# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Delfs v. Stricker,* 2024 BCCA 35

Date: 20240202
Docket: CA48205

Between:

**Tanner Delfs**

Appellant
(Plaintiff)

And

**Kim Stricker, Josh Stricker and Fred Stricker**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated March 9, 2022 (*Delfs v. Stricker*, 2022 BCSC 373, Vernon Docket M55955).

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| Counsel for the Appellant: | C.P. Dennis, K.C.<br>E.J.S. Aitken |
| Counsel for the Respondents: | D.M. Pick<br>L.D. Karr |
| Place and Date of Hearing: | Vancouver, British Columbia<br>September 28, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>February 2, 2024 |

**Written Reasons by:**
The Honourable Madam Justice Fisher

**Concurred in by:**
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

***Summary:***

*This is an appeal from the dismissal of an action in negligence arising from a terrible accident in which the appellant was severely injured at the age of nine while a passenger on an all-terrain vehicle. The accident occurred during an off-road trip with the appellant's uncle, his 15-year-old cousin, and a family friend. The appellant submits the trial judge erred (1) in failing to find that the uncle, as the supervising adult, breached the standard of care by permitting him to participate in the trip as the cousin's passenger in the vehicle, and (2) in failing to find that the direct and circumstantial evidence established a prima facie case that the cousin was negligent in his operation of the vehicle. In the alternative, the appellant says that, as a matter of law, a statute in force at the time of the accident but repealed prior to trial, which cast the legal onus of proof on owners and operators of all-terrain vehicles to prove they were not negligent, applied to this action.*

*Held: Appeal dismissed. Given the evidentiary record and the trial judge's findings of fact, it cannot be concluded that the uncle breached the standard of care in his role as a supervising adult by permitting the appellant to participate in the trip as the cousin's passenger. The trial judge made no reviewable error in his analysis of the cousin's liability or in his application of the onus of proof. The reverse onus provision in the repealed statute was purely procedural and did not apply to the appellant's action.*

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**Reasons for Judgment of the Honourable Madam Justice Fisher:**

[1] This is an appeal from the dismissal of a claim in negligence arising from a terrible accident in which the appellant, Tanner Delfs, was seriously injured while a passenger on a Polaris Ranger side-by-side all-terrain vehicle, known as a RZR. The respondents, Fred Stricker and Kim Stricker, owned the RZR and their son, the respondent Josh Stricker, was driving it. The parties are related: Fred and Kim Stricker are the appellant's uncle and aunt and Josh Stricker is his first cousin.

[2] The accident occurred in August 2009, when the appellant was nine years old. He brought this action in July 2019, after he turned 19. The trial judge summarized his conclusion on liability as follows:

> [114] There is no question that, through no 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 back woods on motorized vehicles, an activity that carries inherent risks… 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.

[3] Despite this conclusion, the judge proceeded to assess damages in the event he was found to be in error.

[4] The appellant seeks to set aside the trial judge's order dismissing his claim and an order granting judgment against the respondents for the damages particularized in the judgment below.

## Background facts

[5] For clarity, and with no disrespect, I will refer to the parties by their given names. The following is a summary of facts that are not in dispute.

[6] In August 2009, Tanner and his mother, Natalie Delfs, were visiting the Stricker family's recreational property near Fairmont Hot Springs. The accident occurred on the second day of the visit. Fred, Josh and Josh's friend, Matt Simpson,

set out on an off-road trip on trails in the nearby mountains. There had been a windstorm in the area a few days earlier and the group went out to clear the trails of fallen trees and branches. Tanner asked to go with them and obtained his mother's permission to do so.

[7] As indicated above, Tanner was nine years old at the time. Josh was 15. Both Fred and Josh had experience operating all-terrain vehicles (ATVs) but the RZR, which Josh was driving that day, was new to the Strickers.

[8] The group set off with Fred in the lead, driving a motor bike, followed by Matt Simpson in a single person "Quad" ATV, and Josh in the rear driving the RZR with Tanner as his passenger. The terrain was variable, consisting of flat portions and areas of changing elevation. The path was wide enough for pickup trucks as well as off-road vehicles. There were fallen branches along the trail as a result of the windstorm, and the group stopped a few times for Fred to clear debris (at least once with a chainsaw) and to check in with the boys.

[9] About an hour into the trip, when Fred and Matt were ahead and out of sight, Josh was accelerating up a hill when something on the trail caused the RZR to come to an abrupt stop. Tanner felt a very sharp pain in his stomach and then saw that a branch had impaled him on the right side of his body just below his ribs. The thick end of the branch was protruding from the entry wound and the sharp end was sticking out of his left side just below his armpit. The branch partially pulled out of Tanner's body when the RZR rolled back shortly after it had come to a stop, causing his intestines to fall out.

[10] In this truly terrifying situation, Josh got out of the vehicle and ran up the hill yelling for his father. When Fred heard this, he and Matt turned back and went to the scene. Naturally, they were all focused on getting help for Tanner and took no notice of the landscape around the RZR. Matt remembered seeing a bloody branch sticking up from the ground on an angle towards the front of the RZR. Fred got into the driver's seat of the RZR, backed it up to a nearby junction and went down the mountain to find help.

[11] Tanner was taken initially to Invermere Hospital and later airlifted to Calgary Children's Hospital, where he had extensive surgery to repair his internal injuries. He was required to remain in hospital for 16 days, had to undergo very painful wound treatments, and continued to have pain and other symptoms for many years.



## The decision below

[12] At trial, Tanner's position was that all respondents owed him a duty of care: Josh owed him a duty as his passenger in the RZR and Fred and Kim owed him a duty to supervise and control Josh's activities using "reasonable care to prevent foreseeable damage to others". Tanner asserted that Fred and Kim were negligent: (1) in allowing Josh and Tanner in the RZR in the first place, and (2) by failing to provide adequate supervision.

[13] The respondents accepted that Josh owed Tanner a duty of care but argued that Josh did not breach the standard of care, or alternatively, that any negligent act did not cause Tanner's injuries. They disputed Fred and Kim's liability on a similar basis.

### 1. How the accident happened

[14] Before addressing the liability of each respondent, the trial judge set out to find the facts as to how the accident happened. He found this exercise challenging due to the "limitations of the evidence on how exactly Mr. Delfs came to be impaled by the branch": at para. 52. In reviewing the evidence about this, the judge found all witnesses to be credible and sincere, although he questioned "the reliability of some aspects of each witness' account on the basis of other evidence or logic": at para. 31.

[15] The judge described the evidence of Tanner and Josh as follows:

> [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.



[16] The judge found it unlikely that the RZR was stuck on a log in the manner described by Tanner because both Fred and Matt had passed by the same location and were not obstructed by a fallen tree or log, neither Fred nor Matt recalled seeing a log or tree as they passed by the area or when they returned after the accident, and Fred had encountered no resistance when he moved the RZR away from the accident scene: at paras. 35–36, 89. He found that the RZR ran into "some kind of debris", but he did not accept the debris was "a log or tree of a substantial size", nor did he accept Tanner's recollection that the right front wheel of the RZR "was hanging over the side of a fallen log or tree": at para. 66.

[17] The judge found that the RZR had rolled back after Tanner was impaled, as it was sitting on an incline, and this caused "the branch to withdraw somewhat and pull out Tanner's intestines": at para. 42.

[18] Tanner submitted that the only reasonable inference to draw from the evidence was that Josh drove onto a log or tree that was on the trail, became stuck, gunned the engine and accelerated the RZR, and as he did that, he rotated the tree and a branch came up and into the vehicle from the side. The trial judge did not agree:

> [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.

