyond. Mr. Delfs started part-time work at Save-On-Foods in 2015. Judging by his tax returns, it appears he started work about halfway through that year. He stopped work at Bed Bath & Beyond in 2020. A loss of $5,000 over 5.5 years divided by $12.00 per hour equates to about 6.25 hours per calendar month. I agree this seems a little high, but considering he was earning up to $16.00 per hour at Bed Bath & Beyond, and accepting his evidence that he missed some shifts due

to his stomach pains, I find that $5,000 is a reasonable estimate of his pre-tax past loss of earnings for the part-time work over 5½ years.

[202] I accept Mr. Delfs' evidence that his decision to take the summer of 2021 off work from Janus Academy was due to being exhausted every day. I also accept this is a result of his chronic pain and the anxiety he experiences with the fear of his pain flaring up due to the physical demands of his job and unexpected physical contact from students. This is a result of the accident injuries.

[203] The defendants say there is no evidence of what Mr. Delfs would have earned had he worked the summer, but his Record of Employment from Janus Academy states that he earns $1,283.25 bi-weekly before taxes. I therefore find that that a pre-tax loss of $5,133 is appropriate compensation for the missed work in the summer of 2021.

[204] I leave it to the parties to calculate the appropriate after-tax amounts for each of these, should that be necessary.

[205] I would not order compensation for loss of opportunity to work as a chef in the food industry. I accept this aspiration was genuine while Mr. Delfs was in high school and he ultimately determined he would be physically unable to do the job because of his chronic pain or his sensitive digestive system resulting from the accident injuries. However, the evidence does not go so far as to establish this was a real and substantial possibility. Nor does it demonstrate Mr. Delfs has suffered a pecuniary loss by working as a social worker rather than a chef.

Loss of Future Earning Capacity

[206] Mr. Delfs claims $700,000 for loss of future earning capacity. Relying largely on Dr. Negraeff's opinion that full time hours are likely not sustainable for him, he argues there is a real and substantial possibility that he will be unable to sustain full-time work throughout his working life.

Legal Principles

[207] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47 [*Rab*] the Court of Appeal restated the analysis for assessing a future loss of earning capacity, articulating it as a three-step process:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.
>
> [Emphasis in original.]

[208] In *Grewal v. Naumann*, 2017 BCCA 158 [*Grewal*], Justice Goepel, dissenting but not on this point, discussed how this analysis is to be applied in the context of both past and future loss of earning capacity:

> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[209] The assessment requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence can be a helpful tool in determining what is fair and reasonable in the circumstances but this does not turn the assessment into a calculation: *Grewal* at para. 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[210] Ultimately, the overall fairness and reasonableness of the award must be considered in light of all the evidence: *Rosvold v. Dunlop*, 2001 BCCA 1.

Analysis

[211] I am satisfied that a loss of future earning capacity is established on the evidence in this case, though not in the amount sought by Mr. Delfs.

[212] With regard to the first step of *Rab*, Mr. Delfs' chronic pain discloses a future event that could lead to a loss of earning capacity. Dr. Negraeff's opinion is that Mr. Delfs will experience his chronic pain indefinitely. The conclusion is tempered somewhat by his second report in which he identifies some improvement with Pregabalin, but ultimately he maintains that Mr. Delfs' chronic pain (apart from some improvement) and the effects on his function are otherwise unchanged. In cross-examination, Dr. Negraeff maintained that Mr. Delfs' recovery has "plateaued", though with Pregabalin, it is on a better plateau than at the time of the first report.

[213] With regard to the second step of *Rab,* there is a real and substantial possibility that Mr. Delfs' chronic pain will cause him a future pecuniary loss by preventing him from working full-time. I accept Dr. Negraeff's opinion that full-time hours are likely not sustainable for Mr. Delfs, even with the improvements seen with Pregabalin. Mr. Delfs' recent experience and struggles with full-time work at Janus Academy indicates Dr. Nagreff's concerns and opinion on this matter have merit. Ms. Whitnack agreed with Dr. Negraeff's assessment based on her own work with Mr. Delfs.

