



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Lear v. Lear*, 2025 NLSC 53

**Date:** April 1, 2025

**Docket:** 201601G6152

BETWEEN:

**RICHARD LEAR, AS EXECUTOR OF  
THE ESTATE OF THE LATE  
HERBERT LEAR**

FIRST PLAINTIFF/  
FIRST DEFENDANT BY COUNTERCLAIM

AND:

**RICHARD LEAR**

SECOND PLAINTIFF/  
SECOND DEFENDANT BY COUNTERCLAIM

AND:

**WALLACE LEAR**

DEFENDANT/  
PLAINTIFF BY COUNTERCLAIM

---

**Before:** Associate Chief Justice Rosalie McGrath

---

**Place of Hearing:**

St. John's, Newfoundland and Labrador

**Date(s) of Hearing:**

December 6-9, 2021

April 12, October 25 and November 8, 2022



*Greeley*, 2016 NLCA 26; *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited et al.*, 2020 ONSC 1621; *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2012 ONSC 296; *Steele v. Rendell*, 2017 NLCA 36

**STATUTES CONSIDERED:** *Statute of Frauds 1677*, 1677 (29 Cha. 2 C.3) (U.K.); *Limitations Act*, S.N.L. 1995, c L-16.1; *Conveyancing Act*, R.S.N.L. 1990, c. C-34; *Courts of Justice Act*, R.S.O. 1990, c. C-43; *Judgment Interest Act*, R.S.N.L. 1990, c.J-2

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

**TEXTS CONSIDERED:** Anne La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed., looseleaf (Canada: Thomson Reuters, 2021); Bruce H. Ziff, *Principles of Property Law*, 7th ed., looseleaf (Canada: Thomson Reuters, 2018); G.H.L. Fridman, *The Law of Torts in Canada; Principles of Property Law*, 7th ed. (Canada: Carswell, 2018)

## REASONS FOR JUDGMENT

**MCGRATH, A.C.J.:**

### **INTRODUCTION**

[1] This decision arises out of a civil trial dealing primarily with the right to access and use a wharf and shed. However, at its essence, this proceeding is an example of how unresolved property disputes can lead to breakdowns in family relationships. It also demonstrates how the application of legal principles to such disputes will not necessarily result in an effective resolution for the parties.

[2] By way of background, the Second Plaintiff/Second Defendant by Counterclaim (Richard) and the Defendant/Plaintiff by Counterclaim (Wallace) are brothers who had been neighbours for almost the entirety of their adult lives. They were devoted to their parents who lived nearby. They had shared a hunting cabin, a wharf with an associated stage, and a twine shed for years. As well, their wives and children had spent significant social and family time together.

[3] Those positive relationships deteriorated after the death of their parents and became significantly worse over the last several years, with disputes arising over numerous issues. However, the primary disputes giving rise to these proceedings relate to the ownership and use of a wharf and stage as well as the twine shed. Other claims arise out of those underlying disputes.

## **FACTS**

[4] Until 2018, both parties lived at Calvin Manor Road in Seal Cove, on the same street as their parents, Minnie and Herbert Lear, and their other brother, Calvin. By all accounts, they were a close family prior to the death of Minnie and Herbert.

[5] All three sons, as well as their father, were involved in fishing at some point in their adult lives. In the mid to late 1960s, Herbert either built a shed or relocated an old shed from his property to create a stage for fishing activities on property close to the shores of Seal Cove Harbour at Cemetery Road. As the parties used the term “stage” when referring to this shed, I will refer to this shed as a stage in this decision.

[6] In the early 1970s, when his sons were teenagers, Herbert also built a wharf near the stage. The wharf was approximately 14 feet wide. The teenage boys helped their father to construct the wharf by cutting spruce wood and filling in the area with rock.

[7] At that time, Herbert was working as a heavy equipment operator but discontinued that work in 1976 or 1977 when he began fishing salmon and groundfish, using the wharf and stage for that purpose. Richard joined his father in the fishing enterprise in about 1980.

[8] In the early 1980s, the wharf was significantly damaged by ice, requiring it to be rebuilt. Richard and Herbert carried out the rebuild, with possibly some help from Wallace. They expanded the width of the wharf and shared equally in the cost.

Richard testified the wharf was originally 14 feet wide but it was 26 feet wide after the rebuild.

[9] Wallace then began fishing as well. He, Richard and Herbert together applied for a loan from the Fisheries Loan Board to purchase a trap skiff in about 1985. The skiff and loan were in the name of Richard, while various licences for capelin, groundfish, salmon and lobster were in the individual names of Herbert, Richard and Calvin. However, all three acknowledged a joint enterprise with equal sharing of proceeds and expenses. The enterprise used the gear, licenses, wharf and stage as well as another wharf at the other end of Seal Cove Pond that is not the subject of this litigation. Wallace used that wharf mainly to load and unload lobster.

[10] In addition to sharing a fishing enterprise, Richard and Wallace, together with two other friends, decided to jointly build a hunting cabin off the Witless Bay Line. Richard obtained a permit from Crown Lands to build the cabin and paid an annual fee for the land. Richard and Wallace eventually became the sole two owners of the cabin.

[11] In about 1986, a twine shed was constructed on land owned by Richard and his wife, Diane, close to their home. The shed was made of particle board with a stud frame, concrete floor and roof shingles. It was wired for electricity and a used furnace was supplied by a relative as a heating source.

[12] There were no explicit conversations as to who owned this shed. The labour was carried out by Richard, Wallace and Herbert. Richard said the costs were largely borne by Herbert while Calvin and Wallace thought all three of Richard, Wallace and Herbert shared the costs equally.

[13] In the late 1980s or 1990, Herbert retired from fishing. Calvin says his father asked him if he wanted to take over his interest in the fishing enterprise. While Calvin had done some fishing with Wallace and Richard in the past, he declined this offer. Wallace said his father told him he was sharing the fishing assets equally

between Richard and Wallace when he retired and Richard and Wallace then proceeded to carry on the enterprise in equal shares.

[14] Calvin also testified that he thought his father had given his share of the fishing enterprise and assets to Richard and Wallace in equal shares when he retired. But, again, he never saw or heard any confirmation of this and he was not aware of any deed or document transferring any interest.

[15] Unfortunately, things took a turn for the worse in the fishing industry. The Federal Government bought back Wallace's salmon licence in 1990 as a result of a moratorium. Wallace did not share the buy-back amount with Richard. The Federal Government then announced the cod moratorium in 1992.

[16] The 31-foot boat used in the fishing enterprise was sold to pay back the associated loan. Fishing gear was also sold, with Richard and Wallace sharing the proceeds equally.

[17] Richard said he continued to do a limited amount of lobster fishing along with construction work. However, Wallace said Richard had stopped fishing before the moratorium. After suffering a back injury, Richard received workers' compensation benefits and then tried different jobs, ultimately going into real estate sales in 2001.

[18] After the moratorium, Wallace worked in construction for a couple of years before returning to fishing with a lobster and groundfish licence. Richard says he also transferred a capelin licence to Wallace, with the agreement that Wallace would pay Richard 5% of his earnings. However, Wallace said he was not making enough money and only paid Richard \$500.00 over a period of time.

[19] Wallace also bought a boat for fishing in the mid-1990s. Once he had this boat, Wallace did most of his fishing from Foxtrap where he fished crab and groundfish. Some of the family fishing enterprise gear, such as a trap skiff and cod traps, were passed along to Wallace at no cost.

[20] At trial, there was some suggestion that Richard did not use the wharf after he stopped fishing. Wallace's daughter, Juanita, said Richard never tied on his boat while Wallace acknowledged Richard and his son would have tied on boats for a total of maybe one month of the year between May and October. Their use of the wharf was for recreational fishing and hunting turr.

[21] Calvin also used the wharf. In about 1993, with permission from Wallace and Richard, he built an extension to tie on his own boat as the wharf was getting crowded with both Richard and Wallace's boats tied on.

[22] Herbert passed away in October 2002. In his Last Will and Testament, Herbert left his entire estate to his wife, Minnie. The Inventory attached to his Petition for Probate filed in 2017 identifies the wharf and stage as having a value of approximately \$10,000.00.

[23] From the time of Herbert's death until Minnie died in July 2003, Wallace and his wife, Alice, moved in with Minnie to care for her at night. Diane and Alice would care for their mother-in-law during the day. Richard made visits to his mother and Wallace would be there in the evenings after fishing and working in the woods. From their trial testimony, it was evident there was some friction between the brothers as to who would be in charge of Minnie's care. Wallace testified that Minnie had suggested that whoever cared for her would get a greater share of her estate.

[24] However, Minnie's Will left all her property to her three sons in equal shares. After her passing, Minnie and Herbert's family home was sold, with the proceeds divided equally between their three sons. As well, the sons reached an agreement to subdivide their parents' property. A parcel with 90-foot frontage and a garage was transferred to Wallace and Alice in November 2003 with the agreement that they would pay \$3,500.00 to each of Richard and Wallace if the land was rezoned to allow for the approval of a building lot.

[25] After the death of his parents, Wallace began to do repairs to the deteriorating wharf as the wood was rotting and starting to fall off. In 2005, Wallace, together with three others, took off the top timbers, replaced the rotted wood and added some gravel and asphalt to the existing base. A neighbour testified as to the extensive work that was carried out, including replacing cribbing and installing face boards and bollards.

[26] Wallace also extended the wharf another four feet. At about this time, Calvin signed a conveyance to Wallace for the portion of the wharf he had added on in 1993. The drawing attached to that document shows Calvin's portion as being an area eight and one-half feet wide but Richard says the drawing encompasses an area greater than the portion than Calvin had added.

[27] Richard said he was not approached by Wallace to contribute to the 2005 work on the wharf but Wallace had also refused to contribute to the cost of re-shingling the twine shed at about that same time. A year or two later Wallace put some cement over the top of the wharf as well.

[28] There was little evidence as to the use of or work done on the wharf and stage between 2005 and 2015 other than Wallace indicated he replaced clapboard and shingles on the stage between 2012 and 2014.

[29] The next significant events in the history of the disputes between the parties occurred during the latter part of 2015. However, Richard testified that the relationship between he and Wallace had been deteriorating for years.

[30] I will summarize the nature of the disputes in 2015 dealing with the cabin for the sole purpose of giving context to the claims before the Court. Otherwise, these events are not relevant to the issues I am asked to decide.

[31] On the first weekend of October 2015, the moose hunting season had just opened. Richard and Wallace had a disagreement based on a misunderstanding of

who was using the cabin that weekend: i.e., would it be Richard and his group or their cousin. Richard and his group ended up using the cabin.

[32] The day after Richard and his group had returned from the cabin, Richard's son, Scott, passed Wallace in his vehicle at which time Wallace rolled down his window and apparently "gave the hand to him". Wallace's explanation is that Scott was jeering at him.

[33] Richard then went to Wallace's home at which time Wallace became verbally upset and told Richard he had no right to tell their cousin he could not go to the cabin. Richard said Wallace then told him he would burn down the cabin if Richard used it again. Richard said Wallace also told him he had no right to tie his boat onto the wharf.

[34] Wallace said that in late 2015 Richard came through the gate into Wallace's vegetable garden while Calvin was there. Calvin said Richard started to raise his voice while Wallace walked towards Calvin. Calvin said Richard told Wallace not to f\*\*\* with him.

[35] Wallace testified that he asked Richard to leave a couple of times but Richard was jeering him to hit him. Both Wallace and Calvin testified that Richard said he would see Wallace in the ground and that Wallace said he would call the police. For his part, Richard says he approached the garden merely to discuss a way that he and Wallace could separate assets.

[36] Calvin also testified that, about a week later, he was present when Richard approached Wallace in Wallace's yard and Wallace told him to leave. Calvin said Richard kept coming and begged Wallace to punch him in the face. Calvin was the only one to testify as to that alleged incident.

[37] Richard merely says he had approached Wallace in his garden on several occasions to try to resolve issues but Wallace never told him he was trespassing.

[38] In October 2015, Richard asked Wallace for a key to the stage as Wallace had previously changed the lock on the stage door. Wallace refused to give Richard a key. Richard then removed the lock and threw it in the water. Wallace replaced the lock the next day but Richard again removed that lock and threw it in the water.

[39] Wallace then screwed two by four pieces of wood into the stage door to prevent anyone from entering. In turn, Richard went down with a cordless drill and removed the pieces of wood. No one placed a lock on the door again. Wallace said he then removed his items from the shed to ensure no one stole them.

[40] Relations between the parties continued to deteriorate throughout late 2015 and early 2016. Richard approached Wallace to ask if he would agree to place the cabin in the names of each of their sons rather than in their own names but Wallace refused to sign the application for transfer.

[41] Disputes also erupted between Richard and Wallace with respect to a root cellar that Wallace had created on Richard's property years earlier. The root cellar consisted of a small plywood shed, measuring approximately three feet by three feet, over a manhole cover. When the relationship deteriorated, Richard asked Wallace to stop using the root cellar but Wallace refused. Richard then hooked the top of the shed to his truck, pulled it up and delivered it to Wallace's property. He then said Wallace had 24 hours to retrieve his vegetables.

[42] Richard also said he asked Wallace several times to remove his fishing gear from the twine shed, namely a herring trap/net (referred to in this decision as a net or trap), other nets, rope, etc. Wallace refused to remove the items and said he wanted Richard to give him his share of the twine shed.

[43] In March 2016, Richard removed the large herring net and left it and some of Wallace's crab pots on the side of Wallace's property, near the road. Wallace was given no further access to the twine shed.

[44] Wallace said he saw the herring net on the corner of his property with snow on it but at no time did he go near it. Wallace's adult daughter, Juanita, said when she became aware the net had been placed there, she took photos with her truck parked next to the garage depicting the trap in a pile after it had been placed near her father's property.

[45] In May, 2016, the Town of Conception Bay South (the Town) removed the net from Wallace's property. Juanita said she had received a phone call from her mother saying the Town had just picked up the net, so Juanita retrieved it from the back of a Town truck.

[46] Juanita said the net was cut up and tied up in knots, with a trawl line into it. She took the net back to her own property and advertised it for sale in the classifieds. She did not advertise it as having been damaged.

[47] Juanita testified that two fishermen came to her property and spent 2 days taking the net apart. As it was destroyed, she said she gave it to them either for next to nothing or at no cost. At no time did she take any photos of the net after it was taken from her father's property.

[48] Richard had also been expressing concern about the location of a utility trailer that was parked close to Wallace's property. Richard described Wallace's property as an unsightly mess and complained to the Town about it, including a concern that the location of the trailer was a safety hazard. The Town eventually expropriated the corner of land on which the trailer was located so Wallace was forced to move it.

[49] However, it was in the summer of 2016 that relations between the parties came to a significant head. Near the first day of July 2016, Richard's son, Scott, had tied his boat up to the wharf to use it for the recreational fishery and then left the area. When Scott returned, he discovered the boat drifting away.

[50] Richard said that Scott phoned him to say that Juanita was there and told him she had set the boat loose from the wharf. Richard then arrived at the wharf where Scott and Juanita were still present. He got into his own boat to retrieve Scott's boat and tied both boats onto bollards on the wharf. Juanita admitted she had untied the boat. She said she had done so because it was Wallace who owned the wharf.

[51] On July 3, 2016, Richard arrived at the wharf to fish. He noted that Scott's boat was still tied to a bollard but the remainder of the other 4 bollards had been sawed off. Richard then took a piece of spruce and temporarily tied it on to the wharf. Richard proceeded to take his and Scott's boats and went on vacation a day or two later. While on vacation, Richard's daughter sent him a photo of the temporary post drifting in the water and the remaining bollards sawed off.

[52] On July 4, 2016, Wallace applied for a permit from the Town to conduct general repairs on the wharf.

[53] At about this time, Richard retained a lawyer to write to Wallace and ask him not to do any damage to the wharf, stage or Richard's boat or moorings.

[54] Later that month, on July 30, 2016, Richard went to the wharf and noted Wallace was there with a tractor, stripping the concrete top off the wharf and piling it up. Wallace acknowledged he was removing asphalt, cement and face boards and some "sticks" on the side of the wharf.

[55] Richard and Wallace had words. Wallace repeatedly said to Richard to get his truck out of the way as he was repairing the wharf. Richard then took photos of the event, showing Wallace giving him "the middle finger".