[19] The judge considered a theory suggested by the respondents — that the "stick" entered the vehicle through the seam in the front right fender of the RZR — to be equally plausible. However, he was not able to find the accident necessarily happened that way either.

[20] Doing what he could with the evidence and "being mindful that the plaintiff bears the burden of proof", the judge made these findings:

- As a result of the windstorm, there was considerable debris along the trail, including branches of a substantial size: at para. 67.
- Both Fred and Josh were aware there was considerable debris along the path that they expected or ought to have expected to encounter, and ought to have been aware that they needed to exercise extra caution to watch out for such debris: at para. 68.
- The RZR struck some kind of debris on the trail that was neither a log nor tree of substantial size, which caused it to stop and caused the branch to enter the vehicle and impale Tanner: at paras. 37, 53, 66, 69.

[21] The judge was unable to find precisely how or where the branch entered the RZR:

> [69] … 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.

[22] The judge went on to consider whether these facts were sufficient to establish that Josh was negligent "in causing the branch to enter the vehicle" and whether Fred and Kim were negligent "in having failed to properly train or supervise Josh in the operation of the RZR", including in circumstances where "there were trees and debris all over the place": at para. 70.

### 2. Liability of Josh

[23] The judge held that Josh owed Tanner a duty of care on a standard of a reasonable motorist, by driving at a reasonable speed, with due care and attention, maintaining control of the vehicle and keeping a lookout for hazards. It was not disputed that Josh should be held to the standard of care of an adult since he was engaged in an adult activity, as discussed in *McErlean v. Sarel* (1987), 42 D.L.R. (4th) 577 (Ont. C.A.): at paras. 53–54.

[24] The judge approached the question of whether Josh failed to meet the standard of care as depending on two potential acts or omissions: (1) whether Josh kept a proper lookout for hazards, namely trees and branches that might enter the vehicle and injure Tanner, and (2) 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: at para. 76.

[25] Tanner relied heavily on warnings contained in the Owner's Manual for the RZR to inform the standard of care. The Owner's Manual "prohibited" anyone under 16 years old from driving the RZR and anyone under 12 years old from riding as a passenger and contained various safety warnings directed to the proper operation of the vehicle. These included warnings to "[b]e constantly alert for hazards such as logs, rocks and low hanging branches", use extra caution when operating on

unfamiliar terrain as “[n]ot all obstacles are immediately visible”, avoid operating over “large obstacles such as rocks or fallen trees” and watch for “branches or other hazards that could enter the vehicle”. Tanner argued that the standard of care should be informed by the Owner’s Manual and Josh did not meet the standard of care by operating the RZR contrary to the age restrictions, not having been properly trained in operating the vehicle nor instructed to avoid hazards, failing to read the Owner’s Manual, failing to watch for branches that could enter the vehicle and otherwise failing to heed various other warnings.

[26] The trial judge accepted that the Owner’s Manual can inform the standard of care but did not agree that it dictated the standard: at paras. 78–79. He considered the operator’s skill level, experience and maturity to be more relevant than their specific age. The judge found that Josh’s age was not a factor in the accident as he had “considerable experience in operating ATVs and other vehicles” and was mature and responsible: at paras. 82–84. The judge also found that Josh had little experience driving the RZR and was unaware that the Owner’s Manual cautioned that the RZR “handles differently from cars, trucks or other off-road vehicles”. However, he did not find that reading the caution would have led Josh (or Fred) to have done anything differently because the Owner’s Manual did not explain how the RZR handled differently from a car or how this difference could lead to a branch entering the vehicle: at para. 85.

[27] As for Josh’s training, the judge found he was “reasonably trained by Fred in how to operate the RZR” but was not instructed on “how to safely navigate around or over objects encountered on the trail”. Nevertheless, the judge did not find this to be a factor in the accident, nor did he consider Tanner’s age or size to be a factor given the lack of evidence about this: at paras. 86–87.

[28] The judge’s critical findings related to Josh’s liability were as follows:

- He was “not able to find” that Josh was driving at an excessive speed or that speed impaired Josh’s ability to see what lay ahead on the trail or caused the branch to enter the vehicle: at para. 88;

- Although the Owner's Manual warned to avoid operating "over large obstacles such as rocks and fallen trees" and to "use extreme caution and operate slowly" if such obstacles are unavoidable, whatever it was that blocked the RZR's progress was not a "large" obstacle. If it had been, Fred, Matt and even Josh would have noticed it and he was "not persuaded the RZR was perched on a fallen tree": at para. 89;

- 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 because the Owner's Manual recommended this action "before operating over an obstacle that could cause an overturn" and an overturn was not a risk in these circumstances: at para. 90;

- The standard of care in an off-road environment required Josh as the operator to maintain a careful watch for debris by watching for branches hanging from trees and also on the ground: at para. 91; and

- Although Josh was under a duty to keep a particular lookout for hazards on the trail, the judge was "not able to find" Josh negligent in failing to keep a proper watch as he was satisfied that "whatever the branch was attached to was not plainly visible as a hazard": at para. 93.

[29] The judge then concluded:

> [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.
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> [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.



[30] The judge did not consider the evidence to establish either wrongful conduct on the part of Josh or that the type of damage (a large branch entering the vehicle) was a reasonably foreseeable consequence of using the accelerator to free a stuck vehicle: at paras. 97–98.

[31] The judge appreciated that Tanner was "in a very difficult position to prove the specific cause of the impalement" given that the accident happened very quickly and long ago, and no one surveyed the scene at the time or afterwards. He considered Tanner's argument that the evidence supported an inference of negligence in accordance with the principle discussed in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, but rejected it:

> [102] The court [in *Fontaine*] 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.

[32] The judge therefore found the evidence did not establish that Josh failed to meet the requisite standard of care "as an adult operating an off-road side-by-side ATV" and dismissed the claim against him: at para. 104.

### 3. Liability of Fred and Kim

[33] Tanner asserted that Fred and Kim failed in their duty to supervise Josh and to ensure Tanner's safety by failing to read and adhere to the Owner's Manual and to instruct Josh in accordance with the Owner's Manual, and by failing to properly

supervise Josh on the day of the accident. There was no dispute that the standard of care for parents supervising a child in an activity such as using an ATV was informed by *Ryan et al. v. Hickson et al.* (1975), 7 O.R. (2d) 352 (H.C.J.) [*Hickson*], and *J.G. (Dependent Adult) v. Strathcona (County of)*, 2004 ABQB 378. The judge consolidated the elements of the standard at para. 106 of his reasons:

- 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.

[34] The judge held that the Strickers met the standard of care to supervise Josh and to ensure Tanner was safe: at para. 108. He found the extent of Fred's training of Josh to be "adequate to meet the standard":

> [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.

[35] Further, he could not find anything about the adequacy of Fred's training of Josh on the RZR that caused the accident: at para. 110.

[36] Finally, the judge was satisfied that Fred exercised reasonable care in supervising the trip. He found it was reasonable for Fred to be in the lead, as this

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": at para. 111. He considered Kim's deferral to Fred on these matters to be reasonable: at para. 112.

[37] As for Tanner's argument that Fred and Kim were negligent in allowing Josh and Tanner in the RZR in the first place, the judge referred only to his earlier finding that Tanner's age was not a factor in the injuries he suffered. He also referred to the absence of evidence "that the injury would not have happened or would have been materially different" if Tanner was a larger child of 12 years, and concluded:

> [113] … 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.

[38] Therefore, despite the terrible injuries suffered by Tanner, the judge was "unable to find on the evidence" that the accident was caused by the negligence of any of the respondents: at para. 114.