[214] Dr. Lo opines that Mr. Delfs has demonstrated an ability to function with a high capacity and should be able to sustain full-time hours. However, I prefer Dr. Negraeff's opinion on this point. Dr. Lo's opinion is based on a review of Mr. Delfs' detailed medical records, together with his work and school performance, but he did not examine Mr. Delfs himself. Prior to preparing his opinion, and in support of a pre-trial application brought by the defendants seeking an order that Mr. Delfs attend with Dr. Lo for a physical exam, Dr. Lo swore an affidavit stating the exam was necessary for him to respond "in accordance with my medical training" to Dr. Negraeff's opinion of Mr. Delfs' work capacity. He deposed he needed to observe Mr. Delfs' movements and ask Mr. Delfs "the usual questions that a doctor

would ask in order to elicit information upon which to ground my opinion". He also stated that if he was unable to examine Mr. Delfs in person and assess his movements, he will "be unable to draw any conclusions about his vocational capacity."

[215] The defendants argue these statements were made before Dr. Lo had the opportunity to review Mr. Delfs' very detailed and extensive medical records. However, I do not accept this fully addresses the concerns stated in his prior sworn statement. In particular, I do not accept that a medical record review is a full substitute for observing Mr. Delfs' movements, which Dr. Lo previously stated was "necessary".

[216] Further, while Dr. Lo assists patients with managing chronic pain as part of his practice, he does not share Dr. Negraeff's vast and focused experience and expertise in this area, which is another reason I prefer Dr. Negraeff's opinion.

[217] Apart from Dr. Lo's opinion, the defendants point to the fact that Mr. Delfs worked 20–30 hours per week from 2015 through 2020 while attending school, and he has worked full-time at Janus Academy since January 2021, except for the two months he took off in the summer. They point to the physical demands of both jobs as evidence that Mr. Delfs can sustain full-time work with physical components. They argue Dr. Negraeff's opinion on this point should be given little weight because he is not a vocational consultant or an occupational therapist.

[218] I disagree with all these points. A significant part of Dr. Negraeff clinical work is assisting patients to manage pain so they may cope with work or return to work. Assessing his patients' ability to work full-time at a general level (as opposed to specific vocations) is part of his clinical practice. His opinions on that point should be given weight.

[219] I also disagree that Mr. Delfs' work and school history suggest he is capable of maintaining full-time work. This argument does not consider Mr. Delfs' endurance struggles with his full-time job at Janus Academy, the exhaustion he feels at the end

of the day, and the fact he found it necessary to take the past summer off work due to his endurance level. Moreover, while his Bed Bath & Beyond job required some physical excursion, including lifting boxes and walking up and down stairs, it was only part-time. Mr. Delfs' school work at Mount Royal, which was concurrent to his Bed Bath & Beyond job, did not have physical demands. Thus, the fact he was able to sustain some element of physical work on a part-time basis says little about his ability to sustain full-time work in the future.

[220] However, I find it is not a real and substantial possibility that Mr. Delfs will suffer a future pecuniary loss before 2025 given his plans to complete his bachelor's degree, starting in the fall of 2022. I also find it is less likely that he will move to part-time hours in the first five years after he completes that degree than in the years after. I say this because he will be working to establish himself in a new type of job and one that he expects to be less physically taxing than his current work. Further, Dr. Negraeff agreed in cross-examination that, in light of the success with Pregabalin and the fact he has been working full-time at Janus Academy, Mr. Delfs may be able to sustain a period of full-time hours. Dr. Negraeff also states that he is concerned with Mr. Delfs' capacity to cope with employment-related activities "now and in the future", but he specifically states a concern about this capacity "in the long run."

[221] This leads me to the third branch of *Rab*, which is to assess the value of the loss, including the relative likelihood of the possibility occurring. The assessment in this case is a challenging one given Mr. Delfs' young age. It is especially hard to predict how his career and his injuries might unfold over the course of his lifespan. As Justice Voith (then of this Court) observed in *Lauriente v. Schoonhoven*, 2017 BCSC 2246 at para. 120, it is because there is no means of resolving future uncertainties like these that the nature of the exercise is an assessment rather than a calculation.