[56] The Royal Newfoundland Constabulary (RNC) arrived and told Wallace not to destroy anything else. Despite that warning, Wallace began destroying the wharf that evening. The RNC returned and gave another warning, advising Wallace he should retain a lawyer. Wallace responded that he did not need one.

[57] On July 31, 2016, the RNC arrived at the wharf again and told Wallace to stop destroying the wharf. At that point, a general repairs permit from the Town was posted on the stage. Wallace acknowledged at trial that his intention in obtaining the permit was to destroy the wharf rather than repair it.

[58] In early August, 2016 Richard complained to the Town that the work being done on the wharf went beyond repair work. On August 9, 2016, the Town revoked the general repairs permit and documented that revocation in a letter dated August 11, 2016.

[59] On August 18, 2016 Richard says he installed a game camera at the wharf as the destruction of the wharf was continuing. At some point, he also wrote “Smile you’re on camera” with a smiley face and “Lear Estate Permit Revoked” on the stage. He also contacted the Town to let them know the facing was being taken off the wharf. The Town hand delivered Wallace the letter revoking the permit on August 19, 2016.

[60] However, Richard says that on August 21, 2016, the camera that he had installed recorded Wallace at the wharf at night and additional pieces of wood had gone missing from the wharf. Wallace disputed the dates as the camera footage noted the date as July 21, 2016.

[61] There was also evidence as to an event in late August, 2016 between Richard and Wallace in Wallace’s yard. Richard said Calvin and Wallace were in Wallace’s yard when Richard told Wallace not to go to the wharf and stage at night. Richard said Wallace put his fist up to him and, using expletives, said to get off his land. Richard responded by telling Wallace to give it his best shot. While Wallace refers to an incident in his brief, his evidence was not clear as to whether and when this occurred. Calvin, as well, was far from clear as to the dates and number of incidents in Wallace’s garden involving Richard and Wallace.

[62] However, it is acknowledged there was a physical altercation between the two brothers on September 21, 2016 when Richard went onto Wallace’s property with

an envelope containing money to pay for his share of the annual Crown lease payment on the cabin. Richard's wife had seen Wallace park his tractor on the lot next to his house and suggested to Richard that it would be a good time to approach him.

[63] Diane asked Richard not to call the RNC after that incident as she "had enough" and did not want Alice to go through anything else. Prior to the falling out between the brothers, Alice and Diane had been close friends since they were young girls. Richard therefore agreed not to involve the police.

[64] Diane testified that she knew then it was time to sell their home as she was fearful to live there. She was concerned over what Wallace may do.

[65] In October, 2016, Wallace says that someone removed his trailer from the side of the road bordering his property. He had used this utility trailer to store some gear. The utility trailer was subsequently discovered on a landwash where it had apparently been dumped. A photo of the trailer on the landwash was entered into evidence. This photo is marked with a handwritten date of October 14, 2016. Wallace alleges that it was Richard who was responsible for the dumping of the trailer.

[66] In that same month of October, 2016 Richard applied, as executor of the Estate of Minnie Lear, for a permit to repair the wharf. Later that month he issued the Statement of Claim against Wallace in this matter.

[67] In October, 2016, Richard wrote to the RNC and the Royal Canadian Mounted Police asking that they keep an eye on Wallace as he had threatened to destroy the wharf and burn down the cabin.

[68] In late October or early November, 2016 Wallace complained to the RNC that Richard had stolen his "custom" wood that had been on the wharf. Richard then

returned the pieces of wood that Wallace had stripped from the wharf to Wallace's property. Those pieces of wood had been stacked on the wharf.

[69] In November 2016, the Town issued to Richard, as executor of the Estate of Minnie, a permit to repair the wharf. Wallace appealed this decision and a statutory stop work order was in place until the appeal could be heard.

[70] Notwithstanding the stop work order, the Town agreed that Richard could go ahead and do the minimum work required to enable use of the wharf. Richard and his son therefore carried out that work, stripping out any protruding nails and replacing the bollards. While doing this work, Juanita and a friend of Wallace came and took photos. A Town enforcement officer then showed up. Richard showed the officer the permission he had received from the Town.

[71] Following this event, Richard began video recording the wharf area and an altercation then ensued between Juanita and Richard. Juanita struck Richard with her closed fist. Scott was also present and Richard says Juanita punched Scott several times in the head. Criminal assault charges were laid against Juanita but she was acquitted following a trial as the trial judge was of the view that Richard had consented to the altercation.

[72] Wallace and Richard also each filed peace bond applications against the other. Richard agreed to sign a peace bond if Wallace did as well, but Wallace refused. Eventually, a Provincial Court judge issued a peace bond against Wallace as she found he had been destroying property. The Court did not issue a peace bond against Richard.

[73] Richard advised Juanita he would enter into a peace bond in relation to her if she similarly entered into a peace bond in relation to him. They both signed. Calvin was present in court on that occasion.

[74] Richard also testified as to occasions at about this time when he had real estate signs stolen from the community, suggesting that it was done by his brother(s). However, no evidence was presented to substantiate this claim.

[75] In the summer of 2017, Richard approached Calvin to see if he could speak to Wallace but he said Calvin just threw up his arms and said he did not want to get involved.

[76] With the consent of Wallace's counsel, Richard also introduced into evidence a dash cam video of an incident that occurred on December 19, 2017. Richard had been making a left-hand turn onto Calvin Manor Road in the evening while Wallace was walking up his lawn over a snowbank on the corner of the road. After this incident, Wallace called the police and accused Richard of trying to run him down. Richard showed the video to the police officer and gave him a copy of the peace bond.

[77] The police phoned Richard the next day to say Wallace was going to be charged with breach of a peace bond and no charges would be laid against Richard. Wallace was not convicted of this alleged breach and there was some suggestion by Wallace that the officer involved may have acted inappropriately.

[78] I refer to the above evidence of the dash cam incident and Provincial Court trials involving family members in this summary but note that, at trial, I questioned their relevancy to the pleadings on many occasions. I also expressed concern that, despite counsel's consent, many of the questions asked about these events and the time spent dealing with them offended the collateral fact rule of evidence. The relevancy and admissibility of this evidence will be discussed later in this decision.

[79] Richard eventually sold his house, including the twine shed, on May 2, 2018, for the sum of approximately \$296,000.00. However, Richard and his family continued to use the wharf.

[80] The next notable event was a disturbing incident on June 29, 2018, the first day of the recreational food fishery. When Richard and Diane went to go fishing, they noticed that two bollards that Richard and his son had installed had been sawed almost the entire way through. Richard discovered this when he let the boat out and dropped the grapple while Diane was in the boat. When he asked his wife to do a few turns around, the bollard broke off while she was holding onto the rope. Diane was almost thrown into the water. After this incident, Richard and Scott installed other steel pipe bollards in concrete.

[81] In November 2018 Wallace's appeal of the Town's decision to issue a permit to Richard was heard and denied.

[82] Richard then obtained a permit from the Town to carry out work on the wharf in the spring of 2019. He decided to do the work himself rather than involve a third party. He estimated the total cost of all work on the wharf and stage at approximately \$15,000.00, taking into account time they spent on labour.

## **ISSUES:**

[83] The parties approached the issues from very different perspectives and their positions changed throughout the course of the trial. It came to the point where it was almost impossible to discern the actual issues I must decide. I have therefore reframed the issues based on the evidence and submissions that were put before me. The issues that I will determine can be summarized as follows:

1. Who has a legal or beneficial interest in the wharf and stage for the purposes of determining the issues raised in this matter?
2. Are Richard and the Estate of Herbert entitled to damages for the actions of Wallace in attempting to destroy the wharf and stage? If so, what is the amount of damages?

3. Has Richard unlawfully interfered with Wallace's right to use the wharf and stage and, if so, what is the amount of damages?
4. Has Richard unlawfully interfered with Wallace's right to exercise any interest in or use of the twine shed and, if so, what is the amount of damages?
5. In the alternative to (4), did Herbert's financing and labour and Wallace's labour in respect of the twine shed create a constructive trust for their benefit? If so, was Herbert's constructive trust interest then gifted *inter vivos* to Richard and Wallace in equal shares? If so, what is the value of this constructive trust?
6. Did Richard trespass the real property of Wallace on September 21, 2016? If so, what is the amount of damages?
7. Did Richard commit the torts of assault or battery on Wallace on September 21, 2016? If so, what is the amount of damages?
8. Did Richard commit the torts of trespass to goods or conversion in respect of Wallace's herring trap? If so, what is the amount of damages?
9. In the alternative to (8), is Richard liable to Wallace for any damages or loss of the herring trap in his alleged possession of it as a bailee? If so, what is the amount of damages?
10. Did Richard commit either the tort of trespass to goods and/or conversion with the respect to the utility trailer of Wallace? If so, what is the amount of damages?

11. Are any of the parties entitled to other relief including any award for aggravated or punitive damages, or any other relief not specifically plead?

12. What is the appropriate award of costs?

## LAW AND ANALYSIS

### **1. Who has a legal or beneficial interest in the wharf and shed for the purposes of determining the issues raised in this matter?**

[84] At the heart of this first issue is the question of ownership of the wharf and stage. However, neither party provided any evidence as to how Herbert may have acquired an interest in the area on which the wharf and stage are located.

[85] Wallace acknowledged that his father did not obtain a Crown grant but presumed he acquired title by “squatter’s rights” as there was little to no enforcement of Crown rights years ago. As the wharf and stage are located on a shoreline, I query whether an individual could have acquired title to the area of the wharf that was filled in over the water or the area of the shoreline on which the shed is located, even by way of long possession. However, no evidence was lead or submissions made on that point.

[86] What all parties have submitted is that the property on which the wharf and stage was constructed was “owned” by Herbert before his sons started to share the use of it with him. I also find that the wharf and stage would not be considered chattels as they were affixed to the real property and incorporated into it. As such, when I refer to ownership of the property, I am referring to any and all property rights that Herbert may have had in the land, stage and wharf.

[87] The evidence as to what happened to Herbert's interest in the property after Richard and Wallace began fishing with their father was not agreed. Both parties have been inconsistent in their claims of ownership and damages, both prior to and during this litigation. The inconsistent positions taken throughout have caused significant confusion, unnecessary court time and, in the case of Wallace, made it next to impossible to discern his ultimate position by the end of his testimony.

[88] Prior to the start of litigation and continuing throughout trial (even at points in his final submissions), Wallace claimed that he was the sole owner of the wharf and stage. This claim is what lead, at least in part, to this dispute.

[89] As noted in the summary of evidence, Wallace attempted to prevent Richard from having access to the wharf and stage in 2016. He also clearly made statements to others going back as far as 2005 that he was the sole owner.

[90] Two of the witnesses testified at trial that Wallace was the sole owner and they were not aware he had taken a different position at any time before they testified.

[91] Wallace's son-in-law, Jeffrey, said he understood (at the time of trial and earlier) that the wharf belonged to Wallace. He held this belief as far back as 2005 because he helped Wallace make improvements to the wharf. It was always his understanding that Wallace was the sole owner and had sole use of the wharf.

[92] Juanita also testified that the wharf belonged solely to her father. She said her father told her the wharf was put there at his expense and that he paid three men to do work on it.

[93] On cross-examination, Juanita did acknowledge that the wharf was originally put there by her grandfather, with assistance from his sons, and that the stage had belonged to her grandfather, Richard and her father. However, she steadfastly maintained the position that her father owned the wharf.

[94] While prior to trial, Wallace claimed to be the sole owner, Richard was less than clear on his position on ownership prior to trial as well.

[95] In a letter from Richard's legal counsel to Wallace dated July 16, 2016, Richard's counsel alleged that the wharf and stage was formerly owned by Herbert's Estate, but the letter also stated that Richard was a 1/3 owner of the property. However, this could be explained as being a reference to beneficial ownership.

[96] Inconsistent positions continued in the pleadings of both parties.

[97] In the Statement of Claim dated October 14, 2016, Richard claimed that the Estate of Herbert died possessed of the wharf. He stated that the three sons of Herbert were entitled to share in the Estate. While he describes the actions of Wallace as having damaged the property of both Richard and the Estate of Herbert, the only compensatory damages that are claimed are on behalf of the Estate. However, when Richard applied for a permit to repair on October 31, 2016, less than three weeks later, the application was made in the name of the Estate of Minnie.

[98] By January, 2017, when Richard applied for Letters of Probate of the Estate of Herbert, Richard identified lands, building and interest in land as part of the Estate property and valued them at \$10,000.00. At trial, Richard said that the inventory was referring to the value of the wharf and stage in 2002.

[99] In his Defence and Counterclaim, Wallace took the position that Herbert's fishing assets, including the wharf, stage and twine shed, were gifted *inter vivos* by Herbert to Wallace and Richard in equal shares. In the alternative, he claimed that Wallace and Richard had collectively extinguished, by way of possession in excess of ten years, any interest the Estates of his parents may have had in the wharf and stage property. He also stated that Calvin had built an extension onto the wharf, with the permission of Wallace and Richard, and that Calvin conveyed his interest in the wharf to Wallace in or about 2005.

[100] Wallace also named the Estate of Minnie as a Defendant by Counterclaim, seeking a declaration of ownership against both the Estates of Herbert and Minnie.

[101] In his Defence to Counterclaim, Richard responds with a statement inconsistent with his Statement of Claim, alleging that the wharf and stage are beneficially owned by Richard and Wallace in equal shares. Even assuming this is an acknowledgement of a conveyance from Calvin to Wallace of Calvin's interest, this would not result in Richard and Wallace having an equal interest in the wharf.

[102] Contrary to the above assertion in this Defence to Counterclaim, in his pre-trial brief Richard took the position that he is an owner of a one-third undivided interest in the wharf as a tenant in common with at least Wallace, and possibly Calvin. He took no position with respect to Wallace's claim that Calvin conveyed the interest he may have had in the wharf to Wallace.

[103] In his pre-trial brief, Wallace also takes a position that is contrary to his own pleadings. He is consistent in alleging that the wharf and stage were gifted *inter vivos* to Wallace and Richard in equal shares but then states, in the alternative, that Richard, Wallace and Calvin had dispossessed the Estates by long possession for in excess of ten years.

[104] Then, when we look at the evidence at trial, Wallace's evidence is almost impossible to follow or reconcile.

[105] Wallace did suggest in his testimony that his father gifted the wharf and stage to Wallace and Richard equally. At one point, he said his father told him he was sharing the fishing assets equally between Richard and Wallace when he retired. Wallace then said his father "pretty well" said the wharf and stage was 50/50 but he did not come out and say it.

[106] However, Wallace also testified that he figured he owned the wharf and stage because he had used it for more than 20 years and no one else stored anything there.

[107] At another point in his testimony, Wallace suggested he was within his rights to remove lumber, cement and gravel as they were his, having done the improvement work in 2005. However, he also took the position that the twine shed was his and Richard's equally, even though it was on Richard's land, and he contributed nothing to the substantial improvements.

[108] At another point in his testimony, Wallace suggested that he owned one section of the wharf that he had added and Calvin owned another section that he had added. However, he was unsure who owned the middle portion of the wharf.

[109] In respect of Calvin's interest, at times Wallace said Calvin had conveyed all of his interest to Wallace and, at other times, he said that Calvin continued to have a 1/3 interest but just didn't use the wharf.

[110] At other times, Wallace tried to differentiate ownership of structures on the wharf and stage from ownership of the underlying land itself and suggested that, since Calvin had no use for the wharf, he did not consider him to be an owner.

[111] On cross-examination, Wallace finally said that if the Crown did not own the wharf, the three brothers owned it equally. He then confirmed on a few occasions that all three brothers had an undivided interest in the land on which the wharf was located.

[112] For his part, Richard asserted in his evidence at trial and in final submissions that he is the legal and/or beneficial owner of a 1/3 undivided interest in the property in common with Wallace and Calvin. Richard says that the ownership rights to the wharf arose pursuant to the Last Will and Testaments of Herbert and Minnie. However, he did acknowledge that Calvin may have transferred some or all of the interest he had to Wallace but took no position on the validity or nature of the transfer.

[113] In his final submissions, Wallace maintained the position that the wharf and stage were gifted *inter vivos* from Herbert to Richard and Wallace jointly. In the alternative, he submitted that the wharf and stage was jointly owned by Richard and Wallace, and potentially Calvin, either by long possession or bequeathment. I will consider these submissions in turn.