**On appeal**

[39] Tanner asserts that the trial judge erred at both the standard of care and causation stages of his negligence analysis, raising two main grounds of appeal:

1. The trial judge erred in law or, alternatively, in mixed fact and law, in failing to find that Fred and Josh breached the standard of care by permitting nine-year-old Tanner to be a passenger in the RZR at all, and failing to find that such breach was a cause of Tanner's injuries; and

2. The trial judge erred in the application of the burden of proof, either:

    a. in mixed fact and law, in failing to find that the direct and circumstantial evidence established a *prima facie* case that Josh was negligent in his operation of the RZR and failing to cast the onus on the defendants to rebut an inference of negligence through the defence of explanation; or

b. in law, in determining that Tanner bore the onus of proving that his injuries were caused by negligence on the part of the defendants when, by operation of statute, the defendants bore that burden.

[40] The statute in issue in respect of this last ground of appeal is the *Motor Vehicle (All Terrain) Act*, R.S.B.C. 1996, c. 319, which was in force at the time of the accident but repealed prior to trial.

[41] Tanner does not challenge the trial judge's conclusion that Kim did not breach an independent duty and bases his claim against her only on vicarious liability as an owner of the RZR should Josh be found liable.

[42] The respondents submit that Tanner's first ground of appeal raises an issue neither pleaded nor argued at trial, and in any event, the evidence was insufficient to establish negligence for simply permitting a nine-year-old to ride as a passenger in an off-road vehicle. With respect to the second ground, the respondents submit that the judge's findings of fact, which attract a high degree of deference, do not permit this Court to find a *prima facie* case of negligence, and leave should not be granted to permit the statutory onus to be raised on appeal. Alternatively, the respondents say the repealed statute does not apply in the circumstances, and in any case, the evidence establishes that they successfully rebutted any presumption of negligence and shifting the onus of proof would not change the outcome.

## Analysis

[43] This was clearly a difficult case before the court below. The judge was faced with a tragic accident that occurred quickly, many years before the trial. He had to deal with what little direct evidence there was and consider it along with the circumstantial evidence of all the surrounding circumstances. He also had to respond to the case that was presented to him.

[44] This has also been a difficult appeal. Other than the application of the *Fontaine* principle, the issues were either not fully argued or not raised in the court below, the consequence of which is that they were not addressed by the trial judge.

Nevertheless, as I explain below, I have considered all the grounds of appeal but have concluded that there is no basis on which this Court can interfere with the conclusions reached by the trial judge with respect to the liability of both Fred and Josh.



### 1. Permitting a nine-year-old to be a passenger in the RZR

#### *a. New issue on appeal?*

[45] The respondents object to the Court considering this ground of appeal on the basis that it presents a new issue on appeal.

[46] Tanner submits that this issue is not new. He points to several passages in the pleadings, the respondents' closing written submissions in the court below, and the judge's acknowledgement of this argument at para. 113 of his reasons.

[47] This Court does not generally consider new issues on appeal, as the appellate function is best carried out when issues are decided with the benefit of considered reasons in the court below. There is discretion to grant leave to raise new issues, however, which is exercised sparingly, by considering whether (1) the issue is, in fact, new, (2) the evidentiary record is sufficient to permit a proper analysis of the issue, and (3) it is in the interests of justice to do so: see *R. v. Gill*, 2018 BCCA 144 at paras. 9–12 and the cases cited therein. In determining whether the interests of justice warrant granting leave, it is appropriate to consider whether entertaining the issue might lead to a different outcome: *Gill* at para. 12; *L.S. v. G.S.*, 2014 BCCA 334 at para. 112.

[48] In my view, the first ground of appeal does not raise a new issue. The judge described Tanner's claim against Fred and Kim at the outset of his reasons and addressed it, albeit briefly, at para. 113:

> [5] He claims … 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.
>
> …

> [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.
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> [Emphasis added.]

[49] The respondents acknowledged in their written closing submission at trial that Tanner alleged negligence on the part of Fred and Kim "in allowing Josh and Tanner in the vehicle in the first place". However, Tanner's counsel did not develop the singular issue of an underage passenger at trial or feature this in his written closing submissions to the judge. Nor did he focus on this argument in his oral closing other than to suggest, in response to the trial judge's questions about the relevance of Tanner's age, that Tanner could say "I shouldn't have been in there, so it wouldn't have happened" or "If I was in there, Fred should have been driving".

[50] While the issue itself is not new, the more developed argument Tanner presents in this Court was not made before the trial judge. In this circumstance, the judge, quite understandably, did not consider it necessary to determine whether Fred and Kim breached the standard of care by allowing a nine-year-old to be a passenger in the RZR given the age restriction in the Owner's Manual. He briefly considered the argument but concluded only that Tanner's age was not "the cause" of his injuries: at para. 113.

[51] Despite the absence of considered reasons on this issue from the court below, my view is that this Court is in a position to properly address this ground of appeal and it is in the interests of justice to do so. Insofar as this argument relies on facts, the evidentiary record is complete, and the respondents have provided full submissions in this appeal.

***b. Standard of review***

[52] Tanner submits that no deference is owed to the trial judge on this ground of appeal because the judge made no finding that Fred met the applicable standard of care in permitting him "to ride as an underage passenger with an underage driver", and thus failed to consider a required element of the legal test for negligence.

[53] The respondents assert that in finding that the Strickers "met the standard of care imposed upon them to both supervise Josh and to ensure Tanner was safe" (at para. 108), the trial judge found that "permitting nine-year-old Tanner on the RZR" did not breach the standard of care. They say this finding implies that including Tanner on the trip was not unreasonable and did not expose Tanner to an unreasonable risk of harm. They submit the judge's determination of the standard of care, his application of the facts to that standard, and his determination that the Strickers ultimately met that standard is a question of mixed fact and law, subject to review only for palpable and overriding error.

[54] I note first the inconsistent descriptions in these submissions of the precise breach alleged by Tanner. In fact, Tanner has articulated the breach inconsistently throughout his argument — as either permitting Tanner to be a passenger in the RZR at all or permitting him to be a passenger in the RZR with Josh. I address below why this is a distinction with a difference. At this point, I can only address what the trial judge did or did not do on the question that was put to him.

[55] The judge did find that the Strickers met the standard of care imposed on them "to both supervise Josh and to ensure Tanner was safe". However, his reasons address only Josh's maturity, capability and experience and Fred's training and supervision:

> [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.
>
> …
>
> [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.

[56] I do not read the reasons as making any implicit finding that the Strickers did not breach the standard of care by "allowing a nine-year-old to be a passenger in the RZR". The judge addressed this question separately and simply assumed a breach in the manner he described to dismiss the argument for want of causation: at para. 113 (reproduced above). Even if this finding can be implied, the judge's analysis was narrowly focused as described in the preceding paragraph.

[57] It was not through any fault on the judge's part that he failed to make a determinative finding on this question, as he received only a very brief argument on the point.

[58] Nonetheless, this question is an important part of the standard of care analysis and the consequence is that the judge did not fully consider whether Fred met the standard of care required of him as a supervising adult of a nine-year old child, an element of the legal test for negligence. Where, in respect of a finding relating to negligence, a judge has failed to consider a required element of the legal test or has made a similar error in principle, an appellate court does not owe deference: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36; *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia,* 2005 SCC 60 at para. 23. That said, the judge's findings of fact that relate to the standard of care required of Fred must be given deference.