[222] The question is further complicated by the fact that while Dr. Negraeff clearly opined that full-time work would be a struggle for Mr. Delfs, he was not able to assess what hours Mr. Delfs could sustain. He stated the "level of hours would be

discovered over time and experience with different types of work and the effect it has on his ability to manage his symptoms and other aspects of his life". Thus, while findings of the relative possibilities and probabilities that Mr. Delfs will be unable to work full-time hours can be readily made on the evidence, predicting what those part-time hours will be is more challenging.

[223] Counsel for Mr. Delfs suggests the loss should be assessed on the basis that Mr. Delfs will work half-time from the date of trial to the end of this working life, but I find this is overly pessimistic and not in accordance with the evidence. In my view, for the reasons I explain below, the potential for part-time hours only becomes a real and substantial possibility after 2025 at the earliest. Further, I would assess Mr. Delfs' part-time hours to be more than half-time for most of his working life, although I accept half-time is a real and substantial possibility later in life.

[224] In my view, it is almost certain that Mr. Delfs will return to university and complete his degree such that I do not consider there to be a real and substantial possibility of a loss before that. If Mr. Delfs resumes his studies in September 2022 as planned, he may complete his bachelor's degree by May 2024, but I find it is more probable that he will follow the path he did for his diploma and complete the degree in 2½ years so that he may work part-time while attending school. This means Mr. Delfs will complete his degree by the end of 2024 and return to full-time work by January 2025.

[225] Based on Mr. Delfs' current functioning with his chronic pain, the fatigue he experiences at the end of a work day, and Dr. Negraeff's opinion, I accept there is a real and substantial possibility that Mr. Delfs will need to begin part-time work once he finishes his degree. However, given that he expects to be able to take a less physically demanding job at that point and since he will be working to establish himself in a new line of work, I assess likelihood that Mr. Delfs will have to move to part-time work between 2025 and the end of 2029 to be in the range of 50%.

[226] In the long run, though, I assess the likelihood that he will have to move to part-time hours after 2029 to be higher, in the range of 75%. I would have assessed

this probability to be greater were it not for the fact that Mr. Delfs expects to be able to work at a less physically demanding job with a full bachelor's degree, which may enable him to work full-time, at least for some periods. I must therefore account for that contingency.

[227] I agree that Mr. Delfs working to the age 67 is a reasonable expectation. He will turn 67 in 2067.

[228] With regard to the part-time hours that Mr. Delfs will need to work, as I have said, I find that it is overly pessimistic and not in accordance with the evidence to suggest Mr. Delfs will need to work half-time starting now to the end of his working life. On the other hand, Dr. Negraeff could not predict what part-time hours would be needed. I therefore consider three-quarters time to be a reasonable basis on which to assess Mr. Delfs' loss of capacity for most of his working life. However, Dr. Negraeff opines that with age, Mr. Delfs' ability to carry out employment-related activities "is more likely to deteriorate rather than improve." I accept this opinion as a real and substantial possibility and, to give it effect, I consider half-time hours are a reasonable basis on which to assess Mr. Delfs' loss of earning capacity for the last 10 years of his working life.

[229] Thus, I will assess Mr. Delfs' loss of future earning capacity by assessing three time periods: 2025-2029, 2030-2057, and 2058-2067.

[230] I would also make the assessment on the basis that Mr. Delfs will earn an annual salary in the range of $60,000 in present-day, pre-tax values. This is based on Mr. Delfs' evidence of what he understands his earnings might be after achieving a full bachelor's degree. I consider it highly likely that Mr. Delfs will complete his bachelor's degree. Unfortunately, the plaintiff has not led expert evidence on objective salary expectations for Alberta residents with a full bachelor's degree in social work. However, I base the assessment on $60,000 because I consider that a person with a full bachelor's degree in social work is almost certain to earn more than what Mr. Delfs presently earns with only a diploma ($45,000) and more than

what the plaintiff's expert economist, Mr. Pivnenko, suggests a person might objectively earn with a two-year diploma in social work.

[231] Even if Mr. Delfs does not complete his bachelor's degree, I am satisfied, based on his success in post-secondary education and his tenacity in overcoming some of the learning and social challenges he faced as younger person, his personal ambition will compel him to pursue a career at a higher earning level than he presently has. Further, since my assessment does not account for likely increases in salary (as I have no evidence on that) I do not consider an annual salary of $60,000 to be too high to assess his future loss of earning capacity. Thus, for the purposes of this assessment, I consider Mr. Delfs' expectation of earning in the range of $60,000 is reasonable.