### *Inter Vivos Gift*

[114] With respect to the submission that the wharf and stage were gifted to Richard and Wallace by Herbert, no witness provided evidence that Herbert had signed any documentation gifting the property to his two sons. Further, no witness was able to testify as to any specific conversation in which Herbert indicated he was making such a gift.

[115] In support of his position, Wallace relies heavily on the evidence of Calvin. Again, Calvin did not witness Herbert gift the fishing assets to his two brothers, either in writing or orally, but Wallace submits that this would be the most likely conclusion.

[116] Calvin's evidence was that Herbert's desire was to pass on his share of the fishing enterprise to him, including the wharf and stage, and Calvin gave his consent and recommendation to pass "his" share on to his two brothers in equal shares instead. Wallace says this is consistent with the subsequent conduct of Herbert and his three sons in respect of their use and/or disuse of the fishing assets between Herbert's retirement and his death.

[117] Further, Calvin's evidence was that he believed that the only part of the wharf that he actually "owned" was the addition he had constructed in 1993.

[118] Richard noted in his Trial Brief that the *Statute of Frauds 1677*, 1677 (29 Cha. 2 C.3) (U.K.) would typically require the conveyance of real property to be done in writing.

[119] The requirement that all transfers of real property be set out in writing was discussed by Orsborn J. (as he then was) in the 2015 decision of this Court in *King v. King*, 2015 NLTD(G) 130 where it was stated at paragraph 44 as follows:

With respect to a gift of real property in Newfoundland and Labrador, any purported transfer of real property is unenforceable unless the transfer is sufficiently set out in writing. This flows from the provisions of the *Statute of Frauds, 1677* (U.K.), 29 Cha. 11 c3. ...

[120] However, Wallace's submission is that the doctrine of part performance applies, referring to a decision of Rowe J.A. (as he then was) in *Cleary v. King*, 2014 NLCA 33. In that decision, Rowe J.A. outlines the judicial history of the doctrine at paragraph 12, including the two necessary criteria as outlined in *Hollett v. Hollett* (1993), 106 Nfld. & P.E.I.R. 271, 334 A.P.R. 271 (Nfld. S.C. (T.D.)):

- a) The acts must support the idea that a contract existed; and
- b) The acts must be consistent with the oral contract which is alleged.

[121] Wallace asserts that everyone's conduct supports the idea that Herbert intended to gift all his interest in the fishing enterprise, including the wharf and stage, to Richard and Wallace once Calvin refused to join the enterprise. As a result, Wallace submits that the two conditions have been met.

[122] In support of this position, Wallace says the following acts support a conveyance by way of gift, as evidenced by trial testimony and exhibits:

- a) Richard, as Executor of Minnie's estate, appears to have distributed all other assets formerly owned by both Minnie and Herbert in 2003 and Richard did not claim that title to the wharf and stage was held in Herbert's estate until a dispute arose;

- b) Richard, Wallace, and Calvin, as beneficiaries of Minnie's estate, signed an agreement regarding distribution of real property, with no mention of the wharf and stage;
- c) Richard testified that he held a capelin license nominally but it was beneficially owned by Herbert, Richard and Wallace in connection with their joint enterprise. Further, Herbert transferred a salmon licence to Wallace but Richard believed he had a beneficial interest in it. Wallace also asserts that this is consistent with Herbert allegedly financing the construction of the twine shed that was to be beneficially owned by all three;
- d) When Calvin built his addition, his evidence was that he approached Herbert, who referred him to Richard and Wallace to obtain permission. Richard also testified Calvin had "everyone's consent";
- e) In the bill of sale from Calvin to Wallace, Calvin conveyed only the portion of the wharf that he added and believed he did not possess any other interest that he could convey; and
- f) Wallace made improvements to the wharf in 2005 without any involvement, consent or disapproval from any other family member.

[123] With respect to (a) and (b) noted in the paragraph above, Wallace suggests that Richard did not convey the wharf and stage from either the estates of Herbert or Minnie because he did not consider Herbert to have had an interest in them at the date of his death. If Richard had considered that Herbert had an interest in the wharf and stage, he should have applied to probate Herbert's will shortly after his passing, or shortly after Minnie's death, and then legally transferred any interest in that property to the beneficiaries as he did with the land and garage adjoining the parents' matrimonial home. In fact, while Richard applied to probate Minnie's Will in 2003, he only applied to probate Herbert's will in January, 2017, approximately two months after he applied for the permit to repair and after this action was commenced.

[124] Wallace notes that Richard testified that his initial belief was that title had vested in the estate(s) and he was so advised by his counsel. As a result, Wallace says there is no logical explanation why he didn't proceed to transfer the wharf and stage.

[125] I have considered this issue and do not view the failure to execute a deed of conveyance from the estates of Herbert or Minnie after their deaths as proof that Richard believed Herbert did not own the wharf and stage at the time of his death. I note that neither party was able to provide me with a legal description of the wharf and stage property or any evidence as to Herbert's alleged title to that property. In these circumstances, and in light of the relatively low value of the property, it would not be unusual for an executor not to execute a formal deed of conveyance. The parties merely continued on with their use of the property until disputes arose.

[126] As for the failure to include the property in the conveyance of the real property surrounding the matrimonial home property after Minnie's death, this conveyance dealt only with one specific parcel of real property for which there was a proper legal description. This is in contrast to the wharf and stage. Further, the deed of conveyance that was signed did not purport to deal with all estate assets.

[127] With respect to (c) above, all parties were clear that they operated a fishing enterprise together but fishing licenses were, by operation of law, only issued in the name of an individual. As a result, it is not surprising that the parties may have considered licences held in various names, which directly generated the profits, to be jointly owned. However, this does not equate to a conclusion that a pre-existing piece of property owned by one of them was transferred to all three *inter vivos*. Further, the evidence indicates that there was not even any compensation paid by the individual licence holders to the others to compensate them for any interest after the fishing enterprise came to an end and licences were bought back by the Federal Government, thereby causing me to question the assumption of equal ownership.

[128] With respect to the submission in (d), Calvin did testify that he approached Herbert for permission to build onto the wharf but, at Herbert's suggestion, he also sought "everyone's consent". However, Calvin did not testify that Herbert made

any statement as to who owned or held an interest in the wharf. He merely asked his son to ensure his other sons were in agreement.

[129] With respect to paragraph (e) above, Wallace says Richard's position on the bill of sale between Wallace and Calvin is inconsistent with his position on ownership. He notes that Richard asserts that the bill of sale does not convey any interest Calvin had received from the estates but Richard does not dispute the legitimacy of the document. He acknowledges it may convey some other interest.

[130] With respect to paragraph (f) above, Wallace also asks that I consider that Richard did not store anything or otherwise use the stage at the time this dispute arose. In fact, Richard admitted in cross-examination that he did not even know what Wallace had stored inside or its value. Wallace says Richard had not been looking to use the wharf or stage and had not for years.

[131] Again, I find the alleged acts in (d) through (f) above do not indicate that everyone treated Herbert as having made an *inter vivos* gift to Wallace and Richard.

[132] I recognize that Calvin gave evidence that his father asked him if he wanted to take over his share of the fishing enterprise when he retired, failing which his share would go equally to Richard and Wallace. However, Calvin's testimony was very vague on this point and he did not refer to specific conversation(s).

[133] Overall, I had concerns regarding the reliability and credibility of Calvin's evidence. His testimony was often lacking in any detail or specificity in regard to events, dates and conversations. He made generalized statements that supported Wallace and said he was not taking any sides as between his two brothers. However, he had previously acknowledged in sworn answers to interrogatories that he attended at Provincial Court proceedings to support Wallace and he acknowledged making anonymous complaints to Richard's employer.

[134] Further, even if I accept Calvin's evidence, the fact that Calvin first approached Herbert for approval to build onto the wharf after his father retired from fishing would indicate that he viewed his father as the sole owner.

[135] Finally, the fact that Herbert asked Calvin to get the consent of Richard and Wallace is also consistent with a father wishing to treat all his children equally in respect of property that was used by the family and that would ultimately become theirs through inheritance.

[136] With respect to the bill of sale from Calvin, in Richard's testimony, he took no position on the intent of the parties or the validity of this document. His issue was with respect to the size of the addition. Richard's lack of a position is understandable as Richard was not a party to it. As well, given the handwritten nature of the document and the lack of any description of the property other than a hand drawn diagram, it would be difficult for anyone to take a legal position.

[137] What the bill of sale from 2005 does indicate to me is that neither Calvin nor Wallace obtained legal advice with respect to the document. As Wallace made improvements to the wharf and was asserting sole ownership of the rest of the wharf and stage at that time and afterwards, he thought he became owner of any and all interest Calvin had by virtue of the bill of sale. The execution of that bill of sale however does not mean that the parties were correct on their assumption of ownership at the time of its signing.

[138] Finally, the fact that no one objected to Wallace making improvements to the wharf in 2005 is not an unequivocal indication that everyone considered the wharf to have been gifted to him and Richard. It is more indicative of Wallace's belief, expressed to others on occasion, that he was the sole owner.

[139] For his part, Richard simply says that he has consistently maintained that Herbert did not gift the wharf and stage to he and Wallace, even though taking that position would have left him with a greater ownership interest.

[140] Based on the above analysis, I agree with Richard's position that the evidence does not establish on a balance of probabilities that Herbert gifted the wharf and stage to Wallace and Calvin in equal shares when he retired from the fishery. The law and facts do not support Wallace's claim of an *inter vivos* gift.

[141] All of the above acts are equally or more consistent with the failure of a family to discuss or have settled intentions with respect to any legal rights to property initially owned by one but used by all of them. It is not unusual for children to continue using property owned by a parent for years without formalizing any arrangement or transfer of any interest. The assumption is family members will continue to use the property without issue.

### ***“Adverse” Possession***

[142] In the alternative, Wallace submits that the estates of his parents have been dispossessed by their three sons who have enjoyed open, notorious, exclusive and continuous possession of the wharf and stage as if they were the true owner, for over ten years following the death of both parents.

[143] The sixteen fundamental principles to establish adverse possession are set out by the late Justice Goodridge (as he then was) in *Wickham v. Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, 46 A.P.R. 452 (Nfld. S.C. (T.D.)). I have revised the principles to correspond with amendments to statutory limitation periods for bringing an action for recovery of land since the *Wickham* decision and have reproduced the principles relevant to this proceeding below:

1. No action for possession of land may be brought after 10 years has expired since the cause of action arose;
2. As a corollary to the first principle, the title of a person who has a right to bring such an action but does not do so is extinguished after 10 years;

3. For the benefit under the *Limitations Act*, S.N.L. 1995, c L-16.1 to begin to accrue, two factors must be present. These are:

a. either dispossession or discontinuance of possession; and

b. “adverse” possession;

4. Possession must be open, exclusive, notorious and continuous; and

5. The claimant must have such possession of the land as the nature of the land permits.

...

7. The concept of “adverse” possession no longer exists. Despite the repeated references to adverse possession in the cases, there appears to be no doubt that possession does not have to be adverse to provide the benefits of the *Limitations Act*.

8. The acts under which the claimant seeks the benefit of the *Limitations Act* must be acts of possession and not acts of trespass.

...

10. The possession of a co-owner may operate to extinguish the titles of other co-owners.

11. The interest of next-of-kin who remain in possession is among themselves as tenants in common while the interest which they acquire against tenants in common who are dispossessed or who discontinue possession is as joint tenants.

...

14. Time runs against an administrator from the date of death of the intestate.

15. The onus of proving that a person is entitled to the benefit of the *Limitations Act* lies upon the person who claims such benefit.

16. There seems to be an interest in land lying somewhere between an adverse claimant, and a tenant at will. The former is the person in possession who acquires a good defense after 10 years, the latter after 11 (because the statutory period does not begin to run until a year after the tenancy began). The interest referred to is a license. The licensee acquires no benefits under the statute.

[144] Wallace acknowledges it could be argued that one or more of the brothers were in fact licensees which is discussed in paragraphs 142 to 144 of *Wickham*. However, Wallace says there is no indication that Herbert intended to only grant his sons permission to use and not ownership. Wallace asserts that the evidence supports his position that it was Herbert's intention to transfer ownership.

[145] Wallace asserts that the brothers' acts of possession have dispossessed either or both estate(s). Paragraph 137 of *Wickham* states that "Time Runs against an administrator from the death of the intestate" which remains true by operation of Section 19(3) of the *Limitations Act*. As Herbert and Minnie passed away in 2002 and 2003 respectively, the limitation period of 10 years afforded by section 7(g) of

the *Limitations Act* for an action to be commenced by either estate had long expired when Richard commenced this action in 2016.

[146] However, without repeating the analysis above, I have found that the evidence does not establish an intention by Herbert during his lifetime to transfer ownership of the wharf and stage to his sons. Clearly, his sons' use of the wharf and stage was consensual and with the leave of Herbert. Use in those circumstances during Herbert's lifetime would be consistent with them being licensees.

[147] Further, once Minnie passed away, all three sons became beneficial owners of Herbert's interest in the wharf and stage pursuant to her Last Will and Testament, with all sons being aware that they shared equally in the estate assets. As executor, Richard was certainly aware who the beneficial owners were and he has taken the position that all three sons are beneficial owners by virtue of their inheritance. They therefore became tenants in common.

[148] Since his position as executor has been to continue to allow the beneficial owners to use the wharf and stage, it cannot be said that the use of the stage by any of the three brothers was not consensual and with leave of the legal owner.

### *Constructive Trust for the 2005 Improvements*

[149] An alternative submission made by Wallace is that a constructive trust in the wharf was created for his own benefit as a result of improvements he made in 2005, as well as his reconstruction of the stage. He says he performed this work at his own expense and for the benefit of his own commercial fishing enterprise.

[150] It is for this reason that he was of the mistaken understanding he was the sole owner. In any event, he submits that, notwithstanding any damage he caused, the wharf and stage was in a more valuable condition at all times since the completion of the 2005 improvements than it was when the parties acquired an interest in it.

[151] Counsel for Wallace submits that Wallace's statements as to why he thought his time, effort and money put into the wharf gave him ownership rights is, in essence, a simplified, yet accurate, description of a constructive trust. A constructive trust would result in Wallace holding a greater share of a beneficial interest in the wharf as a result of the 2005 improvements and his reconstruction of the stage.

[152] Wallace refers to *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78, in which Green J.A. discussed the principles of unjust enrichment underlying the concept of constructive trusts as they are outlined in *Kerr v. Baranow*, 2011 SCC 10. At paragraphs 145 and 146 the court stated as follows:

145 The basic principles governing the rights and remedies for unjust enrichment remain the same for all subject areas, regardless of whether they arise out of a domestic context or not, but the courts must apply those common principles in ways that respond to the particular context in which they are being applied (*Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), per Cromwell J. at paragraphs 31-34). It is well-established in Canadian law that the establishment of a claim for unjust enrichment depends on the plaintiff being able to establish three elements: (i) an enrichment of or conferral of a benefit on the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment (*Kerr*, paragraph 32; *Economical Mutual Insurance Co. v. Bank of Nova Scotia*, 2015 NLCA 29, 367 Nfld. & P.E.I.R. 297 (N.L. C.A.), paragraph 21).

146 The remedial response to the establishment of the cause of action results in restitution, or a giving back, to the plaintiff of the enrichment previously unjustifiably conferred on the defendant. The remedy can be either a personal monetary one, calculated by reference to value received (*quantum meruit*) or a proprietary one (constructive trust).

[153] Wallace submits that Richard was conferred the benefit of the 2005 improvements and reconstruction of the stage and that the corresponding deprivation is the extensive work performed.

[154] As to the extent of the work, Wallace refers to the evidence of Clarence Morgan and Jeffrey Dalton on the extensive nature of the 2005 improvements.

Jeffrey Dalton described the condition of the wharf prior to the 2005 improvements as follows:

“The state of the wharf was eroded, because most of the round sticks were rotted and gone, so that caused the ballast to wash away, and it was pretty near inusable [sic]. That’s why it was repaired, I guess. [...] Not at that time, there was no face boards, no. There was hardly any cribbing left, actually.”

[155] Wallace submits that there is no juristic reason for this enrichment as Richard acknowledges that he did not contribute in any way to the 2005 improvements and stage construction. Richard would be unjustly enriched if he were compensated for the loss of property for which he made no contribution.