### *c. The standard of care of a supervising adult*

[59] Tanner's argument on the first ground of appeal focuses on the liability of Fred as a supervising adult. He submits the judge erred in failing to find that Fred breached the standard of care by permitting nine-year-old Tanner to participate in the trip as Josh's passenger in the RZR. He says the judge focused on the specific mechanics of the accident rather than the fact that Tanner should never have been in the RZR driven by Josh in the first place. He contends the judge impermissibly conflated the standard of care with causation and misapplied the test for causation.

[60] With respect to the liability of Josh, Tanner submits only that this same analysis applies equally to Josh because his conduct was to be evaluated as an adult.

[61] My analysis will address this argument in respect of Fred's liability as I do not agree that the analysis applies to Josh. While Josh was properly assessed as an adult in respect of his operation of the RZR, he was not acting in a role equivalent to a supervising adult.

[62] Tanner's articulation of Fred's alleged breach of the standard of care was expressed inconsistently throughout his submissions to this Court. However, I understand his position to be not simply that Fred permitted Tanner to go on the trip at all (the error in judgment asserted in his factum), but rather that he permitted Tanner to go on the trip in the RZR with Josh as an underage driver (as developed in his argument). This distinction is important. The first asserts simply that Tanner's presence on the trip exposed him to an unreasonable risk of harm regardless of who was driving the RZR. The second is more complex and requires consideration of Josh's age in the context of the trial judge's numerous findings of fact. Tanner relies heavily on the age restrictions in the Owner's Manual and Fred's failure to take these restrictions into account.

[63] The trial judge did not consider this distinction, nor did he draw any conclusions on the basis that nine-year-old Tanner should not have been allowed to be a passenger on the RZR, with or without Josh. He simply assumed a breach of

the standard of care consistent with his understanding of Tanner's submission (which did not include Josh) and briefly considered causation in light of that assumed breach:

> [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.
>
> [Emphasis added.]

[64] I do not see this reasoning as conflating the standard of care with causation, but I do agree that the judge's statement that Tanner's age was not causative of his injuries does not properly address causation in relation to the alleged breach of Fred's standard of care as defined in this passage. If Fred's negligent act was permitting Tanner on the RZR at all, it would not constitute the sole cause of his injuries but it could be a cause, depending of course on other factors.

[65] I will say at the outset that I do not consider either the age of the driver or the age of the passenger to be determinative in the absence of other factors. To be clear, the issue before us involves consideration of Fred's decision to permit Tanner and Josh to be together in the RZR.

[66] The trial judge, correctly in my view, considered the Owner's Manual to inform the standard of care but not to dictate it. The standard of care must have regard to the experience, abilities and maturity of the underage driver. Fred cannot be said to have breached the standard of care simply by allowing Josh, a 15-year-old, to operate the RZR, contrary to the Owner's Manual. Tanner does not challenge this, but contends that the same does not apply to a nine-year old passenger. He submits that in this respect, the Owner's Manual is evidence of a breach of the standard of care, absent other evidence, and says that Fred's failure to read the Manual and

give any consideration to the manufacturer's age restrictions in permitting Tanner to ride as a passenger with Josh was objectively unreasonable.

[67] Respectfully, I see the issue as more complex than this. The test to be applied is both objective and subjective. In *LaPlante (Guardian ad litem of) v. LaPlante*, [1995] B.C.J. No. 1303 (C.A.), Taylor J.A., for the Court, described the obligations of a person in the position of a supervising adult as follows:

> [14] A parent or other person responsible for small children, has, of course, a duty to take reasonable care not to expose them to unreasonable risk of foreseeable harm. The test to be applied in determining whether that duty has been discharged is an "objective" one in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances. But the test is "subjective" to the extent that the reasonable parent must be put in the position in which the defendant found himself or herself, and given only that knowledge which the defendant parent had, when deciding what the reasonable parent in [the father's] position would have understood or believed, and as a consequence would have done or not done. … [I]t will be enough to answer a claim in negligence that the course adopted by the defendant parent was one of those which the reasonable careful parent might have taken, even though events may, of course, have shown the choice to have been unfortunate.
>
> [Emphasis added.]

[68] The standard of care applicable to Fred as a supervising adult is not grounded simply by Tanner's age. The objective test is, to be sure, informed by the age restrictions in the Owner's Manual but the subjective test is informed by Fred's specific circumstances and his knowledge about both the nature of the activity in which he permitted Tanner to participate and the circumstances in which the activity was to be carried out.

[69] However, Tanner's submission does not end with the passenger age restriction. He further submits that the objective unreasonableness of Fred's decision was "compounded" by the following additional features of this case: (a) the inherent dangers of a trip "deep in the bush", (b) Fred's awareness that there was considerable debris on the trails that he expected to encounter due to the windstorm, (c) the purpose of the trip being to clear debris from the trails, (d) the fact that the RZR had been "hardly used", and (e) Josh being under the manufacturer's minimum

age for drivers, with limited experience operating the RZR and having received no instruction from Fred based on the Owner's Manual, such as instruction to stay away from debris like tree branches and trees on the trail. I agree that these are factual circumstances relevant to a proper assessment of the standard of care applicable to Fred, but they are not the only relevant circumstances.

[70] The trial judge's analysis of Fred's liability was brief. He described the standard of care imposed on Fred simply as to "supervise Josh and to ensure Tanner was safe" and focused only on Fred's training of Josh, Josh's maturity, capability and experience with ATVs and other motor vehicles and Fred's supervision of the trip. However, in the context of the dangers inherent in the activity involved here, a broader assessment of whether Fred's conduct overall created an objectively unreasonable risk of harm to Tanner would have been a more appropriate approach. As explained in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
>
> [Emphasis added.]

[71] That said, I am not convinced that this broader assessment would have resulted in a different conclusion on the standard of care given the judge's positive findings about (a) Josh's maturity, experience and abilities, and (b) Fred's training of Josh and his supervision of the trip, which must be considered against his findings related to the circumstances outlined by Tanner that arguably heightened the risk of danger.

[72] These facts can be contrasted with those in *LaPlante*, where a father was found to have exposed his children to an unreasonable risk of harm by permitting his

16-year-old son to drive him and his four younger children on a highway in icy conditions. A tragic accident occurred when the son lost control of the vehicle while overtaking a tanker-truck on an icy stretch of the road. Two of the children were killed and the father and the other two children were seriously injured. In one of two actions arising from the accident, the father was held jointly and severally liable with his son for the damages suffered by the two surviving children.

[73] The trial judge's finding of negligence against the father was based in part on the fact that his teenage son was driving a car that was new to him, he had little driving experience generally and almost no experience driving a vehicle with a gear shift, and he had never driven in icy highway conditions. There was also evidence that the son had disabilities caused by brain damage suffered during an operation 10 years earlier as well as physical injuries arising from a collision six months earlier.

[74] The Court of Appeal affirmed the trial judge's finding of negligence against the father. Taylor J.A. was satisfied that the evidence supported the conclusion "that a reasonably careful father would have foreseen that taking the young children on that journey would expose them to unreasonable risk of harm", as a reasonable parent would not have considered that the 16-year-old son had the skill and judgment required to drive a car on a highway in icy conditions: at paras. 16–17. The reasonable parent would have foreseen the unreasonable risk of harm to which the younger children would be exposed and would have taken an alternative course of conduct.

[75] Similarly, in *Edmondson et al. v. Edmondson et al.*, 2022 NBCA 4, a father took his five-year-old son for a ride on a motorcycle that was not designed to carry more than one person. The father put the child on a makeshift seat he had rigged onto the top fender of the motorcycle, tied the child to him with a belt, and failed to dress the child in protective clothing. An accident occurred when a vehicle turning left failed to yield the right-of-way to the motorcycle. The father was found to have been negligent by placing his child on a motorcycle that was clearly not properly equipped.