[232] Based on a salary of $60,000 and taking my assessment of the real and substantial possibility that Mr. Delfs will have to move to three-quarters time up to around 2057 and half-time from then to retirement, I assess the gross annual pre-tax loss for working part-time from 2025 to 2057 to be $15,000 (i.e. one-quarter of $60,000) and from 2058 to 2067 to be $30,000.

[233] Counsel for Mr. Delfs proposed using the present value table in Mr. Pivnenko's Earnings Projection report to arrive at a present value for a future loss of income. I accept that approach and apply it to the findings I have just discussed.

[234] Using column 8 of Table 3 of Mr. Pivnenko's report, I assess the loss as follows:

- **2025-2029:** The present value of an annual loss of $15,000 in this period totals $68,535. Applying a 50% probability to that loss results in $34,268 for that period.

- **2029-2057:** The present value of an annual loss of $15,000 this period totals $294,195. Applying a 75% probability to that loss results in $220,646 for that period.

- **2058-2067:** The present value of an annual loss of $30,000 in this period totals $144,330. Applying a 75% probability to that loss results in a loss of $108,248 for that period.

The total of the three periods, being the present-day value of the cumulative loss, is $363,162.

[235] This analysis may appear to have more precision than in fact exists having regard to the significant uncertainties relating to a lifetime of work and managing chronic pain for a plaintiff who was 21 years of age at trial. Nevertheless, I consider it is a reasonable assessment in light of my findings of fact, the uncertainties, and the contingencies. Having regard to the overall fairness in light of the evidence and the fact the assessment is not a mathematical calculation, I would have assessed Mr. Delfs' loss of future earning capacity at $365,000 had I found the defendants liable for the accident.

8. Cost of Future Care

[236] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition to the extent that is possible. When full restoration cannot be achieved, such as in the case of chronic pain with no prognosis for improvement, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[237] The test for determining the appropriate award is objective, based on medical evidence. There must be a medical justification for each item claimed, and the claim must be reasonable: *Milina* at para. 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63. Justification means the cost is both medically necessary and likely to be incurred by the plaintiff. If the plaintiff has not used a service in the past, it may be

inappropriate to include it in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung,* 2012 BCCA 57 at paras. 55, 60, 68–70.

[238] The defendants concede Mr. Delfs has chronic pain, PTSD symptoms, and flashbacks that flare up from time to time. They acknowledge he has needs for ongoing care to manage his pain and improve his functioning. As they state in their argument, "there is considerable overlap between the [occupational therapy] experts on both sides." The defendants, supported by Ms. Lee's report, dispute some items identified by Ms. Whitnack as being truly medically necessary either at all or to the extent she suggests. They also argue, in some cases, that Ms. Whitnack's cost estimate for some items is high.

[239] Had I found for Mr. Delfs' on liability, I would have allowed many but not all of the items claimed for his future care. I will set out those items that I would and would not have allowed for. Should it become necessary to quantify those in a present value if I am found to be wrong on the issue of liability, I will accept counsel's invitation to have Mr. Pivnenko or another economist assess the present value of those items that I would have allowed.

Occupational Therapy

[240] Mr. Delfs was an outpatient with the Alberta Children's Hospital, and Dr. Negraeff recommends he continue to be followed by a team for long-term management of his chronic pain and mental health conditions. Mr. Delfs has "aged out" of the children's hospital system and thus does not receive the same support he once did under the public health care system. Some elements of the team recommended by Dr. Negraeff will be covered by Alberta Public Health, but others will not.

[241] Ms. Whitnack identifies Occupational Therapy as an item that will not be covered by public health. She assesses the average yearly cost of occupational therapy services to help him manage his long-term care at $625.00. She recommends this as a yearly cost to 2024 and then every five years after 2025. I accept that Mr. Delfs' future care will be considerably assisted by ongoing access to

occupational therapy services and this cost is reasonable. I would have allowed for this item.