[156] Wallace also submits that Calvin would have acquired a constructive trust interest in the wharf as a result of the addition he built onto the wharf in 1993.

[157] Richard acknowledges that Calvin signed a bill of sale purporting to convey Calvin’s addition to Wallace which is described in a hand drawn diagram as eight and one-half feet wide. However, he would not confirm that it does not convey any of Calvin’s supposed 1/3 share “of the whole”.

[158] For his part, Wallace takes the position that the bill of sale conveyed Calvin’s interest in the addition which he held by way of constructive trust.

[159] Wallace asserts that he, Richard and Calvin have all acknowledged that they considered Calvin to have some sort of ownership or claim to his addition, which is separate and distinct from the whole and capable of independent conveyance. Wallace therefore submits that the bill of sale must then refer to Calvin’s beneficial interest in his addition to the wharf, which would be in the form of a constructive trust.

[160] Wallace submits that the existence of these two constructive trusts, for his improvements and reconstruction of the stage as well as Calvin's addition, further complicates Richard's claim. Richard describes the wharf as having a frontage of 36 feet, yet he acknowledges that the two additions, which Wallace says are now owned by him, total 12.5 feet, or just over 1/3 of the current length of the Wharf. Wallace therefore asserts that Richard admits that his claim is to 1/3 share or interest in the "original wharf" owned by Herbert (prior to the additions), with the "original wharf" comprising about 2/3 of the current structure.

[161] Firstly, I note that Wallace's submission that the additions made by he and Calvin amounted to 12.5 feet does not explain how the wharf measured 26 feet before the additions and is now 36 feet. Richard's evidence that the width of Calvin's addition was about six feet is more probable.

[162] Further, I must consider the fact that not only did all three brothers have some sort of interest in the original wharf, they also all had use of the entire wharf. The extensions merely formed part of the whole and were not capable of being accessed or used independently. As all three had an interest in the wharf and stage, it cannot be said that they suffered a deprivation. They did not unjustly enrich a property that belonged to only one of them.

[163] As Wallace notes in his submissions, if the property were partitioned and sold, he could claim a greater share of the proceeds based on improvements he made (assuming those improvements continued to add any value after the damage done to them). This concept will be discussed in greater detail later in this decision.

[164] However, that is not the issue I have been asked to decide and, if this issue had been raised, Calvin should have been given the opportunity to become a party or intervenor as he is someone who may have a continuing interest in the property.

[165] Further, at this stage, the evidence before me is insufficient to make any finding of constructive trust and, in any event, it would be inappropriate to make such a finding in light of the relief sought.

***Determination on Ownership for Purposes of this matter***

[166] In the further alternative, Wallace agrees that if I find that the *inter vivos* gift failed and that the estate(s) have not been adversely dispossessed, pursuant to the terms of his parents' wills, the wharf and stage vested in Minnie upon Herbert's death, and then vested in Richard, Wallace and Calvin on Minnie's death.

[167] Wallace submits that Calvin's bill of sale conveyed either his share of his entire interest in the wharf and stage to Wallace or his constructive trust interest for his addition.

[168] However, Wallace ultimately acknowledged that the wharf and stage formerly owned by Herbert is now fully vested in Richard, Wallace and possibly Calvin. As a result, despite all of the submissions on transfer of ownership interests and constructive trusts, the parties do actually agree on ownership for the purposes of determining all claims pleaded other than Wallace's request for a declaration of ownership against the estates of Herbert and Minnie.

[169] To summarize, no one provided me with any evidence of documentary title or evidence as to how Herbert may have otherwise acquired title to the wharf and stage. I have found that none of the brothers acquired title by way of "adverse" possession. Further, the evidence lead was insufficient to establish any constructive trust interest allegedly acquired by Wallace and/or Calvin on a balance of probabilities. If there were to be an accounting for improvements between co-tenants in common that could happen on partition or sale, as discussed later in this decision.

[170] Finally, as noted above, Calvin was not even a party to these proceedings. It would be manifestly unfair to make any determination in respect of ownership without providing him an opportunity to participate either as a party or intervenor with standing on this issue.

[171] Ultimately, however, Richard and Wallace agree that the wharf and stage is beneficially owned by each of them and possibly Calvin. It is evident that Richard holds a 1/3 share of interest in the wharf and stage (subject to any claim for a greater share of proceeds on any partition or sale which need not be determined for purposes of this action). Further, either Wallace and Calvin each hold a 1/3 share or interest in the wharf and stage or Wallace holds a 2/3 share or interest in the wharf and stage.

**2. Are Richard and the Estate of Herbert entitled to damages for the actions of Wallace in attempting to destroy the wharf and stage? If so, what is the amount of damages?**

[172] Wallace asserts that Herbert's estate has no standing in this action. Wallace says that, as Richard only claimed compensatory damages of \$15,000.00 on behalf of Herbert's estate and did not amend his pleadings, the claim for damages should be dismissed.

[173] In response, Richard says that the only reason the estate of Herbert was named as a plaintiff is that the legal title may remain vested in Herbert's estate. If I were to make any order as to ownership of the wharf and stage it would be appropriate that the estate be a nominal party to the litigation. However, I agree with Wallace that this is not how the claim for relief was plead.

[174] Nevertheless, I find that a review of the Statement of Claim in its entirety makes it clear that Richard plead that he, Calvin and Wallace were beneficial owners of the wharf property pursuant to the wills of their parents. While the claim for \$15,000.00 was made in respect of the estate only, there is also a claim for such other relief as the Court may deem mete and just. Further, Richard's Statement of Claim makes it clear that he was claiming that both Plaintiffs have suffered damages and were continuing to suffer damages from the loss of the use of the wharf. As such, I would not dismiss the claim for damages based solely on how the claim was pleaded.

[175] The real thrust of the claim is based on Richard's submission that the wharf and stage are beneficially owned by Richard, Wallace and/or Calvin. Further, their

interests are “undivided” in the sense that neither of the beneficial owners were the owners of a separate or distinct section of the wharf and stage or the lands upon which these structures are situate. I agree with this submission.

[176] The evidence indicates that, on three different occasions, Wallace cut off, destroyed or partially cut off the bollards or mooring posts on the wharf, both those that were originally there and ones replaced by Richard and Scott. This resulted in Richard and his family being unable to use the wharf for a time.

[177] One particularly egregious act of damaging the bollards resulted in Diane almost falling over the wharf and into the waters of Seal Cove Pond. Wallace admitted that he had intentionally cut the two bollards almost all the way through so that they would break off.

[178] Wallace tore off and threw into the water a metal dock cleat attached to the wooden bumper that Richard had purchased. Wallace also tore off the wooden planks and wharf bumper that extended all along the front of the wharf and used his tractor to tear up the concrete decking. He then dumped the torn up wood and concrete so that it blocked access to the stage and made the stairs impassable.

[179] Wallace initially denied doing the above for the purpose of destroying the wharf. He testified in Provincial Court at a peace bond hearing that he was doing repairs. However, he admitted at trial that he was untruthful before the Provincial Court judge as his intention was to destroy the wharf rather than replace it.

[180] In November 2016, Richard loaded up the torn up wooden facings, bumper and concrete decking to remove it from the wharf because it was blocking access to the wharf and stage. He says it was apparent that Wallace had no intention of removing the debris.

[181] Wallace reported this as a theft of “custom” wood to the RNC but this complaint went no further.

[182] Richard and Scott replaced the bollards that had been sawn off or destroyed by Wallace on at least three occasions. Richard also spent significant time removing all of the old nails and spikes from the front of the wharf that remained after Wallace tore out the wooden facings and bumper.

[183] In September, 2016 Richard obtained a quote from a contractor, Rod Greeley, of \$7,500.00 to excavate and replace the large cribbing and posts as the bollards had been sawed off. It included the price of taking materials in and out but did not include the cost to replace the bollards. Rod Greeley testified that it would have taken him and his team several days to carry out the work.

[184] In November, 2021 Richard obtained quotes of \$2,325.54 and \$1,436.64, respectively, to buy replacement lumber and concrete. Richard noted that the cost of construction materials would have significantly increased since 2016. Wallace took the position that pressure-treated lumber and some of the materials quoted, including face boards as well as the amount of concrete, were not required.

[185] In carrying out the work with help from Scott, Richard removed some damaged portions of the wharf and cut timbers to install new cribbing, placing them with 12-inch spikes. He also bought lumber from a sawmill to place on the outside of the wharf. In addition, he replaced the base of the wharf. He did not put on a concrete top and two bollards were not replaced until just prior to trial. Even those two newly replaced bollards were only temporary. Richard also did work on the stage as it had blown down in a windstorm in 2017. He said it took him 3 to 4 weeks to carry out the repair work in addition to the two to three days his son spent replacing bollards.

[186] It is Richard's position that the amount of \$15,000.00 is a reasonable, if not low, estimate for the time and effort already expended in clean-up and repair and for the time that he will have to put in to complete the repairs in the future. He notes that the written estimates are old and the cost of labour and materials has significantly increased.

[187] For this part, Wallace suggested at trial that the materials he removed belonged to him and there was no resulting loss to Richard. However, these materials were incorporated into the real property. Like the old materials, they were fixtures that formed part of the real property that is the wharf. As the wharf is owned by Richard, Wallace and potentially Calvin in some proportion as tenants in common, the fixtures form part of the real property owned by all co-owners.

[188] It might well be the case, as submitted by Wallace, that on a sale of the wharf, Wallace may have the right to argue that he is entitled to a larger share of the sale proceeds. However, no one asked me to order a partition of the property. As such, that is not the issue that is before me.

[189] While no specific cause of action has been plead, a claim is made that the Plaintiffs have lost the use of the wharf and that Wallace pay the estate of Herbert “the full sum of \$15,000.00” which is noted in the pleadings as the estimated cost to repair the wharf and “such further and other relief as this Honourable Court deems mete and just”.

[190] In his Defence and Counterclaim, Wallace denied that he damaged the wharf, asserting he had made improvements. He further denied there was any loss of use or that repairs would cost \$15,000.00.

[191] However, in their briefs, both pre and post-trial, the parties addressed the issues as claims arising between co-owners of real property with each claiming the other had “ousted” them from the wharf.

[192] However at trial, Wallace admitted that his actions in removing and partly cutting through the bollards, removing the concrete decking, the wooden facings and bumper and depositing all of the torn up materials in front of the stage and on the stairs was intended to make the wharf unusable by Richard. Richard submits that this would effectively “oust” him from the use of the wharf, and thereby constitute the tort of trespass, even though this claim was not specifically plead.

[193] While the Statement of Claim is lacking in particularity, there are sufficient facts plead for Wallace to understand the nature of the claim and respond to it as he has done. Further, no argument was raised that I should not deal with this issue of ouster as arising from the pleadings.

[194] However, Wallace takes the position that Richard cannot obtain either injunctive relief or damages for repairs. He submits that a co-tenant in common cannot claim against another co-tenant for intentional damage done to co-owned property and be awarded monetary damages. The only remedy is to make a claim for partition and seek relief on sale. Further, a claim for an injunctive was not sought in the pleadings.

[195] Wallace also notes that I made it clear at the beginning of trial that the only issues being adjudicated in this action are those that were plead. No injunction or application for partition was sought and no request to amend the pleadings was made. As such, that an award of damages is not available to Richard.

[196] Wallace refers to chapter 12 of Anne LaForest's text, *Anger & Honsberger Law of Real Property*, 3rd ed., looseleaf, (Canada: Thomson Reuters, 2021) where the author deals in section III with the rights and obligations between tenants in common and the remedies available to them at law.

[197] In dealing with remedies in respect of waste, Wallace refers to section 14:26 Trespass and Waste by Tenants in Common, which reads as follows:

The court will not restrict a tenant in common in the legitimate enjoyment of the estate because an undivided occupation is of the very essence of a tenancy in common and to interfere with that right would be to deny an essential equality of title. Therefore, a tenant in common is not entitled to an injunction where their co-tenant is exercising their rights in a legitimate manner. If a tenant in common desires relief, they must proceed by partition. Equitable waste will not be restrained but, if a tenant in common proceeds to destroy the common property, they will be restrained by injunction. It has been said that: It is clear that a tenant in common has not an unlimited power to do as he will with the estate; for though the court is slow to interfere between tenants in common, yet where one commits any act

amounting to destruction, he will be restrained. Hence, the digging of earth for bricks was restrained.

[198] Wallace asserts that it is a longstanding principle that partition is required for relief in these circumstances, referencing *Dougall v. Foster*, [1853] CarswellOnt 42, 4 Gr. 319, from the Court of Chancery of Upper Canada. In addition to the Chancellor's judgment, the report includes the *obiter dicta* of two Vice Chancellors, and they all express varying opinions on what conduct would warrant an injunction. However, all three are clear that the remedy against a tenant in common is partition.

[199] Wallace also refers to a statement of this principle Grimmer J. in *Hersey v. Murphy*, 1920 CarswellNB 35, 48 N.B.R. 65 (S.C. (Ch.)) at paragraph 14:

Having reached this conclusion it is quite unnecessary to labor the matter further, but as an injunction was applied for and obtained, and I am asked to continue it, I desire to say that the trend and bulk of authority is that in some cases Courts of Equity will grant an injunction in favor of one co-tenant against another, to prevent waste (which is not the case here) but the jurisdiction is sparingly exercised, and the Court will grant an injunction only where the waste complained of is malicious or destructive, or attended with peculiar circumstances warranting such relief. As between tenants in common, acts of destructive waste only will be restrained: *Hole v. Thomas*, 7 Ves. Jr. 589. The note to this case is of such importance I deem it advisable to state it here:

In case of coparceners and tenants in common, no legal remedy is provided as to acts of waste or trespass between themselves: *Matts v. Hawkins*, 5 Taunt. 24, but Courts of Equity will interfere not only when (as in the principal case) one tenant in common is committing acts which, if suffered to go on, would amount to a destruction of the property, (*Norway v. Rowe*, 19 Ves. 159), but also, whenever it appears that any sort of waste has been committed, or threatened, by one tenant in common, who has, by contract, become the occupying tenant of the other, and who is consequently bound to treat the property as any other occupying tenant should treat it, (*Twort v. Twort*, 16 Ves. 132), though prospective relief cannot be given, as against tenants in common against acts of mere equitable waste: *Smallman v. Onions*, 3 Brown 622. The remedy, in such cases, is to apply for a partition: *Goodwin v. Spray*, 2 Dick. 667.

[200] In response, Richard points out that Wallace, in his submissions, acknowledges that he agrees in principle that no person has the right to intentionally damage or interfere with the property rights of another and that no one has the *prima facie* right as property owner to do damage. He says Wallace's position that he cannot claim for "ouster" is inconsistent with his own position that he can make a claim that he has been "constructively ousted" from the wharf and shed, as discussed later.

[201] Richard also refers to the portion of *Anger & Honsberger* quoted by Wallace acknowledging that an undivided occupation is at the very essence of a tenancy in common and that to interfere with that right would be to deny an essential quality of title. The authors also note where a tenant in common commits any act amounting to destruction that tenant in common will be restrained. This suggests that the Court can make an order for an injunction even if it is not specifically plead as it would be "mete and just" in the circumstances.

[202] Having reviewed the above submissions and case law, I find that the law does allow Richard the right to claim injunctive relief restraining destructive waste. However, as noted, no such relief was sought in the pleadings and I made it clear to counsel at the start of, and during the course of, trial that they needed to focus on the claims that were placed before the Court. At no time did counsel ask the Court to allow an amendment to the pleadings.

[203] I also agree with Wallace's position that no evidence was presented as to any acts of waste after 2018. There is no suggestion that Wallace intends to carry out any further destruction in the future. He finally acknowledged at trial that he had no legal right to destroy the wharf. As such, I will not grant injunctive relief that was not pleaded and appears to no longer be required. However, any further destructive waste could result in legal action with attendant relief and cost consequences.

[204] That then leaves the issue of whether Richard can claim for costs of repair and loss of use as a result of his right to claim that he was ousted from the wharf and stage.

[205] In response to Wallace's submission that a monetary award is not available between co-tenants in common, absent an application for partition pursuant to section 46 of the *Conveyancing Act*, R.S.N.L. 1990, c. C-34, Richard refers to the text by Bruce H. Ziff, *Principles of Property Law*, 7th ed., looseleaf (Canada: Thomson Reuters, 2018). The author notes at pages 394 and 397 that an owner, even one holding in fee simple, may be liable for waste. Ziff also notes that an attempt to oust a co-owner may be regarded by the Court as a trespass by the co-owner.