[76] In both *LaPlante* and *Edmondson*, the conduct of the supervising adults clearly exposed children in their care to an unreasonable risk of harm. In *LaPlante*, the father failed to recognize his 16-year-old son's lack of experience, skill and judgment in driving a motor vehicle at highway speeds in difficult conditions. In *Edmondson*, the father created the risk himself not only by putting his child on a motorcycle, which the court accepted was inherently riskier than a car, but also by using improper equipment.

[77] In this case, as the judge found, the off-road activity Tanner was exposed to was inherently dangerous in itself, and more so due to the hazardous conditions on the trails on the day of the accident and the fact that the RZR was new to both Fred and Josh. Josh had little experience driving the RZR but he did not lack experience, skill and judgment in driving ATVs generally. Fred took safety seriously, had instructed Josh on the safe and proper use of ATVs and had set parameters on Josh's use of these vehicles. However, he also had little experience with the RZR, had not read the Owner's Manual, did not train Josh based on any of the advice in it and, more specifically, did not instruct Josh on how to safely navigate around or over objects encountered on the trail. Weighing these findings, the judge concluded that Josh was "reasonably trained" by Fred in how to operate the RZR and the extent of Fred's training of Josh "was adequate" to meet the standard.

[78] I have some concerns that these conclusions are inconsistent with the standard of care the judge purported to apply, which required a supervising adult to provide proper and thorough training in the use of the vehicle with particular regard to using it safely and carefully, as well as instruction on how to avoid the dangers inherent in the activity in light of the conditions. Based on the judge's findings, Fred's training of Josh on the RZR appears to have been limited to its mechanical operation without instruction on how to avoid the inherent dangers in the off-road activity in light of the conditions that day.

[79] These circumstances bear some similarity to the liability of the adult defendants in *Hickson*, where a nine-year old passenger on a snowmobile was

injured when he fell off and was then struck by another snowmobile following closely behind. Both drivers, boys of 12 and 14 years old respectively, were found negligent in their operation of the vehicles by driving too fast in the circumstances. The fathers of the drivers were also found negligent in failing to properly and thoroughly train their sons in the use of the snowmobiles. The training provided had been directed primarily towards the mechanical operation of the snowmobiles with little or no instruction with respect to the dangers involved in operating the vehicles at high speeds under varying conditions.

[80] However, Tanner does not challenge the trial judge's finding that Fred's training of Josh was adequate. I accept that this finding was open to the judge in light of the whole of the evidence, especially his findings about Fred's serious approach to safety, his training of Josh on the safe and proper use of ATVs and his reasonable supervision of the trip itself.

[81] Tanner relies primarily on Josh being underage and simply refers to some evidence that he says compounded Fred's objectively unreasonable decision to permit nine-year-old Tanner to participate on the trip as Josh's passenger in the RZR.

[82] In my view, this ignores the judge's careful review of the evidence earlier in his reasons and his findings. Some of the findings had the effect of rendering the inherently dangerous activity even more dangerous (such as the primary purpose of the trip, the condition of the trails, the "hardly used" RZR and Fred's failure to read the Owner's Manual and instruct Josh how to safely navigate around or over objects encountered on the trail) and some of them had the opposite effect (such as Josh's maturity, experience, skill and training, Fred's approach to safety, his adequate training of Josh, his reasonable supervision of the trip, and ultimately, Josh meeting the standard of care in his operation of the RZR). Considering this body of evidence, I am unable to accept Tanner's submission that Fred failed to meet the standard of care required of him by permitting Tanner to participate in the trip as Josh's passenger in the RZR.

[83] I would not, therefore, accede to this ground of appeal.

### 2. Burden of proof

[84] Tanner submits the trial judge erred in his analysis of the burden of proof by failing to find *prima facie* negligence in Josh's operation of the RZR. He submits in the alternative that the judge's placement of the ultimate burden on him to prove negligence was contrary to the now-repealed *Motor Vehicle (All Terrain) Act*, which was in force at the time of the accident and which, he says, applies in this case.

[85] As I will explain, I am not satisfied that the judge erred in either respect, and I would not interfere with his conclusion that Josh did not breach the standard of care.

#### *a. Prima facie negligence*

[86] Tanner challenges the trial judge's conclusion that the evidence did not establish that Josh failed to meet the standard of care required of him as an adult operating the RZR. He contends the direct and circumstantial evidence established that Josh was *prima facie* negligent and it was therefore incumbent on him to rebut this presumption through the defence of explanation, in accordance with the principle in *Fontaine*.

[87] The respondents say that Tanner's submission ignores significant findings of fact made by the trial judge, none of which were manifestly wrong.

[88] The finding of facts and drawing of inferences from the evidence is in the province of the trial judge and an appellate court must not interfere with a judge's conclusions on factual matters absent palpable and overriding error: see *Fontaine* at para. 34. The application of a legal principle to the facts of a case is a question of mixed fact and law, reviewable on the same deferential standard.

##### *The principles in Fontaine*

[89] *Fontaine* involved a highway accident in which a truck ran off the road with no apparent explanation, killing its two occupants. Both bodies were found in a badly damaged truck after it had been washed along a flooded creek bed. No one saw the

accident, and no one knew precisely when it had occurred. The only evidence of negligence was the fact that the vehicle had left the road and had travelled with sufficient momentum to break a path through some small trees.

[90] The plaintiff's action in negligence against the administrator of the driver's estate was dismissed at trial and on appeal to this Court: (1996) 22 B.C.L.R. (3d) 371. Before the Supreme Court of Canada, the appeal centered on the maxim *res ipsa loquitur* ("the thing speaks for itself"), which operated to provide evidence of negligence in the absence of an explanation of the cause of an accident.

[91] There had been a great deal of confusion in the jurisprudence about *res ipsa loquitur*, to the point where critics had urged it "be relegated to the ash heap": see Allen M. Linden et al, *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis Canada, 2022) at §4.04. In *Fontaine*, Justice Major, writing for a unanimous Court, obliged, and articulated a simpler formulation of the correct approach to the drawing of inferences of negligence:

> [26] Whatever value *res ipsa loquitur* may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.
>
> [27] It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. <u>That evidence is more sensibly dealt with by the trier of fact, who should 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</u>.
>
> [Emphasis added.]

[92] In *Fontaine*, the trial judge had concluded that the circumstantial evidence (the fact that the vehicle left the roadway and travelled with sufficient momentum to break a path through some small trees), when taken with other evidence about the road and weather conditions, was no more than neutral evidence and did not point to

any negligence on the part of the driver. She also found that the defence had succeeded in producing alternative explanations of how the accident may have occurred without negligence on the driver's part. Major J. considered these findings to be reasonable in light of the evidence, and thus saw no basis to interfere with the trial judge's conclusion that the plaintiff had "failed to establish on a balance of probabilities that the accident occurred as a result of negligence attributable to [the driver]": at para. 36.

[93] *Fontaine* has been considered and applied by this Court: see *Nason v. Nunes*, 2008 BCCA 203; *Singleton v. Morris*, 2010 BCCA 48; *Gaebel v. Lipka*, 2017 BCCA 432. In *Singleton*, Chief Justice Finch described how a defendant may negate an inference of negligence:

> [38] Thus, in cases such as this, the trial judge may – but is not required to – draw an inference of negligence [from the fact there was a rear-end collision]. The defence, however, may attempt to rebut such inferences through the defence of explanation. A defence of explanation, as stated in *Hackman v. Vecchio* (1969), 4 D.L.R. (3d) 444 at 446 (B.C.C.A.) is an explanation of how an accident ***may*** have occurred without the defendant's negligence. The defendant does not bear the onus of proving how the accident ***did*** happen…
>
> [Emphasis in original.]