Medications

[242] Mr. Delphs claims a present value of $50,063.00 as the current, with-tax, value for future medication costs, including Flunarizine, Tylenol Extra Strength, Prozac, Lansoprazole, and Pregabalin.

[243] Since I have found Mr. Delfs has not proven his headaches are caused by his accident injuries, I would not allow costs for Flunarizine or Tylenol. I find the costs for Fluoxetine, Lansoprazole, and Pregabalin are accident-related and I would have allowed for them. I would not make an adjustment to the Fluoxetine to account for pre-existing anxiety symptoms. The evidence does not establish that without the accident, those symptoms would have been so severe as to warrant this medication, particularly after the stressors related to Mr. Delfs' sexuality lifted when he came out in grade 9.

[244] However, I agree with Ms. Lee that an adjustment should be made to account for the medication subsidy Alberta Blue Cross would provide once Mr. Delfs reaches 65. Ms. Whitnack did not account for this because of uncertainty as to whether the program would still exist when Mr. Delfs reaches 65, but there is no evidence to suggest a real and substantial possibility that the program may be cancelled. I would leave it to counsel to make that adjustment should it be necessary to do so.

Psychological Services

[245] Dr. Spivak recommends ongoing and long-term contact with a mental health professional. Ms. Whitnack lists this cost at $4,000 every five years.

[246] Mr. Delfs clearly benefits from psychological services. The defendants question this item to some degree in that Ms. Whitnack's advice on how much treatment might be appropriate is hearsay from Mr. Delfs' treating psychologist. However, I am satisfied the extent of treatment is consistent with Dr. Spivak's evidence on the point, including the evidence he gave in cross-examination and the

reference to episodic flare-ups in his second report. I would have allowed this item as claimed.

Active Rehabilitation

Exercise Physiologist

[247] This is based on Dr. Negraeff's recommendation that Mr. Delfs work with a trainer or kinesiologist to develop a suitable exercise and fitness program to help manage his pain. Ms. Whitnack identifies this cost as $3,000. Ms. Lee does not dispute the suitability of the item but states that a monitored exercise program with a physiotherapist and kinesiologist is $1,995. I would have split the difference of these estimates and awarded $2,500 for this item, which is to be adjusted for present value.

Facility Membership

[248] Ms. Whitnack proposes a one-time payment of $1,208 for a facility access fee for the active rehabilitation program plus an annual cost of $302 to age 65 and $260 beyond 65. Ms. Lee questions the need for this since Ms. Whitnack proposes Mr. Delfs transition to a home-based program and suggests a health facility is not necessary to maintain an exercise program. However, Ms. Whitnack notes that Mr. Delfs' future living conditions are uncertain and he plans to move into an apartment. Mr. Delfs ultimately aspires to have a detached home of his own. Whether that will be attainable or not cannot be determined but there is a real and substantial possibility he will do so. I would have awarded the full amount of the first 24 months ($1,208), 50% of the Long-Term Adult amount to account for the contingency of a home-based exercise program, and 85% of the over-65 amount to account for the contingency that after he retires he may downsize to a smaller home that is not suitable for home-based exercise.

Nutritionist/Dietitian

[249] Ms. Whitnack and Ms. Lee agree on this item as a one-time cost. Ms. Whitnack recommends follow ups in 2025 and 2029. Ms. Lee opines the follow-ups can be done through a publicly-funded primary care clinic. I agree with

Ms. Whitnack that specialized advice for Mr. Delfs' chronic pain is appropriate and I would have awarded the costs she recommends, including the follow-ups, adjusted to present value.

Adaptive Aid Allowance

[250] Ms. Whitnack recommends an allowance for a blood pressure monitor, heart rate monitor, TENS machine, and a consult for the use of the machine. However, these are not for accident-related injuries so I would not have made an award for them. Further, a pill organizer is no longer necessary as Mr. Delfs now has control and self-discipline over taking his medications.

[251] Ms. Whitnack recommends Mr. Delfs access an app to assist with management of his psychological symptoms and suggests an annual cost of $77 for this. Ms. Lee suggests a free app will suffice. Had the defendants been liable for Mr. Delfs' injuries, I agree it is reasonable that they pay for Mr. Delfs to have the benefit of the paid app. Though there is little evidence about the difference between the paid and unpaid apps, I expect the latter comes with some compromises that Mr. Delfs should not have to endure had the defendants been responsible for his injuries.