[206] Ziff references the 1857 decision of *Stedman v. Smith* (1857), 8 E.L. BL.1, 120 E.R.1 (Q.B.), where the Court held with respect to a dispute by tenants in common over a common wall that an actual ouster by a defendant of a plaintiff from the possession of the common property would constitute a trespass upon which a plaintiff might maintain an action against a defendant.

[207] Richard takes the position that he can claim in trespass because he has been actually ousted from the property. In support of this position, he refers to the 1873 decision of the New Brunswick Court of Queen's Bench in *Brown v. Moore*, 1873 CarswellNB 55, 15 N.B.R. 42 (N.B. S.C.)

[208] That case involved an action by a tenant in common against his co-tenant in common for ouster. The defendant had attempted to exclude the plaintiff by locking a gate to a portion of the property that was co-owned. At paragraph 5, the court noted that the object and intent of the defendant was to exclude the plaintiff from any occupation of that part of the land and thereby to destroy his benefits as co-tenant in common.

[209] At paragraph 7, the court notes that if a tenant in common does not allow the other tenant in common the right to enter or occupy the land (for example by driving out of the land any of the cattle of the other tenant in common) this is an ejectment or expulsion whereupon the other tenant in common can recover damages for the entry.

[210] The type of actions which might result in an action by a tenant in common must be those that are shown to have adversely affected the right of the co-tenant in common and with the intention to oust the co-tenant in common by asserting actual and exclusive ownership of the entirety (paragraph 9).

[211] Wallace acknowledges the intent of his actions was to prevent Richard from accessing and using the wharf and stage. He was successful in his intent for a period of time. This constituted an attempt by Wallace to assert actual and exclusive ownership of the entirety of the wharf and stage. The claim of ouster has therefore been made out. I also find support in the above authorities that a claim for damages for ouster may be made outside an application for partition.

[212] However, I still must consider what damages could be claimed by a tenant in common for such an ouster. The cases relied on by Richard dealing with ouster provide no guidance on the measure of damages.

[213] Richard relies on damage awards in traditional cases of trespass as between persons who are not tenants in common. In a trespass action heard before Judge Skanes of the Newfoundland and Labrador Provincial Court in 2015, *Newhook v. St. John's (City)* (2015), 372 Nfld. & P.E.I.R. 352, 1158 A.P.R. 352 (N.L. Prov. Ct.), at paragraph 9, she noted the following excerpts from the Canadian Encyclopedia Digest:

163. A successful Plaintiff in a trespass action is entitled to damages awarded based on the principle of restitutio in integrum. If the measure of damages is the cost of repair, it must be reasonable, practical and fair in all the circumstances.

[214] At paragraph 15, she also referenced the Ontario Superior Court decision of *Pyper v. Crausen*, 2008 CarswellOnt 1455, 166 A.C.W.S. (3d) 205 (Sup. Ct. J.) where the court stated, in part:

... In other words, the successful plaintiff in a trespass action is entitled to "that sum of money which will put the party who has been injured, or who has suffered,

in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. ...

[215] In response, Wallace says that, even if such damages could be made out, Richard claims to hold only a 1/3 share of interest, and as the remaining 2/3 of the interest is held by Wallace and/or by Wallace and Calvin, Richard cannot recover the entire costs of the repairs. In *Anger & Honsberger*, at section 14:27, the author says that it has been held that tenants in common may join in action of debt or covenant but that, if one sues alone, they can only recover their portion. Richard can therefore recover, at most, 1/3 share of the total cost.

[216] Wallace also asks me to consider the evidence of Calvin and a neighbour, David Lear, which indicate that the Wharf now appears to be completely repaired, aside from the fact that the concrete that Wallace had added has not been replaced and neither have two bollards.

[217] Further, Richard's evidence was that he and his son performed the necessary work over a few days with materials he had on hand. The evidence also reveals the wharf has actually been used by Richard and his family after that repair work. The loss of use of the wharf was therefore only for a short period of time.

[218] Wallace also takes issue with the quotes Richard has obtained. He notes that the quote for concrete from Capital Ready Mix includes enhancements that were not part of the wharf that was damaged and extends the concrete area beyond what had previously been there. As a result, the true cost of replacement would be just a small fraction of the quote.

[219] Aside from the concrete, Wallace submits that the remainder of the claim for the excavation and lumber is wholly unnecessary. Essentially, Richard is taking the position that the wharf must be completely torn down and rebuilt for the sole purpose of properly replacing the bollards. The evidence does not support that this work is required.

[220] Wallace says that Rod Greeley does not have sufficient experience building wharves to make any reliable representation as to what a sufficient bollard would require and he had no experience at all when he met with Richard to prepare the quote in 2016. Wallace says the temporary bollards are more than sufficient and Richard has continued to moor his boats there for years with no issue.

[221] Wallace also submits that if I find that excavation is not required to replace the bollards, then the lumber, or at least the majority of it, is also not required. There was conflicting evidence regarding the status of the face boards on the wharf. Richard testified that 11 out of 62 feet of face boards remain, while Calvin and David Lear both testified that they believe they have been replaced.

[222] Wallace submits that all of the lumber would only be required in the event of excavation and a complete rebuild of the face boards. If the Court finds excavation unnecessary, the majority of the Richard's claim cannot succeed. In fact, the two quotes for lumber and excavation total \$9,825.54 of the total amount claimed of \$11,262.18 or about 87% of the Richard's claim.

[223] In the event I find that all or part of the lumber is required, Wallace submits that the quote for lumber is also significantly inflated as it is for pressure-treated lumber which was not previously used and it includes four posts for bollards that were not included in Rod Greeley's 2016 quote.

[224] Wallace therefore says the evidence indicates that Richard is seeking an order that Wallace pay for unnecessary renovations rather than repairs.

[225] Finally, Wallace submits that if Richard can make a claim for repairs, then the Court should consider "all just allowances and such directions as will do complete equity between the parties". As Wallace has made improvements which have increased the selling value of the property Richard cannot take the advantage of the increased value without submitting to an allowance for those improvements. On accounting, any award to Richard would be outweighed by an award to Wallace.

[226] As noted above, having considered the case law and submissions of the parties, I find that the law allows Richard to claim that he has been ousted for the property and therefore maintain an action in the nature of trespass seeking damages. However, I agree with Wallace that a claim for monetary damages for repair is complicated by the fact that Richard's rights are as a tenant in common. He acknowledges that he is only a 1/3 owner of the wharf and stage. Further, he has not actually incurred the costs he is now claiming to carry out work on the wharf and shed. If I were to award him the full amount claimed, there is no assurance that this amount will go towards any further repair work and thereby benefit all co-tenants in common.

[227] It is for that reason that the law does not generally allow one tenant in common to claim the entire cost of repairs and betterment from other tenants in common, even one who has ousted him, without making a claim for partition or at least adding all tenants in common to the action (ie., Calvin, whom Richard claims holds a 1/3 interest in the wharf).

[228] Just as Calvin cannot claim against Richard and Wallace for any improvements he made to the wharf in 2005 because he did not make a claim for partition, Richard cannot claim for his work on the wharf until one of the tenants in common makes a claim for partition. It is at that time that a court would make an accounting for work done on the property as between the tenants in common.

[229] This also aligns with the rationale behind allowing a claim for ouster as a claim in the nature of trespass. The purpose of allowing a tenant-in-common to make a claim for actual ouster is to compensate that tenant in common for their loss of use and to put them in a position where they can exercise their ownership and use rights that are at the essence of the rights associated with a tenancy in common.

[230] This differentiates the damage awards in respect of the trespass cases submitted by Richard in which all property owners have claimed against a third party for trespass.

[231] Even if I were to find that Richard can claim for the cost of repairs, I agree with Wallace that Richard has not established that all proposed repairs are necessary. In fact, Richard obtained a permit to repair from the Town and was given authorization to complete the necessary repairs to make the wharf safe for use even while the issuance of the permit was under appeal. Richard's own evidence and that of others, including a neighbour who lives across from the wharf, is that he has used the wharf after work was done by Richard and Scott. I find it hard to believe that Richard would use the wharf and risk injury to himself and his family if it were not safe.

[232] Richard's evidence and that of Rod Greeley suggests that the estimates obtained are for work that was required to "properly" repair the wharf. While Wallace did not provide me with any evidence from someone with knowledge of wharf construction from which I can properly assess the cost of repair, given the small amount of the claim, I can understand why he would not go to this expense.

[233] However, the evidence I was provided does indicate to me the quote is for an area and depth of concrete that is greater than what had been there. It also includes prices for other improvements and pressure-treated lumber which represents an improvement of the type of wood that had been there.

[234] However, if Richard wished to proceed to better the wharf by making improvements, including a new and better concrete pad and a better grade of lumber, he would be free to do that as would any tenant in common. In such a case, he could argue for a greater share of the proceeds on partition or sale, as permitted by law.

[235] It is up to a party to determine how they frame their claim and relief for damages. In this case, Richard clearly chose to make a claim in damages rather than seek partition of the property. He stated back in the summer of 2016 that his wish was for the parties to continue in "peaceful ownership." However, having heard the evidence as to the animosity between the parties and how entrenched they are in their positions, I question where there is any realistic possibility of peaceful possession and whether the end of this litigation will bring about that result.

[236] While I am not prepared to order damages for the work that Richard wishes to carry out, I am not suggesting that Wallace should not pay some amount of damages to place the wharf back in the position where other tenants in common could use it. In particular, I find that any damages awarded for ouster should take into account Wallace's intentional acts of destruction and compensation for the time that Richard was unable to use the wharf.

[237] *Baker v. Baker*, 1976 CarswellBC 153, 3 W.W.R. 492 (S.C.) relied on by Wallace and summarized later in this decision, stated that a compensatory award for occupational rent based on loss of use can be made. Wallace himself submitted that he could make a claim against Richard for occupational rent as a result of his alleged ouster. I would also consider it appropriate to compensate for the time and effort Richard and Scott put into repairing the wharf to the point where Richard could exercise his rights of use as co-tenant in common.

[238] However, I was not provided with any evidence by either party of an appropriate rent and I have no real evidence of any expenditures made by Richard to date. Nevertheless, I must note the small amount of the claim and value of the property. Give the amount at stake in this action, it would be inequitable and disproportionate to require the parties to provide further evidence on this issue.

[239] I am therefore prepared to make a global general damages award to Richard of \$6,000.00 to compensate him for the loss of use of the wharf and the time and effort put in by him to place the wharf in a condition where he can exercise his rights as a tenant in common.

**3. Has Richard unlawfully interfered with Wallace's right to use the wharf and stage and, if so, what is the amount of damages?**

[240] Wallace submits that Richard unlawfully interfered with his use and enjoyment of the wharf and stage by:

- a) repeatedly destroying locks on the stage, leaving Wallace's fishing equipment exposed to the elements and vulnerable to theft, thereby rendering it unfit for storage;
- b) giving an ultimatum of "peaceful co-ownership" under threat of partition and sale as executor of Herbert's estate; and
- c) applying for a work permit in the name of Minnie's estate;
- d) Richard and his family closely observing, videoing and photographing Wallace at the wharf and stage; and
- e) generally seizing ownership and control over the wharf as executor.

[241] In making this claim, Wallace relies on the same concept of ouster as relied on by Richard in his claim against Wallace. Wallace acknowledges that he may not have been actually "ousted" from the wharf and stage as he was not physically prevented from using them but he relies on the British Columbia Supreme Court decision in *Baker* at paragraphs 14 and 15 for his position that Richard's conduct resulted in constructive ouster. He says that intolerable conditions can amount to ouster without physical barriers. As noted above, at paragraph 31 of that case, the court awarded occupational rent, stating that the award was simply compensatory.

[242] However, the acts that are alleged to constitute constructive ouster in that case were significantly different than those that are now before the Court. *Baker* was a family law case in which the court was asked to determine whether the wife was entitled to make a claim for occupational rent in respect of the matrimonial home after her husband allegedly ousted her from the home by causing her terrible physical and mental strain, creating impossible living conditions.

[243] This is a case which predates modern family law statutes and it is apparent the court was attempting to use property doctrines to create a remedy for a spouse who was a joint tenant with the other spouse in a matrimonial home. It has limited, if any, application to this claim involving use of a wharf and stage by tenants in common who only used the property on limited occasions.

[244] The case law dealing with ouster on which the court relied noted the general rule that a joint tenant may not make a claim for loss of use or occupation against the other tenant unless they have been ousted by the other tenant. Unless ouster is made out, the court can only make allowances between the tenants for any improvements to or loss of use of the property where a court severs a joint tenancy by court order for partition and sale. I refer to paragraph 11 of *Baker* that in turns refers to the 1920s decision of the Ontario Court of Appeal in *Mastron v. Cotton*, 1925 CarswellOnt 232, 58 O.L.R. 251, (C.A.).

[245] Richard also notes that at no time did he tell Wallace, either orally or in writing, that he could not use the wharf and stage. Further, he took no action to physically prevent him from using the property. Even during the course of the peace bond hearing against Wallace in 2017, Richard did not seek an order restraining Wallace's use of the property. Similarly, no other court actions were taken to prevent Wallace's use.

[246] Richard notes the evidence reveals that Wallace did in fact attend at the wharf and stage after the locks were removed and Wallace's permit to repair was revoked. Having reviewed the evidence at trial of the video footage taken by Richard, I am satisfied that the nighttime footage was taken on August 21, 2016 and not a month earlier.

[247] In particular, Richard's testimony that the footage was recorded the day after his wedding anniversary is credible as that date would stand out in his mind. The advanced state of destruction of the wharf also indicates that the footage could not have been taken a month earlier. This is clear from seeing photos of the destruction of the wharf taken throughout the summer of 2016 and the time stamped date from

Richard's phone. The camera footage also shows "Lear Estate Permit Revoked" which was written on the stage after August 11, 2016.

[248] Further, while it is true that Richard placed cameras on the property, this was done to stop further destruction of the wharf. The presence of cameras should not have deterred Wallace from entering onto the property for lawful purposes.

[249] It is also true that Richard laid complaints with the Town and the RNC that the wharf was being destroyed. The RNC did not act but the Town did revoke the permit as it was not repairs that were being carried out by Wallace, but rather destruction. However, this did not amount to interference with Wallace's lawful use of the property.

[250] Richard also acknowledges that he removed locks from the stage but this happened after Wallace refused to allow him access to the locked stage. Wallace had also screwed the stage door shut with deck screws after Richard first removed the lock. Further, while leaving the stage unlocked it may have placed Wallace's property at risk of theft, I find that it did not interfere with Wallace's lawful use of the stage.

[251] With respect to Richard's application to repair the wharf, again this did not interfere with Wallace's use of the wharf. The permit was necessary in order to lawfully repair the wharf.

[252] Overall, I am satisfied that Richard's actions, including his actions in removing locks, filming activities at the wharf, and laying a complaint with the Town about the destruction of the wharf contrary to the repair permit were for the purposes of avoiding further damage.

[253] These actions could not amount to a constructive ouster as they would not have created intolerable conditions if Wallace had wished to access the wharf and stage. In fact, Richard was only occasionally at the wharf himself. Wallace's own

actions is continuing to go to the wharf when Richard was not present indicate that he did not feel his ownership and access rights had been denied. While Wallace may not have felt welcome at the wharf, he created this situation through his own unlawful actions. Richard did not prevent Wallace from exercising his right of access. Wallace has not established on a balance of probabilities that he was constructively ousted.

**4. Has Richard unlawfully interfered with Wallace's right to exercise any interest in or use of the twine shed and, if so, what is the amount of damages?**

[254] Wallace claims that he had an interest in the twine shed and he should be compensated for that lost interest and/or loss of use. He values his alleged 1/2 share interest at \$5,000.00.

[255] Wallace arrives at this \$5,000.00 valuation by suggesting that an appropriate share of the profits of the sale of the twine shed would be \$7,500.00, representing a 1/2 share of his estimated \$15,000.00 valuation for the entire twine shed. Wallace based this valuation on his estimation that the twine shed represented approximately five percent of the \$296,500.00 sale price of Richard's property. He reduced the \$7,500.00 value to account for what he estimates that Richard put into the property over the years. I will note that these estimations of value are not supported by any evidence other than Wallace's own estimations.