[94] The burden or onus which the *Fontaine* formulation places upon a defendant is solely evidentiary; the analysis does not "cast" a legal burden of proof on a defendant. This is because in a negligence action, the legal burden of proof always remains on the plaintiff: *Singleton* at para. 34, citing *Marchuk v. Swede Creek Contracting Ltd.* (1998), 1998 CanLII 6280 (B.C.C.A.) at para. 10; see also *Helgason v. Rondeau*, 2023 BCCA 339 at para. 33.

[95] In summary, *Fontaine* does not impact the legal burden of proof in a negligence action. Rather, it permits the trial judge to draw an inference of *prima facie* negligence from the direct and circumstantial evidence, and as a corollary, imposes an evidentiary burden on the defendant to rebut the drawing of such an inference through the defence of explanation should the plaintiff succeed in establishing a *prima facie* case. If the defendant advances a reasonable explanation

as to how the accident may have occurred without the defendant's negligence, the plaintiff has necessarily failed to discharge his burden to prove negligence: *Fontaine* at para. 33; *Singleton* at paras. 38–39; *Gaebel* at paras. 30–31.

***Application of the principles***

[96] Tanner submits the trial judge ignored relevant evidence and drew erroneous conclusions from it, contending that the "reasonable inference to be drawn from the evidence" was that Josh drove the RZR into the debris either because he was driving too quickly for the conditions or through a lack of attention. He further submits that the judge, by isolating his analysis to the impalement itself, failed to recognize that the other direct and circumstantial evidence established a *prima facie* case of negligence, which therefore required the shifting of the burden to Josh.

[97] The trial judge referred to the correct principle from *Fontaine* and appears to have considered the circumstances of this case to be the same as those in *Fontaine* — i.e., the "bald proposition" of the impalement was insufficient to establish a *prima facie* case of negligence:

> [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.

[98] When this passage is considered in isolation, it does appear that the judge limited his analysis to the fact of the impalement, which would be an incorrect application of the *Fontaine* principle.

[99] However, reasons must be considered as a whole, and these reasons are replete with findings based on both direct and circumstantial evidence on which it was open to the judge to find that a *prima facie* case of negligence had not been established. This includes findings Tanner submits are relevant as well as findings in favour of Josh. For example:

- There was considerable debris, including branches, along the trail as a result of the windstorm, some of which was of a substantial size;

- Josh was responsible and mature and followed his father's instructions on the proper use of ATVs;

- Josh was aware there was considerable debris on the trail that he expected or ought to have expected to encounter and ought to have been aware that he needed to exercise extra caution to watch out for such debris;

- Josh ran into some kind of debris on the trail that impeded the RZR's forward progress and caused a branch to enter the vehicle and impale Tanner;

- Whatever the branch was attached to was not of a substantial size and was not plainly visible as a hazard;

- Matt Simpson's evidence of a bloody stick projecting up from the ground towards the front of the RZR did not establish how it got that way; and

- The branch entered the RZR's right front wheel well or came through the side of the vehicle either by the RZR's forward motion or by Josh's efforts to free the stuck RZR from some unidentified obstruction.

[100] The judge concluded that the evidence did not establish that the hazard, whatever it was, ought reasonably to have been seen by Josh keeping a proper lookout. He inferred this in part from the evidence that Fred and Matt had passed by the same area just ahead of Josh without noticing a hazard. Tanner submits that this same evidence negates any suggestion of a freak accident and constitutes direct evidence that the obstacle on the trail could have, and ought to have, been avoided by Josh.

[101] In my view, the evidence that Fred and Matt had not noticed a hazard when they passed the area is circumstantial evidence from which the judge could draw an inference either way — that there was no obvious hazard to be seen, or that Fred

and Matt successfully avoided a hazard. While another judge may have interpreted the evidence differently, the inference drawn was open to the judge and it is not for this Court to interfere absent palpable and overriding error.

[102] The judge also relied on the evidence that no one noticed a specific hazard when they returned to the scene of the accident. Tanner contends this overstates the evidence given the fact that no one was concerned about surveying the landscape at the time, and it also understates the evidence given Matt's "vivid memory" of seeing a bloody stick or branch sticking up from the ground on an angle towards the front of the RZR. He says this is direct evidence of a hazard on the trail that Josh struck but which both Fred and Matt avoided.

[103] Again, the judge was clearly aware of this evidence and its limitations, including that Matt's evidence did not explain how the bloody stick got that way. It is not for this Court to re-weigh the evidence to reach a different conclusion. This was a difficult case in light of the obvious limitations in the evidence. The judge did not ignore relevant evidence and the conclusions he drew from the evidence were available to him.

[104] In summary, it was open for the trial judge to conclude that a *prima facie* case of negligence had not been established on the direct and circumstantial evidence. To repeat the words of Major J. in *Fontaine*, the drawing of evidentiary conclusions from the evidence "is the province of the trial judge": at para. 34. Here, as was the case in *Fontaine*, there is no indication the trial judge committed a palpable and overriding error in electing not to draw an inference of negligence. Accordingly, there is no basis for this Court to interfere.

[105] Further, because the judge concluded that no *prima facie* case had been established, there was no need for him to cast an evidentiary burden upon the respondents in the form of the defence of explanation. He made no error in not doing so.

***b. Statutory onus of proof***

[106] Tanner submits that as a matter of law, the *Motor Vehicle (All Terrain) Act* created a presumption that loss or damage sustained in an accident involving an "all terrain vehicle" was caused by the negligence or improper conduct of the operator. Because the statute was in force at the time of the accident, he says it applied in this case to place the legal onus on the respondents. Although this was not brought to the trial judge's attention, he submits that a failure to apply the correct onus of proof is an error of law that should be considered on appeal.

[107] The *Motor Vehicle (All Terrain) Act* included provisions addressing accident reporting. Section 6 required operators of all terrain vehicles to report accidents, deemed the owner of an all terrain vehicle liable for personal injuries resulting from negligence of an operator driving with the owner's permission, and imposed an onus of proof on the owner or operator to disprove negligence. This latter provision was contained in s. 6(8):

> (8) If loss or damage is sustained by a person because of the use or operation of an all terrain vehicle, the onus of proof that the loss or damage did not arise entirely or solely through the negligence or improper conduct of the operator is on the owner or operator.

[108] The statute was repealed in its entirety in 2014 by s. 41 of the *Off-Road Vehicle Act*, S.B.C. 2014, c. 5. Section 6(8) was not replaced, as the *Off-Road Vehicle Act* does not deal with private liability.

[109] Under s. 35 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provision is made for the continued application of repealed legislation to facts occurring prior to repeal where vested rights are involved:

> 35 (1) If all or part of an enactment is repealed, the repeal does not
>
> …
>
> (c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,
>
> …
>
> (e) affect an investigation, proceeding or remedy for the right, obligation, penalty, forfeiture or punishment.

[110] The effect of this provision is that repealed law continues to apply to pre-repeal facts for most purposes as if it were good law: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) at p. 798. It is aimed at, among other things, protecting rights "acquired, accrued, accruing or incurred" under an enactment so as to permit such rights to remain in effect notwithstanding the subsequent repeal of that enactment: see *Quigley v. Insurance Corporation of British Columbia* (1988), 22 B.C.L.R. (2d) 259 (C.A.); *Scott v. College of Physicians and Surgeons* (1992), 95 D.L.R. (4th) 706 (S.K.C.A.).