[252] Ms. Whitnack recommends Mr. Delfs acquire a foam mattress to better assist with his abdominal discomfort. She suggests $2,000 every 13 years which she said is the cost of a foam mattress less the cost of a conventional mattress. She also claims to have prorated this cost by 50% to account for the fact that it is also aimed at accommodating his back pain which is unrelated to the RZR accident. I agree with Ms. Lee that $3,500 to $4,500 seems extraordinarily high for a foam mattress. She estimates the cost of a good qualify foam mattress is $1,000. Giving Ms. Whitnack some benefit of the doubt on the cost, and having regard to the fact that the mattress also accommodates the unrelated back pain, I would have allowed $750 for this item every 13 years. I would have allowed the full amount claimed for the anti-fatigue mats at $165 every seven years.

[253] Ms. Whitnack recommends Mr. Delfs obtain three quality reclining seat backs every seven years. She suggests these will decrease pressure on his abdomen. The

defendants say this is unnecessary and, in any event, Ms. Whitnack has not prorated the cost to account for addressing back pain. However, she testified this is specifically to address abdominal pain, not back pain. Given Mr. Delfs' chronic pain and Ms. Whitnack's own interactions with Mr. Delfs in assessing his needs, I would have deferred to Ms. Whitnack's expertise on this point and accepted this item.

[254] Ms. Whitnack recommends $75 to upgrade to a self-propelled lawn mower every 14 years, $700 for a snowblower every 14 years, and bi-annual service for both at $75. She opines this is necessary to assist with Mr. Delfs' challenges with yard work. Mr. Delfs currently lives at his parents' home and has access to these items. He may own a home sometime in the future, and I find this is a real and substantial possibility, but it is unlikely to happen for some years. In the meantime, he is likely to live in an apartment where he would not need these items. Further, there should be an apportionment of the cost of them to account for the back pain. Having regard to these contingencies, I would have awarded half the amount claimed.

Support Services

[255] Ms. Whitnack recommends some limited house and yard-keeping services to assist Mr. Delfs with moderate to heavy tasks. I have found earlier that Mr. Delfs finds this work challenging with his chronic pain, though he ultimately completes it. I have declined to make a separate award for loss of housekeeping capacity since it was claimed as a cost of future care. I would have allowed these items subject to two deductions. First, I do not understand nor accept the need for "House & Yard" maintenance while Mr. Delfs is living in an apartment so I would not allow this. For the remainder, I would have allowed 75% of the claimed costs to account (25%) for the contributing element of Mr. Delfs' back pain and a contingency deduction that Mr. Delfs may live in an apartment or condominium beyond 2029.

Vocational/Avocational Support

[256] Ms. Whitnack opines that with the uncertainty regarding Mr. Delfs' future functioning in his work, his chronic pain, and the flare-ups in his psychological

symptoms, improved accommodation in the workplace “will be crucial in maintaining employment and with him having a reasonable balance at home and work.” In connection with this, she recommends as part of his future care that he receive occupational therapy assistance to help with problem-solving barriers, follow-up support, and assistance in communicating with his employer. (I note this is in addition to the occupational therapy assistance for the team-based approach to managing Mr. Delfs’ medical care discussed earlier.) Ms. Whitnack also recommends future support of this nature on three further occasions to account for “medical, social, vocational, and/or environmental changes either in his symptoms or his job duties and working conditions.” She estimates the present cost of each of these four segments of assistance to be between $1,000 and $2,500.

[257] Ms. Lee agrees with the occupational therapy assistance on a one-time basis. With Mr. Delfs’ demonstrated abilities to attend school and work, she opines that he will learn from this one period of consultation what is needed to accommodate his work needs and does not need future occupational therapy support.