[256] In considering this claim, I find that the twine shed was constructed in 1986 or 1987 and, while it was located on Richard's property, the initial construction was largely financed by Herbert, with labour supplied by Herbert, Wallace and Richard. As with the wharf and shed, Wallace asserts it was Herbert's intention that the twine shed be used by his sons while fishing. Richard denies that Wallace or Herbert had any ownership interest in the twine shed or that Herbert had ever gifted the twine shed or any interest in it to Richard and Wallace.

[257] Calvin testified it was his father's intention that Richard and Wallace use the twine shed as part of their fishing enterprise. In fact, he believed his father gifted the two brothers his share in the twine shed when he retired from the fishery. However, this gift was not in writing and Calvin could not recall being part of or overhearing any conversation on this point.

[258] Wallace refers to the evidence of Harold Janes, who assisted with the installation of some duct work when the twine shed was constructed. Harold thought he may have been paid by Wallace but was not sure of this. He also said he assumed, by the conduct of everyone, that the twine shed was constructed by and for the use of the Herbert, Richard and Wallace.

[259] The twine shed was in fact used by the sons for about 20 years until Richard no longer permitted Wallace to use it 2016. In the first years after its construction, the parties contributed equally to oil for the furnace in the shed. However, that practice was discontinued and Richard then began paying all oil expenses as well all taxes, electrical and insurance expenses. Richard then sold the property on which his home and the twine shed were located in 2018, with no portion of the proceeds going to Wallace.

[260] Wallace notes that, on cross-examination, Richard did not even deny that compensation to Wallace would be appropriate. Instead, Richard stated that he believed Wallace had already been compensated by not having to pay any rent, repairs, or other expenses over the years.

[261] For his part, Richard says that the evidence reveals that he made significant improvements to the twine shed following its construction, all at his own expense, which included replacing all shingles on the roof, and the addition of vinyl siding, a garage door and a metal entrance door. In addition, he paid all property taxes, insurance costs, electrical bills and maintenance costs.

[262] Richard acknowledges that he asked Wallace to contribute to repairs and improvements but that Wallace refused to make any contribution. When questioned

about his lack of contribution at trial, Wallace's answer was "why would I pay for something that I don't own."

[263] With respect to the assertion that Wallace held any legal or beneficial interest in the twine shed, Richard submits that this assertion is unsupported by the evidence and law. The same can be said of Wallace's submission that Herbert had any interest that could have been gifted to his sons. Richard again relies on the *Statute of Frauds* which requires that a transfer of interest in land must be in writing.

[264] With respect to the claim for loss of use, Richard repeats that the benefits enjoyed by Wallace from 1986 or 1987 to 2016 far exceeded any contributions he made to the initial construction of the twine shed.

[265] I reiterate the statements of law above with respect to the requirements that transfers of an interest in land must be evidenced in writing pursuant to the *Statute of Frauds*.

[266] As with the wharf and stage, there is no evidence, either written or oral, to suggest that Herbert gifted any interest he may have thought he had in the twine shed to Richard and Wallace. In fact, there is no evidence that establishes on a balance of probabilities that either Herbert or Wallace had any ownership interest in the twine shed. Again, Wallace asks that I infer an intention to create contractual relationships between family members without evidence to substantiate that intention.

[267] Based on the evidence of the close family relationship between Herbert, Richard and Wallace at the time the twine shed was constructed, I find it likely that Herbert gifted work and materials to Richard to construct a twine shed on his matrimonial home. This would certainly not be an uncommon occurrence between father and son.

[268] The evidence also indicates that approximately  $\frac{3}{4}$  of the twine shed was used by Richard as a garage for storage of personal items such as boat trailers, ski-doo's and a sit-on lawn mower with no complaint from either Herbert or Wallace.

[269] The twine shed was also located on Richard and Diane's matrimonial home property with no evidence the shed was or was intended to be moveable. There was no evidence of any agreement by Richard, Wallace or Herbert that the twine shed would not form part of the real property if Richard and Diane sold their home.

[270] Perhaps more importantly, Wallace testified that he refused to pay expenses associated with the twine shed because the twine shed was not his. Wallace's own actions and statements are contrary to his assertion that he had any ownership interest in the twine shed.

[271] All of the above indicate that neither Richard, Herbert nor Wallace ever intended that Herbert or Wallace would have any ownership interest in the twine shed. There is also absolutely no evidence to suggest that Herbert gifted any ownership interest he may have had to Wallace.

[272] Having said that, I am also satisfied that it was the intention of all that Richard would allow the others to use the twine shed for the storage of fishing gear.

[273] Herbert and Wallace enjoyed the use of the twine shed for many years after it was constructed. After Herbert stopped fishing, Wallace continued to benefit from its use as storage. However, in his post-trial brief, Wallace has also claimed the amount of \$1,000 - \$2,000 as compensation for the loss of the use of the twine shed between 2016 and 2018. However, there is no evidence there was ever any agreement that the use of the twine shed would continue until Richard sold the property.

[274] Further, even if Wallace was entitled to any damages based on an alleged breach of an oral contractual agreement that he could use the twine shed, Richard

says that the amount sought by Wallace should only amount to a reasonable amount of rent based on similar storage space.

[275] Having found that there was never any agreement that Wallace's use would continue indefinitely, I also find that Wallace was given ample notice by Richard that he must retrieve his belongings but he failed to do so. He has not established any right to damages based on his loss of use.

**5. In the alternative to (4), did Herbert's financing and labour and Wallace's labour in respect of the twine shed, create a constructive trust for their benefit? If so, was Herbert's constructive trust interest then gifted *inter vivos* to Richard and Wallace in equal shares? If so, what is the value of this constructive trust?**

[276] Wallace's position is that Herbert's financing and labour in respect of the twine shed created a constructive trust in his favour. This constructive trust interest was then gifted *inter vivos* to Richard and Wallace in equal shares. Wallace says that his own contribution to its construction, together with his share of Herbert's interest, resulted in each of Richard and Wallace holding a 1/2 share equitable interest in the twine shed.

[277] However, as noted above, I find it is likely that both Herbert and Wallace made contributions towards the construction of the twine shed without any expectation of creating an ownership interest or expectation of any type of interest in the shed. While Richard may have benefited from their work and materials, I cannot find that Richard was unjustly enriched to the prejudice of Herbert and Wallace.

[278] Herbert had use of the twine shed while he fished and Wallace had use of the twine shed for almost 30 years, long after the fishing enterprise ended, with little to no contribution beyond his initial labour. They did not suffer any deprivation and Richard was not unjustly enriched by their contributions.

[279] Having found no ownership interest in the twine shed, either by way of gift or constructive trust, and no agreement with respect to a continuing right to use the twine shed, I make no finding of a constructive trust and also make no award of damages for any loss of use of the shed.

**6. Did Richard trespass the real property of Wallace on September 21, 2016? If so, what is the amount of damages?**

[280] Wallace asserts that Richard trespassed on his property on several occasions but his pleadings reference only one date of September 22, 2016. As noted in the summary of facts above, Wallace and Calvin both provided evidence of other incidents when Richard arrived while Wallace was in his vegetable garden with Calvin but the dates of those incidents and what happened are far from clear.

[281] Further, those incidents were not pleaded and there is little to no evidence on that other than Calvin's evidence.

[282] However, Richard did acknowledge an incident on Wallace's property in August, 2016. Wallace asked Richard to leave. Richard took Wallace's warning and left the property. As such, I find that Richard did not trespass on Wallace's property on that occasion.

[283] The more significant incident that is alleged to constitute trespass to real property is the incident in September 2016. While the Counterclaim alleges the event occurred on September 22, 2016, the evidence at trial indicates the date as September 21, 2016. As no one was prejudiced by the mistaken date in the pleadings, I will deal with the September incident in respect of which evidence was given at trial.

[284] On that occasion, Richard acknowledges that he came onto Wallace's property and there was a resulting physical altercation. That physical altercation is the subject of the claim for assault and/or battery referred to below.

[285] Richard and his wife both testified that Richard had gone onto Wallace's property to give Wallace money for his share of the Crown lease on the cabin. Richard testified that Wallace had been telling him for many weeks that he owed him money for the lease. When Richard saw Wallace on his property, he thought that was a good time to bring out his share of the payment in an envelope.

[286] Wallace testified that he immediately asked Richard to leave and noted that he had given Richard previous warning that he was not to come onto his property. A physical altercation, as later described, then ensued.

[287] I will not go into every detail of the physical altercation that occurred between the two parties but suffice it to say the parties engaged in physical aggressions with Wallace attempting to remove Richard from his property.

[288] Richard acknowledges that there was a no trespassing sign on Wallace's property. However, the words "no trespassing" were written on Wallace's property for many years prior to the incident as a general deterrence. In fact, Richard had been on Wallace's property with that sign displayed numerous times without any indication that he was not welcome prior to August, 2016.

[289] However, I find that Richard would have been aware in September 2016 that Wallace had specifically forbidden him from entering onto his property as a result of the August, 2016 incident. While I accept that Richard's motives were to deliver an envelope to Wallace, he did not need to enter onto Wallace's property to effect that delivery of funds. With the clear prior warning given by Wallace, I find that Richard did commit an act of trespass on September 21, 2016.

[290] Richard takes the position that, if I do find that he trespassed on the property of Wallace, that trespass was at best *de minimus* and Wallace put forward no evidence to suggest that there was any damage to his property.

[291] On the other hand, Wallace relies upon the decision from the Ontario Superior Court of Justice in *Fitzpatrick v. Orwin*, 2012 ONSC 3492 which suggests that a claim for trespass will still exist even when there is no quantifiable loss. In particular, Wallace relies upon paragraphs 159 and 160 as reproduced below:

159 In *Hudson's Bay Co. v. White*, [1997] O.J. No. 307 (Ont. Gen. Div.), rev'd on other grounds [1998] O.J. No. 2383 (Ont. Div. Ct.) (QL), at para. 15, Lederman J. held that general damages for trespass may only be awarded where there is evidence that a loss was suffered. In contrast, nominal or punitive damages for this tort may be awarded without proof of loss, since this tort is actionable per se. These reasons were adopted by Harvison-Young J. of the Ontario Superior Court in *Cantera v. Eller*, [2007] O.J. No. 1899 (Ont. S.C.J.), aff'd 2008 ONCA 876 (Ont. C.A.), at para.63.

160 I also adopt Lederman J.'s reasoning and note that the Squires have not provided any evidence of actual losses suffered as a result of Mr. Fitzpatrick's trespass, apart from those for which they have been compensated for the tort of intentional infliction of mental distress. As such, they can only be awarded nominal damages. In *Canter*, \$1,000 was awarded for trespass where a neighbour tore down a fence after receiving communication that it was not constructed on his property. In *Freitas v. Defraga*, [2006] O.J. No. 2152 (Ont. S.C.J.), Perell J. awarded \$2,500 in damages for trespass where a neighbour continuously trespassed onto the abutting driveway of another neighbour. The facts in *Freitas* also demonstrate several acts of neighbourly misconduct and animosity as occurred in the current case. Justice Perell also awarded general damages of \$2,000 for trespass in *Mueller v. Lee*, [2007] O.J. No. 1045 (Ont. S.C.J.) where the construction project of one neighbour damaged the curb of another neighbour.

[292] As noted above, in that case, the court was willing to grant nominal or punitive damages, quoting previous decisions in which damages have been awarded where trespass occurred to facilitate acts of neighbourly misconduct. The damages awarded in those cases ranged anywhere between \$1,000.00 and \$2,500.00.

[293] Wallace also relies upon the case of *Gillespie v. Gill*, 1999 BCPC 39, in which Dhillon, J. awarded a plaintiff \$2,000.00 in aggravated damages for mental distress and loss of quiet enjoyment of their property. However, it is notable in that case there was actual physical damage to the property. Machinery had travelled over an easement, tearing out flowers, stripping branches of trees and destroying a fence.

[294] Relying upon these cases, Wallace submits that, adjusting for inflation, appropriate damages for what he alleges are repetitive acts of trespass would be in the range of \$3,000.00 to \$4,000.00.

[295] As I have found that there was only one act of trespass on September 21, 2016, that resulted in no property damage or loss of enjoyment of the property, I am only prepared to award nominal damages in respect of that act of trespass in the amount of \$1,500.00.

[296] However, the more significant issue to determine in respect of the incident of September 21, 2016, is the alleged claim for assault and/or battery.

**7. Did Richard commit the torts of assault or battery on Wallace on September 21, 2016? If so, what is the amount of damages?**

[297] I find on the evidence at trial that Wallace initiated a physical altercation with Richard after he failed to leave the property. Wallace threw a wrench at Richard and then grabbed him by the shirt collar.

[298] It is at that point that the parties' recollection of what transpired is irreconcilable. Richard says that Wallace, without warning, released his right arm from Richard's left shoulder and punched him in the face with his closed fist, causing him injury and breaking his eyeglasses. After that, Richard pushed Wallace back over a pile of junk. Richard stuffed the envelope in Wallace's coat, threw a pen at him and left. Wallace then left on his tractor.

[299] However, Wallace denies that he punched Richard in the face with his fist. He acknowledges that he may have accidentally struck Richard in the face with his elbow but said he didn't have an actual recollection that was the case.

[300] Wallace says that the fact that he first made physical contact with Richard is not relevant. Wallace was entitled to use reasonable force to eject a trespasser from his property.

[301] Wallace relies on the Saskatchewan Court of Queen's Bench decision in *Saunders v. Patricia Hotel (1973) Ltd.*, 2000 SKQB 109 which states in paragraphs 18-20 as follows:

18 ... Under the common law a person who refuses to leave the premises after he has been requested to leave becomes a trespasser in which case the owner or proprietor is entitled to use reasonable force to remove the trespasser from the premises. Whether the force used was reasonable will depend on the circumstances of each case. See: *Anderson v. Sutherland* (1954), 14 W.W.R. 413 (Sask. Q.B.).

19 The burden of proof is on the defendant to establish that the force used was not excessive. The test is whether the force used was more than was reasonably necessary. See: *Cottreau v. Rodgeron and Saulnier*, 1965 CarswellNS 18, 53 D.L.R. (2d) 549 (N.S. S.C.).

20 I conclude that the plaintiff became a trespasser after he was repeatedly asked to leave the premises but refused to do so. He was afforded a reasonable opportunity to leave the premises. The amount of force used by the defendant's employees amounted to nothing more than the forcible removal of the plaintiff. The defendant has met the burden of proof in establishing that the force used was not excessive.

[302] Wallace submits that he did not use excessive force and did not intend to strike Richard at all. Rather he was trying to drag Richard off the property in a non-violent manner. He does not reference throwing a wrench.

[303] Wallace submits, in the alternative, that striking Richard in the face would not be excessive force noting that Richard testified that Wallace had tried to push Richard, but Wallace said he "couldn't push me around".

[304] In determining whether excessive force was used, I am aided by both the oral and documentary evidence entered at trial.

[305] Richard entered into evidence photographs taken by his wife following the incident showing him with a red and swollen nose, cuts on the bridge of his nose and two black eyes. For his part, Wallace entered into evidence photographs showing bruising on his torso, shoulder and arm area.

[306] These photographs clearly show that there was a physical altercation between the two and that Wallace made physical contact with Richard's face, either through his fist or his elbow, but the contact was clearly significant and intended to injure.

[307] Wallace's photographs also indicate that Richard made physical contact with him and are consistent with some grabbing and pushing Wallace in accordance with his testimony. Richards says this grabbing and pushing is consistent with him acting in self-defence.

[308] A good synopsis of the legal framework to be applied when defending a claim of assault and/or battery based on the doctrine of self-defence is set out in the 2008 decision of the Supreme Court of British Columbia in *Buchy v. Villars*, 2008 BCSC 385. At paragraph 112, the court stated as follows:

112 While the parties cited a number of cases on the issue of self-defence, I believe an accurate summary of the law is contained in Linda D. Rinaldi, ed., *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) vol. 1 at 2-30 to 2-31 (footnotes omitted):

### **1. Self-Defence**

19 The law gives everyone the right to defend himself against either a threatened or an actual attack from another. The right of self-defence proceeds from and is limited by the necessity to ward off the danger of such an attack. Therefore the right of self-defence commences when the necessity for such defence begins and it terminates when the necessity for such self-defence comes to an end. The law, however, requires that the force used in defending oneself must not be out of proportion to the severity of the attack. An attack by fists may be answered by fists but not with deadly weapons such as knives and guns. In exercising the right of self-defence one must use only such force as on reasonable grounds the person attacked believes

to be necessary for his own defence. In short, self-defence means defence, not counter-attack.