[111] As Sullivan explains, the provision is a codification of the common law presumption that the legislature does not intend legislation to be applied in a way that interferes with vested rights: Sullivan at p. 759, 761. A related common law presumption is that the legislature does not intend legislation to be applied retrospectively: Sullivan at p. 750.

[112] However, there is a third common law presumption of relevance in this case: procedural legislation is intended to have immediate effect. This presumption is formulated in various ways but provides generally that persons cannot have vested rights in procedure and that procedural provisions are an exception to the presumption against retrospectivity: Sullivan at p. 784; see also *R. v. Chouhan*, 2021 SCC 26 at para. 99.

[113] Accordingly, if s. 6(8) is a purely procedural provision which does not create or affect substantive rights, no rights of the type protected by s. 35 of the *Interpretation Act* could have been acquired under s. 6(8) by Tanner.

[114] Whether s. 6(8) applies depends on (1) whether the provision is purely procedural or substantive, and (2) if substantive, whether Tanner had a vested right within the meaning of s. 35(1)(c) of the *Interpretation Act*.

[115] Tanner submits that s. 6(8) of the repealed statute was a substantive provision that created a rebuttable presumption of negligence; more particularly, a presumption that his loss and damage was caused through the negligence of Josh,

which Josh as operator and his parents as owners had the onus of rebutting. He submits further that this was a right he accrued at the time of the accident.

[116] The respondents submit that s. 6(8) was a purely procedural provision, and alternatively, if s. 6(8) was substantive, Tanner did not acquire a vested right until he filed his claim, which occurred after the repeal.

***Procedural or substantive law***

[117] Professors Sullivan and Côté have each commented that statutes dealing with evidentiary rules are generally considered to be procedural. Sullivan notes that generally, the rules of evidence are considered to be procedural rules that are applied immediately to pending actions upon coming into force: at 790. She defines procedural legislation at 784:

> Procedural legislation is about the conduct of legal proceedings. It indicates how investigations will be carried out, actions will be prosecuted, proof will be made and rights and liabilities will be enforced in the context of a legal proceeding. Such legislation is presumed to apply immediately to pending and on-going proceedings. There is a common law presumption that procedural legislation is intended to apply from the moment it comes into force to all procedures that have yet been carried out…
>
> The presumption is formulated in a variety of ways: (1) persons do not have a vested right in procedure; (2) the effect of a procedural change is deemed to be beneficial for all; (3) procedural provisions are an exception to the presumption against retrospectivity; and (4) procedural provisions are intended to have an immediate effect. …

[118] Similarly, in Pierre-Andre Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters Canada, 2011), Côté states at 197:

> Statutes dealing with rules of evidence are not directly related to the existence of a substantive right. They deal, rather, with the various elements which may influence the judge in ruling on the right's existence, that is, with the legal means of asserting a right rather than with its existence. As they regulate the actions of a judge and the parties during a trial, it would seem reasonable that the evidentiary statutes that are applicable be those in force at the time of administration of the evidence.

[119] Further guidance on the distinction between purely procedural and substantive legislation was provided by Justices Moldaver and Brown in *Chouhan*:

> [92] … Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.

[120] For a provision to be regarded as procedural, it must be exclusively so: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para. 56, citing *Angus v. Sun Alliance Insurance Co*., [1988] 2 S.C.R. 256. In *Angus*, La Forest J. held at 265:

> A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights. P.-A. Côté, in *The Interpretation of Legislation in Canada* (1984), has this to say at p. 137:
>
> > In dealing with questions of temporal application of statutes, the term "procedural" has an important connotation: to determine if the provision will be applied immediately [i.e. to pending cases], … the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure *only* and does not affect substantial rights of the parties." [Quoting *DeRoussy v. Nesbitt* (1920), 53 D.L.R. 514, 516; emphasis added by Côté.]

[121] This applies to rules of evidence. As the Court stated in *Application under s. 83.28 of the Criminal Code (Re)*:

> [57] … where a rule of evidence either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect: *Wildman v. The Queen*, [1984] 2 S.C.R. 311. Examples of such rules include solicitor-client privilege and legal presumptions arising out of particular facts.
>
> [Emphasis added.]

[122] Tanner relies on *Snell v. Farrell*, [1990] 2 S.C.R. 311 and Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022), as authority that the legal burden of proof is determined by substantive law.

[123] In *Snell*, Justice Sopinka stated at 321:

> The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 *Wigmore on Evidence*, §2486, at p. 292.

[124] In *The Law of Evidence in Canada*, the authors state that the rules relating to the burdens of proof, while integral to the litigation process, "are largely governed by the substantive law" (at §3.01). They elaborate somewhat at §3.03, stating as a general proposition:

> The incidence of the persuasive (legal) burden of proof means that the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil or criminal standard; otherwise that party loses on that issue. The substantive law, such as the law of torts or the criminal law, and not the adjectival law of evidence, governs which party has the burden of proof in relation to a fact or issue.

The authors note, however, that the incidence of the burden of proof is also part of the law of evidence (at §3.03, footnote 2).

[125] Tanner also refers to *Wildman v. R*., [1984] 2 S.C.R. 311 at 331, where Lamer J. (as he then was) observed that some rules of evidence are not merely procedural, such as a rule creating a presumption arising from certain facts:

> Some rules of evidence must nevertheless be excluded for they are not merely procedural, they create rights and not merely expectations and, as such, are not only adjectival but of a substantive nature. Such has been found to be the case for rules or laws creating presumptions arising out of certain facts. (See, for example, as regards the presumption of advancement in questions of ownership of property as between husband and wife, *Bingeman v. McLaughlin*, 1977 CanLII 26 (SCC), [1978] 1 S.C.R. 548.) P. Roubier, in *Le droit transitoire*, 2nd ed., Paris, Dalloz et Sirey, 1960, at p. 237, rationalizes their exclusion because, says he, [TRANSLATION] "As these rules are independent of the existence of an issue, they are not affected by the fact that there is litigation in progress".
>
> [Emphasis added.]

[126] *Wildman* supports Tanner's argument that an evidentiary provision establishing a rebuttable presumption of law arising out of certain facts does create rights, as such a presumption is not strictly about how proof will be made in a legal proceeding. Rather, it is a rule that attracts legal significance to facts. Côté endorses this at 200–201:

> Because they affect substantive law, statutes which create, modify or abolish legal presumptions are held to be more than purely procedural … Roubier defends the rule by arguing that legal presumptions apply directly to events themselves: they are independent of the judge and provide a basis, without trial, for the parties to settle their difference: "These rules, whose existence is independent of litigation, are unchanged by the institution of a lawsuit." They can be considered as substantive rather than purely procedural in nature.

[127] The question is whether s. 6(8) creates a rebuttable presumption of law.

[128] Such presumptions are discussed in *The Law of Evidence in Canada* at §4.03:

> Rebuttable presumptions of law are the commonest and most significant presumptions. A rebuttable presumption of law is a rule of substantive law that prescribes a particular legal consequence upon proof of a particular fact(s). A rebuttable presumption of law compels the trier of fact to assume the existence or non-existence of the presumed fact in the absence of evidence to the contrary. Common law or statutory rebuttable presumptions are a legal device mandating that upon proof of the basic fact (Fact A), another fact (Fact B), is presumed in the absence of rebutting evidence. The proponent of a rebuttable presumption has the onus to prove the basic fact. Once the basic fact is established, the party against whom the presumption operates has either an evidential or a persuasive (legal) burden to avoid the legal consequence of the presumption.
>
> [Emphasis added.]