[258] I accept Ms. Whitnack’s recommendation. Mr. Delfs has benefited from her assistance in the past and I am satisfied it will be important for him in the future. I agree with Mr. Delfs’ counsel that Mr. Delfs has tended to show a level of stoicism that persuades me he would benefit from the help of an occupational therapist to assist in advocating for accommodations in his work environment, as well as to assist him in managing his own circumstances. Further, given that Mr. Delfs is young and is yet to define his full career path, I agree that future consults are reasonable as he may change jobs several times over his life. I would therefore have allowed for this item, taking the midpoint of Ms. Whitnack’s cost estimate for each of the four sessions, which amounts to $1,750 each, adjusted for present-day values

[259] Ms. Whitnack also recommends that Mr. Delfs obtain a suitable chair, footrest, and organizers to help manage his pain while sitting at work. The cost of these are estimated at $1,155 every seven years, plus moving aids (should he relocate his work and need professionals to move the chair) for three occasions at a

cost of $235 each. Ms. Lee opines that these costs will be borne by Mr. Delfs' employer who must accommodate him to a point of undue hardship. I agree with Ms. Lee to some extent, but there is still considerable uncertainty in what Mr. Delfs' future employment circumstances will be, including whether he will be an employee, a contractor, or self-employed after he completes his bachelor's degree or in the long-run. Further, he will not be provided these accommodations while completing his school work degree. Having regard to these contingencies, I would have awarded 75% of the amount Ms. Whitnack recommends.

Potential Complications/Future Considerations

[260] Ms. Whitnack lists three areas for some potential additional medications or supplements. Mr. Delfs has not pursued these in his closing argument. Some are not for accident-related conditions (such as Synthroid and Melatonin). Others are for a range of possible treatments that Dr. Negraeff said might be considered, but I am not persuaded on the evidence Mr. Delfs will need or will attempt these other medications. Dr. Negraeff identified these possibilities before seeing the success of Pregabalin. If these items are being pursued, I would not have made an award for them as part of the cost of future care.

9. Special Damages

[261] The plaintiff claims special damages in the amount of $5,589. The defendants accept the special damages, in the event they are liable for Mr. Delfs' injuries, with the exception of:

- the prescription costs of Synthroid, which was a medication Mr. Delfs took to treat an unrelated thyroid condition;
- medications prescribed by Dr. Robin Clegg, as they related to Mr. Delfs' ablation surgeries; and
- the prescriptions for medications to treat Mr. Delfs' headaches, such as Flunarizine and Tylenol.

[262] I agree these items should be excluded from a special damage award. With those exceptions, I would have otherwise awarded the remaining amount of special damages claimed had I found against the defendants on liability.

V. Conclusion

[263] I find Mr. Delfs' claim must be dismissed as the evidence does not establish the accident in which Mr. Delfs sustained his considerable injuries was caused by negligence on the part of any of the defendants.

[264] Mr. Delfs was the innocent victim of a horrifying accident that has, without question, profoundly affected his life and his future. Through no fault of his own, he endured a dreadful injury at a young and formative age and lived through a painful period of treatment and recovery thereafter. He suffered significant post-traumatic psychological injuries in his youth and he continues to experience these today, albeit at a mild and intermittent level. The branch that tore through him caused severe physical damage that, fortunately, was repaired with surgery but has left Mr. Delfs with physical scars and chronic abdominal pain. Now as an adult, that chronic pain affects his endurance and will likely affect his ability to sustain full-time work. However, in my respectful view, the evidence does not establish that the accident that caused these injuries was the result of a negligent act of any of the defendants.

[265] In the event that a higher court may find I am wrong in this conclusion, I have set out my analysis, findings of fact, and conclusions with regard to the various heads of damages claimed by Mr. Delfs. I have done so because of the hardship another trial would impose on the parties. Some of the amounts I would have awarded will need to be converted to present values if they are ultimately awarded. I gratefully accept counsel's offer to have that done by an economist post-judgment.

[266] Counsel did not address the issue of costs. Costs would ordinarily be awarded to the defendant at scale B, but if any of the parties wish to address me on the matter, they may do so by providing a written submission of not more than five pages electronically through the registry. The responding party will then have 14 days to file a response of not more than five pages. Any reply is to be filed within

seven days and will not exceed three pages. Either party may also request a brief appearance to speak to the issue if they wish.

[267] I wish to thank and commend counsel for their thorough preparation of this difficult case and their skilled and professional conduct of the trial. I am also grateful for their very helpful submissions, both written and oral.

"Kirchner J."