...

[309] In making a determination of whether Wallace used reasonable force to remove Richard as a trespasser and then, whether the force used by Richard in defending himself was proportionate to the severity of the attack, I must consider all evidence before me, including evidence that goes to the credibility of Richard and Wallace.

[310] Both sets of counsel have urged me to make adverse findings of the credibility of the opposing party and others who testified on their behalf.

[311] In making a credibility assessment, counsel for Richard asks me to consider the Supreme Court of Canada decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. However, as counsel for Wallace correctly points out in his brief, in the Supreme Court of Canada decision of *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein clarified at paragraph 49 that there is only one standard of proof in civil cases, and that is on the balance of probabilities. Furthermore, Justice Rothstein's analysis specifically refers to *W. (D.)* by rhetorically asking the question "Is *W. (D.)* Applicable in Civil Cases in which Credibility is in Issue?" and provides his answer at paragraph 86 as follows:

However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

[312] In addition to general witness credibility, the Court should consider the “inherent improbability” of each party’s narrative. In *F.H.*, the Supreme Court of Canada confirmed that determination on the civil standard may correctly include this consideration. The court referred with approval to the often cited decision in *Faryna v. Chorny*, 1951 CarswellBC 133, 2 D.L.R. 354 (C.A.); in which O’Halloran J.A. said at paragraph 10:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

[313] In suggesting that the evidence of Richard is not to be believed, Wallace asks that I consider that Richard has “stretched” the truth several times in giving his evidence.

[314] I do find that, at times, Richard carefully characterized his evidence to support his claim. For example, many times he asked the Court to infer improper motives on Wallace and his family without proof or he amplified the nature of the allegations. However, this is not unusual in litigation.

[315] Wallace also asks that I draw an adverse inference from Richard’s failure to call his son, Scott, as a witness who could have given relevant evidence to corroborate Richard’s evidence.

[316] However, I do not find that the failure to call Scott as a witness indicates that Richard’s version of events is improbable. Richard had no reason to require corroboration for events concerning the destruction of the wharf and I fail to see how Scott could have provided relevant testimony in relation to the other issues. I can find no fault in a parent not wanting to draw their child into this court dispute for no apparent reason.

[317] If I were to follow Wallace's reasoning, I could also question why Wallace did not call his wife to testify. Presumably, Alice would have been able to provide evidence on the September 21, 2016 incident as well as the herring trap issue. However, I similarly find that Wallace's decision not to draw her into this matter does not warrant an adverse inference.

[318] Wallace also asks that I consider an oral judgment made by a Provincial Court judge in the criminal trial alleging that Juanita assaulted Richard. The trial judge acquitted Juanita on the basis that Richard consented to the fight.

[319] Counsel for Wallace asserts this entire transcript, as well as the finding of the trial judge, is relevant evidence that should be considered by the Court in the proceeding as it goes to proof of Richard's state of mind. Counsel for Wallace suggests that this proves Richard was biased against and held animus towards Wallace and his family.

[320] However, I cannot agree with that assertion. The criminal proceeding was dealing with proof beyond a reasonable doubt and the parties to the proceedings were not the same as those before me; the parties in Provincial Court were the Crown and Juanita. Neither Richard nor Wallace were a party to that proceedings. Further, Richard was not represented.

[321] The matter involved an altercation between Juanita and Richard. That is not the matter before me. The mere fact that a court concluded that Richard consented to a fight with Juanita has no relevance as to whether Richard acted in self-defence in an altercation with Wallace.

[322] I find that this transcript is therefore inadmissible in evidence as it not relevant to the proceedings before me. Whether the trial judge was correct or incorrect in her finding does not make it more or less probable that Richard acted in self-defence. Asking me to go beyond this finding would also result in essentially asking me to sit on appeal of that decision or waste valuable court resources in deciding a collateral

issue within a trial solely for the purposes of determining credibility. This offends the collateral fact rule of evidence.

[323] While Wallace submits that the transcript and finding goes to Richard's state of mind, there was already ample evidence at trial of animosity exhibited by Richard and Juanita towards the other. The evidence also established an acrimonious relationship between Richard and Wallace that has impacted on other family relationships.

[324] For his part, Richard asks that I approach the evidence of Wallace carefully and make adverse credibility findings against him, Richard asks that I specifically note the following:

- i. Wallace acknowledged that when he applied for a permit from the Town, he was not being truthful as to his intentions to destroy the wharf because he felt they would not grant him the permit if they knew the truth;
- ii. Wallace acknowledged that his sworn testimony regarding the destruction of the wharf before a judge at Provincial Court was not truthful and that he knew being untruthful with the Court was wrong. He attempted to justify his false testimony by the explanation that he wanted to get a peace bond against Richard;
- iii. He also asked the Court to excuse his lying to a Provincial Court judge and said I should believe that he would not lie to me by stating that he would not lie to a judge of the Supreme Court;
- iv. Wallace also acknowledged that he had mislead his daughter, Juanita and his brother, Calvin, as to his real purpose in destroying the wharf so they would not consider his actions to be wrongful; and

- v. Wallace acknowledged that he could not give the name of a single person that he had been truthful and honest with throughout the entire matter.

[325] To the extent that I must resolve any discrepancies between the testimony of Richard and Wallace where no independent evidence is available, I prefer the evidence of Richard over Wallace on the September 21, 2016 incident. The evidence at trial clearly indicates that Wallace had no hesitation in being untruthful on other occasions involving his dispute with Richard. He has demonstrated that he is willing to lie to support his claim.

[326] Richard's evidence with respect to the altercation with Wallace in September, 2016 is also in accordance with a preponderance of probabilities. His version corresponds with the other dealings he has had with his brother who has exhibited a very short temper. Further, his description of events corresponds with the other evidence, including photographic evidence of the injuries suffered.

[327] I therefore find that Wallace's response in throwing a wrench at Richard and grabbing him forcefully constituted the use of excessive force that was disproportionate to the nature of the trespass.

[328] Further, I find that Richard grabbing and pushing Wallace back over a pile of junk was a proportionate use of force in responding to Wallace's actions, including striking him in the face, whether that strike was with his fist or elbow. I therefore find that Richard acted in self-defence and is not liable for the tort of assault or battery.

**8. Did Richard commit the torts of trespass to goods or conversion in respect of Wallace's herring net? If so, what is the amount of damages?**

[329] Wallace claims liability against Richard for the alleged loss of his herring net under the torts of trespass to goods and/or conversion as well as in his role as alleged bailee.

[330] Wallace presented a quote totaling \$7,783.13 representing the cost of materials required to replace the herring net, including HST on HST applicable materials. Wallace further submitted that an appropriate range of compensation would be \$15,000.00 - \$30,000.00 to account for the significant labour that would be incurred in constructing a herring trap of that size.

[331] Richard denied any liability but, in the alternative, submitted that \$5,000.00 - \$10,000.00 would be a fair range of compensation for the value of the used herring trap that was not in good condition prior to its removal from the twine shed.

[332] Firstly, dealing with the torts of trespass to goods and/or conversion, Wallace refers to the decision of the Nova Scotia Supreme Court in *Pelletier v. Forbes*, 2010 NSSC 309, in which Pickup, J. described the requisite elements of these claims.

[333] At paragraph 43 of that decision, the court described trespass to chattels as including any improper handling of another's goods, ie., committing without lawful justification any act of direct physical interference with goods in the possession of another person.

[334] The elements of conversion are described at paragraph 44 of that decision as (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another person to such chattel. It is the presence of intention to deny or negate title to the trespassed chattel that distinguishes conversion from trespass.

[335] Pickup, J. quoted from G.H.L. Fridman, *The Law of Torts in Canada; Principles of Property Law* Seventh Edition (Toronto: 2018) at paragraph 44 as follows:

To deny the plaintiff access to his goods, while at the same time recognizing that they are his, will be trespass. To refuse the plaintiff access in a manner that indicates that they belong to oneself, or to a third person, will be conversion. The difference between the two torts lies in the distinction between simple interference and the exercise of ownership.

[336] In respect of whether a defendant's actions evidence an intention to deny or negate title, the court noted at paragraph 45 that destroying the goods of another amounts to exercising dominion over a chattel that is sufficient to deny or negate the title of another.

[337] In considering whether Richard's actions in respect of the herring trap amount to a trespass to goods or conversion, it is necessary to make specific findings in respect of the removal and alleged destruction of the herring trap. As the versions of events were contradictory in many respects, credibility is very much at issue.

[338] Richard testified that following the breakdown in their relationship in the fall of 2015, he made the decision to cut all ties with Wallace. As a result, in or about March of 2016 he removed the herring trap and other ropes, etc. from the twine shed and placed it adjacent to the property of Wallace.

[339] Richard then sent a text to Juanita on March 21, 2016, advising her that if Wallace did not remove his junk from the back of his garden the herring trap would be going to the dump.

[340] Richard testified that he moved the herring trap in essentially the same manner as he and Wallace had done in the past by hooking each of the three sections onto the hitch of his ATV and towing it to the edge of his property. On the other hand,

Wallace says the herring trap was always moved in one piece with the use of a pick-up truck and two men.

[341] Richard testified that Wallace did not remove the herring trap from the side of his property and it sat there until the latter part of May 2016 when the Town came to remove it as part of their bulk garbage pickup.

[342] This corresponds with the evidence of Juanita who testified that in or about May, 2016 she received a call from her mother who told her that the Town was preparing to remove the herring trap from the side of Calvin Manor Road as part of their bulk garbage pickup.

[343] As noted earlier in this decision, Juanita says she drove and retrieved the herring trap from a Town truck and moved it onto her own property where it remained for approximately two months.

[344] Juanita says that after the herring trap was moved to her property, she discovered that it had been completely destroyed and had been cut up into ten-foot sections.

[345] Juanita says her father then told her to advertise the trap for sale in the classifieds. It was ultimately sold to two fishermen who she said spent two days taking it apart but Juanita could not recall their names. She equivocated on whether she received payment and later said she did not receive payment for the herring trap as it was destroyed.

[346] Juanita had taken photos of her parent's property where the herring trap had been placed depicting it in a pile but she did not take any photographs of it after she retrieved it.

[347] Wallace testified that he never saw the trap so could not testify as to its condition. However, he says it must have been destroyed because it was not possible for Richard to have moved it with his ATV without damaging it.

[348] In determining whether the herring trap was destroyed, I am therefore left to consider the evidence of Richard, Juanita and Wallace.

[349] Richard asks that I approach the evidence of Juanita with great caution for the following reasons:

- i. Juanita is an admitted supporter of her father and has exhibited animosity to Richard and his family, noting that on separate occasions she punched Richard in the face and that she released the moorings of Scott's boat allowing the boat to drift away from the wharf where it was tied up;
- ii. Juanita's testimony on cross-examination was clearly contradictory in that she initially testified that she could observe the damage to the herring net when it was being loaded by the Town but later testified that she only became aware of the damage after she spread the net out on her own property;
- iii. Juanita did not think that it was prudent to take any photographs of the damaged herring trap; and
- iv. Juanita could not recall the names of the two fisherman who purchased the herring trap.

[350] I will not repeat the comments above about the approach to determining credibility in civil matters.

[351] With respect to Juanita's credibility, I accept that she exhibits a high degree of animosity towards Richard as evidenced by her actions towards him throughout the events in question. Again, I do not need to consider whether or not the altercation with Richard was consensual to determine that issue. However, exhibiting aggression and animosity does not mean I must disbelieve her testimony.

[352] I also accept that she has exhibited strong bias in favour of her father, to the point of supporting his statements even when they were proven to be untrue. For example, she continued to maintain her father's position that he was always the sole owner of the wharf until she had no choice but to agree that the wharf had originally been owned by her grandfather.

[353] She also demonstrated that she is willing to carry out acts that could cause property damage for the sake of promoting her father's position as against Richard. For example, she acknowledged having untied Scott's boat from the wharf and letting it drift.

[354] Overall, however, in considering her evidence at trial, I found her to be evasive and aggressive when she was faced with versions of events that did not support her father or that were proven to be false.

[355] The manner in which she gave her evidence and her refusal at times to acknowledge the truth caused me grave concern as to whether I could rely on her testimony.

[356] I also found her testimony that she had not looked at the herring net while it was on the side of her parents' property or when she retrieved it from the Town to strain credulity. Juanita clearly distrusted her uncle. It defies common sense that she would not look at the herring net to see whether he had damaged it.

[357] Even more incredulous in the circumstances is Juanita's inability to give any detail about the advertisement for sale, information about the fishermen who came to purchase it and her equivocation about whether she was paid.

[358] Finally, I also have concerns with respect to the truthfulness of Wallace's evidence that he did not see the herring net in the two months it was immediately outside his home. While I recognize that he was recovering from a heart attack, he did not live alone and he had family members coming and going on a regular basis.

[359] Further, Wallace specifically said he did not have an opportunity to examine the herring trap after Richard had removed it from the twine shed because it was always covered in snow. However, this testimony is inconsistent with the photograph showing the herring trap and other miscellaneous gear which had been removed from the twine shed.

[360] With respect to his evidence that the herring trap could not have been removed from the twine shed in three pieces with an ATV, this was contradicted by the detailed evidence of Richard. If Wallace had been correct in his assertion as to how the herring net should have been removed, he could have subpoenaed witnesses with knowledge of how such a net could be transported. He had no hesitation in calling third party witnesses to testify as to other past events.

[361] Overall, in respect of the evidence regarding the alleged damage to the herring net, I prefer the evidence of Richard over that of Wallace and Juanita. I find that their version of events has not been established on the balance of probabilities.

[362] As a result, I find that Wallace has failed to establish on a balance of probabilities that Richard committed the tort of trespass in respect of the herring trap.

**9. In the alternative to (8), is Richard liable to Wallace for any damages or loss of the herring trap in his alleged possession of it as a bailee? If so, what is the amount of damages?**

[363] Wallace has also made a claim against Richard alleging that he breached his duty as a bailee in respect of the herring trap.

[364] Wallace refers to the Alberta Court of Queen's Bench decision in *Dorico Investments Ltd. v. Weyerhaeuser Canada Ltd./Weyerhaeuser Canada Ltée*, 1999 ABQB 561 at paragraph 10, which notes that the legal relationship of bailor and bailee can exist independently of a contract and is created by one party voluntarily taking into custody goods which are the property of another.

[365] Further, at the same paragraph, Binder, J. notes that common characteristics of a bailment include that (1) the bailor (in this case Wallace) delivers goods to the occupier (in this case, Richard) who has control over the goods and can exclude others; (2) the premises are secure; (3) the bailor remains away from the premises for an extended period of time; and (4) the occupier may provide ancillary functions, for example, delivering the goods to another location.

[366] The court also noted that a bailee has a duty to safeguard the goods and redeliver them in the condition in which they were bailed. However, the court also noted that a delay in collection may entitle the bailee of use a lower standard of care in safekeeping the goods.

[367] When goods are damaged or lost while in the possession of a bailee, the bailee must prove either that they took appropriate care of them, or that their failure to do so did not contribute to the loss.

[368] In this case, Wallace submits that Richard exerted acts of ownership by deciding where and how (not) to store, move, and deliver Wallace's herring trap and therefore created a bailment relationship. As the herring trap was either destroyed or

not returned, there is a *prima facie* case of negligence and Richard must prove that he took appropriate care of the herring trap and/or that he did not contribute to its loss.

[369] It is admitted that Richard removed the herring trap from the twine shed and, when Wallace did not collect it, the Town hauled it away as bulk garbage. Wallace says this happened while he was recovering from a heart attack and the actions did not constitute appropriate care by a bailee.

[370] Wallace submits that it does not matter whether Richard caused the damage unintentionally or the damage was caused by the Town's equipment, it was Richard's actions that directly resulted in the damage.

[371] As I already noted above, the evidence does not satisfy me on a balance of probabilities that Richard's actions in removing the herring trap and depositing it adjacent to Wallace's property caused, directly or indirectly, any damage to the herring trap.