[129] No prescribed language is necessary to create a statutory rebuttable presumption but certain language has been recognized in the case law as creating such presumptions, the most common requiring the trier of fact to reach a specified conclusion "in the absence of evidence to the contrary". See, for example:

> *Criminal Code*, R.S.C. 1970, c. C-34, s. 306(2) (proof of intent to break and enter: see *R. v. Proudlock*, [1979] 1 S.C.R. 525):
>
> (2) For the purposes of proceedings under this section, evidence that the accused
>
> > (a) broke and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein;
>
> *Criminal Code*, R.S.C. 1985, c. C-46, s. 16(4) (presumption of sanity: see *R. v. Chaulk*, [1990] 3 S.C.R. 1303):
>
> (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

> *Copyright Act*, R.S.C. 1927, c. 532 (see *Circle Film Enterprises Inc. v. Canadian Broadcasting Corporation*, [1959] S.C.R. 602):
>
> 20. (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> > (a) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
> >
> > (b) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;
>
> 36. (2) A certificate of registration of copyright in a work shall be prima facie evidence that copyright subsists in the work and that the person registered is the owner of such copyright.
>
> *Criminal Code*, 1953-54, c. 51, s. 224A (see *R. v. Appleby*, [1972] S.C.R. 303):
>
> 224A. (1) In any proceedings under section 222 [impaired driving] or 224,
>
> > (a) where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion;
>
> [Emphasis added.]

[130] None of these examples provide simply for a reverse onus of proof.

[131] I am not convinced that s. 6(8) establishes a rebuttable presumption of law. The provision's allocation of the legal onus on defendants is not expressed as a presumption. Nor does it compel the trier of fact to assume the existence of a presumed fact (Fact B) in the absence of evidence to the contrary once a plaintiff proves the basic fact (Fact A), contrary to each of the examples above. Rather, it permits a judge to draw a legal conclusion of negligence if the defendants do not meet the onus of proving that they were not negligent.

[132] This can be contrasted with the presumption of advancement, a presumption referred to in *Wildman* as one creating rights. The presumption applies to gratuitous transfers where the relationship between a transferor and transferee is one of husband and wife or parent and child. In such cases, the party challenging the transfer has the onus of rebutting the presumption of "intention to advance", i.e., to

make a gift: *Bingeman v. McLaughlin*, [1978] 1 S.C.R. 548; *Pecore v. Pecore*, 2007 SCC 17.

[133] Similarly, the presumption of resulting trust, which is the general rule that applies to gratuitous transfers, places the onus on the transferee to demonstrate that a gift was intended: see *Pecore*.

[134] Under both presumptions, Fact A is the fact of the gratuitous transfer and Fact B is a finding of the intention of the transferor. Once Fact B has been established either by applying the presumption or accepting evidence to the contrary, a legal conclusion then follows. A rebuttable presumption compels a trier of fact to reach factual, not legal conclusions (albeit the legal conclusion may necessarily follow the factual conclusion).

[135] There are few authorities considering whether legislation that provides only for a reverse onus of proof is procedural or substantive. Several are in a criminal or quasi-criminal context and very dated, and I would not place much reliance on them. However, most of these authorities consider statutory onus provisions to be procedural:

- *R. v. Bingley*, [1929] 1 D.L.R. 777 (N.S.S.C.), involved an appeal of a conviction of an offence under the *Customs Act*, R.S.C. 1927, c. 42. The accused was convicted by a magistrate, his conviction was set aside by the County Court, and on appeal to the Nova Scotia Supreme Court, the conviction was affirmed. Between the date of the conviction by the magistrate and the date of his appeal before the County Court, the *Customs Act* was amended such that the legal burden of proof in respect of the offence no longer rested with the Crown, but with the accused. The County Court judge declined to give effect to the amendment, but this was reversed on appeal. The Supreme Court held that the defendant had no right to be tried by the law of evidence as it existed before the amendment; his only right was to be tried according to the law of evidence as it existed at the time of the trial. The Supreme

Court relied on *Republic of Costa Rica v. Erlanger*, [1876] 3 Ch. D. 62 (C.A.) at p. 69 for the proposition that "No suitor has any vested right in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided of course that no injustice is done."

- *R. v. Kumps*, [1931] 3 D.L.R. 767 (Man. C.A.), involved consideration of whether a provision of the *Excise Act*, R.S.C. 1927, c. 60, which cast the onus upon an accused and which was assented to between the time of the alleged offence and the laying of the information, was applicable in the proceedings. The Manitoba Court of Appeal, in concluding that it was, held that the matter of onus "is one of evidence and evidence comes under procedure". It considered the words of Lord Alverstone, C.J. in *Rex v. Chandra Dharma*, [1905] 2 K.B. 335 at p. 338, to be apt: "This statute does not alter the character of the offence or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective". *Kumps* was relied on in *Richardson v. Assn. of Professional Engineers*, [1989] B.C.J. No. 2483 (S.C.) where a statutory amendment which changed the burden of proof was held to be procedural.

- *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316, was an appeal of an order setting aside an adjudicator's decision to uphold a roadside suspension. There had been an amendment to the legislation that placed the burden of proof in a review application on the person who received the driving prohibition but the matter proceeded in accordance with the onus provision in the previous legislation. In *obiter*, however, Justice Newbury commented that "onus of proof is a procedural matter" and referred to Sullivan's description of procedural legislation as legislation "about the conduct of actions" that indicates "how actions

will be prosecuted" and "how proof will be made": at para. 38; see Sullivan at 784.

- *R. v. McGlone* (1976), 32 C.C.C. (2d) 233 (Alta. Dist. Ct.), is the only case referred to by counsel that considered a reversal of onus provision to be substantive. The accused was charged with a regulatory offence of driving without insurance. After the charge was laid but prior to trial, the applicable statute was amended so as to cast on the accused the onus of proving that he had subsisting insurance coverage on the vehicle. The Court held that an amendment which shifted the onus of proof on the accused was a substantive change in the law and did not apply retrospectively.

[136] In my view, s. 6(8) is a purely procedural provision. It does not affect the content of an action in negligence but only the manner in which a plaintiff seeks to enforce his rights through a civil action. This can be contrasted with statutes that remove a statutory bar to action (as in *Angus*) or affect a defence (as in *R. v. Dineley*, 2012 SCC 58).

[137] Moreover, s. 6(8) is awkwardly worded by including "improper conduct" with negligence and it is not at all clear how the section would operate. In the absence of clearer statutory language, I am unable to conclude that the provision created substantive rights or that its repeal was not intended to apply immediately.

[138] In my opinion, Tanner acquired no vested rights under s. 6(8) which fall within the protection of s. 35 of the *Interpretation Act*. The repeal of the statute, and the resulting elimination of any reverse onus of proof which might have applied, had immediate effect. Section 6(8) therefore had no application to this action, which was commenced, tried and dismissed subsequent to its repeal.

### 3. Liability of Kim

[139] In light of my conclusion regarding Josh's liability, it is unnecessary to address Tanner's proposition for this Court to grant judgment against Kim on the

basis of vicarious liability as an owner of the RZR. I note only that this proposition was not pleaded or argued at trial, nor was the legal basis for it addressed before this Court.

**Conclusion**

[140] For all of these reasons, I would dismiss the appeal.

[141] Finally, a word about this very difficult case. This was a horrifying accident involving close family members. Tanner suffered a terrible injury at a young age that has had serious consequences for him. It is evident from the trial judge's reasons that his conclusion that the accident was not caused by the negligence of either Fred or Josh was made with careful consideration of the evidence that was placed before him.

[142] I will end by expressing my appreciation for the able submissions of all counsel in this appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Willcock"