[372] Wallace had two months in which either he or a family member who lived close by could have inspected the trap and removed it to another location but he chose not to do so after clearly being on notice that any alleged bailment relationship was at an end.

[373] There is also no evidence that the herring trap was damaged by weather or exposure to the elements from being left outdoors and, in light of the nature of the goods, that would appear highly unlikely.

[374] While it may be that the Town cut the herring net into 10 foot sections when they collected it, Richard had already given almost two months' notice that he was no longer storing the herring net and specifically sent a notice by text to Juanita that it would be removed by the Town if it was not collected. The bailment would have been at an end by that time as a result of the significant delay in collecting the goods.

[375] However, the most fatal finding with respect to the claim based on an alleged bailment relationship is the fact that I cannot find on a balance of probabilities that the herring trap was actually substantially damaged or destroyed. I have outlined above my findings on credibility regarding the competing testimony of Richard, Juanita and Wallace and I will not repeat those.

[376] As a result, I dismiss Wallace's claim that Richard breached any duty as an alleged bailee.

**10. Did Richard commit either the tort of trespass to goods and/or conversion with the respect to the utility trailer of Wallace? If so, what is the amount of damages?**

[377] As noted under the summary of facts, Wallace alleges that Richard was responsible for his utility trailer that had been stored on his property being dumped onto a landwash with the intention of destroying it. Wallace therefore alleges that Richard is liable to him for trespass to goods and/or conversion of the utility trailer.

[378] I previously reviewed the criteria that must be established in respect of these two torts and I will not repeat the analysis. The only note I will make is that, in contrast to his submission with respect to the herring trap, Wallace acknowledges that Richard did not destroy the utility trailer. In fact, there was no physical damage. Nevertheless, Wallace asks that I award him compensatory damages for the tort of conversion, as he says that Richard acted in a high-handed and arrogant manner, thereby justifying an award of punitive damages.

[379] However, I do not even need to consider the elements of those causes of action or any claim for punitive damages as there is absolutely no evidence that Richard was responsible for the utility trailer ending up at the landwash.

[380] Wallace claims that the evidence demonstrates liability on a balance of probabilities. However, the only evidence upon which he relies is the oral evidence

of Wallace and Juanita saying that no other person had taken issue with the utility trailer. As Richard had complained about its location on Wallace's property, he must have been the one who was responsible. Richard adamantly denies that he had any involvement in this incident.

[381] I cannot rely upon mere conjecture and speculation to make a finding that Richard was responsible for the incident involving the utility trailer. Juanita herself admits that there is absolutely no evidence or proof that he was responsible.

[382] I therefore find that Wallace has not proven this claim on a balance of probabilities. He is therefore not entitled to any relief from this Court.

**11. Are any of the parties entitled to other relief including any award for aggravated or punitive damages, or any relief not specifically plead?**

[383] Wallace seeks an award for aggravated and/or punitive damages as a result of Richard's conduct. He suggests the Court should consider the following conduct:

- a. Richard's interference with the wharf and stage as co-owner with Wallace and as executor of Herbert and Minnie's estates;
- b. Richard's interference with the twine shed in the context of his conduct involving Wallace's former cellar;
- c. Richard's admission that he had been told to leave Wallace's property during the garden incident in August 2016, prior to telling him to leave during the alleged trespass and assault incident in September 2016;

- d. Richard committing an act of assault after having been warned that he was trespassing; and
- e. Richard's disregard for having converted the utility trailer and destroying the herring trap.

[384] As I have only found liability in respect of the trespass in September 2016 it is not appropriate for me to consider the other alleged acts referenced above in determining whether Wallace is entitled to an award for aggravated and/or punitive damages. I will consider only the events surrounding the trespass of September 21, 2016.

[385] Wallace refers to the Ontario Superior Court of Justice decision in *Fitzpatrick* in support of his claim for aggravated and/or punitive damages.

[386] At paragraph 163, Stinson, J. noted that punitive damages are not compensatory, but provide for retribution, deterrence and denunciation and are therefore exceptional. However, they are appropriate in cases of high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior.

[387] In that case, punitive damages were awarded where a neighbour trespassed onto the property of the plaintiffs in the context of a dispute regarding a property encroachment. The plaintiff took advantage of opportunities he had to encounter the defendants in person so he could insult them. He also removed survey markers, detached a video camera and placed a dead coyote on his neighbour's truck. He also waited for the male plaintiff to emerge from his house so that he could relish in the shock and fear of seeing him discover the dead carcass. In those circumstances, the court awarded punitive damages of \$20,000.

[388] Similarly, the other cases referred to by the court in *Fitzpatrick* involved behavior that was particularly egregious, including the removal of lateral supports

to a property causing damage, embedding of devices to cause personal injury and tearing down a fence.

[389] This type of deliberate and reprehensible conduct stands in stark contrast to the facts before me. While I have found that Richard trespassed on Wallace's property in September 2016, no property damage resulted and I have found it was Wallace who initiated physical contact with Richard. Those actions by Wallace were disproportionate to the trespass and Richard acted in self defence in trying to ward off that attack.

[390] Other than the fact that there was a trespass for which I will award damages there is nothing in the facts before me that amounts to high-handed, malicious, arbitrary, or highly reprehensible misconduct by Richard. I therefore decline to make any award of punitive damages.

[391] As for any other relief not specifically plead, in his trial brief filed days before trial, Wallace made claims for harassment relying on case law from the United States with respect to this alleged tort claim. He also made claims that were similar to a claim of malicious prosecution as well as a stand-alone claim for mental anguish. Counsel for Richard responded to these issues in a brief after they were raised.

[392] When questioned by the Court at the start of the trial as to these submissions on claims that had not been pleaded, counsel for Wallace withdrew them. As a result, I will not deal with these claims on their merits in this decision.

## **12. What is the appropriate award of costs?**

[393] Rule 55 of *The Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”) governs the award of costs in civil proceedings. The general principle outlined in Rule 55.03(1) is that the costs of a proceeding or of any issue of fact or law therein shall follow the event unless the Court otherwise orders.

[394] In considering what costs I may award, counsel for Richard refers in his brief to Rules 55.04(3) and (4) which set out some of the considerations that may be taken into account when determining the appropriate column to use in awarding costs under the Scale of Costs. These Rules read as follows:

55.04(3) The Court may award costs to be taxed in accordance with any column or combination of columns under the Scale of Costs in the Appendix to this Rule.

55.04(4) In exercising its discretion under this Rule, the Court may consider

- (a) the amounts claimed and the amounts recovered;
- (b) the importance of the issues;
- (c) the complexity, difficulty or novelty of the issues;
- (d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (e) the failure by a party to admit anything that should have been admitted;
- (f) the proportion of the services rendered prior to the date the amendment to this paragraph introducing a Scale of Costs where costs are taxed according to a column or combination of columns came into force;
- (g) seniority at the bar of counsel; and
- (h) any other relevant matter.

[395] Richard also notes that Rule 55.03(3) provides for presumptive costs in accordance with Rule 19.03 where a party withdraws a cause of action prior to trial. Rule 19.03(1) provides that a party who withdraws a cause of action shall pay the costs of any opposing party to the date of giving notice of withdrawal to the other party.

[396] While both parties asked for solicitor-client costs in their pleadings, neither asked for solicitor-client costs in their briefs and neither referenced the common law authority to make such an award. Richard asked this Court to make an award of costs on a “substantial indemnity” basis while Wallace sought an award of costs on an “elevated basis”.

[397] As noted by Marshall, J.A in *House of Haynes (Restaurant) Ltd. v. Snook* (1995), 134 Nfld. & P.E.I.R. 23, 417 A.P.R. 23 (Nfld. S.C. (C.A.)), an obligation to pay solicitor and client costs is governed by the common law as opposed to Rule 55.03(1) applicable to party and party costs. At paragraph 48 of that decision, Marshall, J.A. made the following statement:

... In contrast, the obligation to pay an opposing party's solicitor and client costs is governed by the common law rule that in contested matters, not involving non-adversarial proceedings instituted by trustees or personal representatives in relation to interpretation of instruments, awards of solicitor and client costs are generally reserved to sanction misconduct by a party. ...

[398] Courts in this Province have recognized that an award of solicitor and client costs is rare. The common law rule was summarized by White, J.A. in the Newfoundland and Labrador Court of Appeal decision in *Greeley Estate v. Greeley*, 2016 NLCA 26, at paragraphs 30 and 31:

30 The cost of adjudicating claims is high, and at the end of the day someone must pay it. Any costs rule is an awkward compromise that does not fully mitigate the actual cost of litigation. Part of our system's compromise is that a full indemnity for costs is rare: see *Petten v. E.Y.E. Marine Consultants* (1998), 179 Nfld. & P.E.I.R. 94 (Nfld. T.D.) at paras. 74-80.

31 Solicitor-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.). They "represent an expression of censure or chastisement": *House of Haynes (Restaurant) Ltd. v. Snook* (1995), 134 Nfld. & P.E.I.R. 23 (Nfld. C.A.) at para. 50. So although solicitor-client costs serve "a compensatory function", their "justification ... is the misconduct of the other party": *Petten*, at para. 80.

[399] Richard relied on a case from the Ontario Superior Court of Justice decision in *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited et al.*, 2020 ONSC 1621, which considered whether to make an award of “substantial indemnity” costs. At paragraph 12 of that decision, Spies, J. specifically noted that it was a specific section of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 that gave the court the authority to award “all or part of the costs on a substantial indemnity basis”, similar to our common law right to award solicitor-client costs. No such statutory or common law authority has been cited here.

[400] However, Richard proceeds in his brief to outline what he alleges to be the malicious, unreasonable and unjustified conduct of Wallace that gave rise to the matter prior to and after the litigation was commenced. He states it is appropriate that the Court assess whether this conduct was reasonable or appropriate in assessing the matters of costs. In particular, he notes the following conduct:

- i. Wallace’s refusal to provide a key to Richard so that he could access the stage;
- ii. Wallace’s actions in misleading the Town when he applied for a permit to repair the wharf and then appealing the issuance of Richard’s permit to repair, thereby preventing the repair by approximately two years;
- iii. The fact that Wallace destroyed the wharf and that his sole purpose in destroying the wharf was to render it unusable by Richard;
- iv. Wallace’s actions in piling up the debris from the wharf’s destruction so as to block the stage and the stairs leading to the wharf;
- v. Filing an unsupported complaint of theft of custom wood with the RNC;

- vi. Filing a false complaint with the RNC that Richard had attempted to run him over with his truck which, except for the dash cam video taken by Richard, may have resulted in him being charged with a serious criminal offence. This occurred while Wallace was subject to a peace bond; and
- vii. Damaging the replacement bollards installed by Richard with the stated intention of having Richard's boat float away from its moorings and almost causing Diane to fall in the water as a consequence.

[401] Richard suggests that the above conduct is similar to the type of conduct referenced in *Fram Elgin* above, that may justify an award of substantial indemnity costs.

[402] However, even if I were to go outside the written submissions and treat the claim for substantial indemnity costs as a request for solicitor-client costs, I do not consider Wallace's conduct to give rise to such an award. Much of the conduct noted above, particularly the first four, constitute the requisite elements of liability for the tort of trespass to property; ie.; they resulted in Wallace having effectively ousted Richard by preventing him from using the wharf and stage. Those actions have been taken into account in making a damages award.

[403] The allegations relating to allegedly false complaints to police are outside the ambit of this litigation. If Richard had wished to litigate those issues and claim compensation for these allegedly false complaints, he could have started an action against Wallace but he did not. While the complaint related to the theft of custom wood was somewhat related to the wharf dispute, that complaint was resolved quite quickly and was really a part of the ongoing disagreement regarding ownership.

[404] With respect to the dash cam incident, as I noted to counsel several times throughout these proceedings, despite their agreement and insistence upon referring to this incident and the fight between Juanita and Richard, it was and remains my view that this evidence is not relevant to the proceedings and offended the collateral

fact rule. I allowed counsel some leeway to proceed and demonstrate its relevance but had to stop the parties from going further by stating that I would not be making any determinations as to who may or may not have been at fault in respect of incidents that were not the subject of the pleadings. To allow this would have turned what was already a lengthy trial with multiple issues into a number of mini-trials on other incidents solely to demonstrate which party was more credible or who had more animus towards the other.

[405] There was already sufficient evidence relating to the events comprising the causes of action on which I could make credibility findings. It was also clearly evident from the relevant evidence that Richard and Wallace each bore significant animosity towards the other from 2015 onward and this animosity extended to certain other family members. The Court did not need to hear every detail of the disagreements that did not form parts of the numerous causes of action. I will not consider the nature of this alleged misconduct in awarding costs.

[406] Finally, with respect to Richards' position that Wallace's prior untruthfulness warrants a claim for increased costs, Wallace refers to *Fram Elgin*. At paragraph 31, Spies, J. referred to the decision in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2012 ONSC 296 which says that adverse credibility findings are not a sufficient basis upon which to award substantial indemnity costs because they are often made against the losing party in standard fare commercial litigation and that to do so would see substantial indemnity costs become the norm, rather than the exception. Something more is required to push costs to an elevated level.

[407] As such, I would not have awarded solicitor-client costs to Richard even if it had been sought in his final submissions. While the conduct of Wallace should not be condoned by this Court, it has been taken into account in assessing damages for ouster and it does not amount to the level of reprehensible, scandalous or vexatious conduct as to justify an award of solicitor-client costs.

[408] For his part, Wallace submits that elevated costs should be awarded in his favor because Richard's counsel spent an undue amount of time with each party examining and cross examining witnesses. In many cases, the questions asked were

not relevant to the issues. For example, counsel for Richard often focused on irrelevant matters such as legal terminology, collateral events and the concept of reasonability. Counsel for Wallace notes how many times I had to stop Richard's counsel to question the relevance of questions and/or admissibility of answers.

[409] Further, counsel for Wallace notes that Richard's counsel repeated arguments in his post-trial brief regarding the use of trial brief submissions made by counsel for Wallace as a prior inconsistent statement to impeach Wallace on cross examination. These submissions were made despite the fact that I had already ruled that the trial brief did not constitute a statement made by Wallace for the purposes of impeaching credibility.

[410] Another example of counsel for Richard continuing to rely on evidence in respect of which the Court had previously ruled against him is the inclusion in the post-trial brief of a statement that I had already ruled was inadmissible on the basis of settlement privilege.

[411] Counsel for Wallace suggests that the above conduct should warrant an elevated award of costs.

[412] Such conduct certainly lengthened the course of the trial and failing to heed rulings by the trial judge is conduct that should not be sanctioned. Again, though, I find that this conduct does not reach the level of blameworthiness to justify solicitor-client costs. It is more appropriate to consider when determining the appropriate column of costs.

[413] Both Richard's counsel and counsel for Wallace claim that they should be entitled to substantial indemnity or elevated costs because the other put forward claims that had no legal foundation.

[414] Wallace says a significant amount of time was spent at trial in dealing with ownership issues when Richard agreed ultimately that legal ownership remained in the Estate but that beneficial ownership was with either two or three brothers.

[415] Also, while he was treating the matter as a dispute between tenants in common, Richard did not maintain an action for partition. Wallace also submits that if Richard had properly pleaded the matter and made the appropriate claims, many issues could have been addressed in pretrial proceedings such as summary judgment, summary trial or expedited trial or even a preliminary determination of fact and law under Rule 38. There also may have been an opportunity to strike pleadings under rule 14.24. Those alternatives would have been far less costly to Wallace.

[416] However, as will be referred to below, Richard can make a similar argument with respect to claims put forward by Wallace.

[417] I refer to the case of *Steele v. Rendell*, 2017 NLCA 36 in this regard. At paragraph 23, in considering whether the court of appeal was deciding whether the trial judge erred in ordering column 5 costs prior to an offer to settle, the court made the following comments in support of an increased award of costs to the successful party:

Although these are all legitimate considerations, the trial judge was entitled to consider that Ms. Rendell was put to significant expense refuting claims that had no reasonable basis. In particular, much of Mr. Steele's evidence focused on his theory that the Land was conveyed to him by his mother. That theory was dramatically contradicted by the evidence. It brought Mr. Steele within a hair's breadth of a solicitor-and-client costs order; only the "benefit of the doubt" saved him (see paragraph 90).

[418] All of the above considerations leads me to a finding that this is not an appropriate case in which to award solicitor-client costs to either party.

[419] In considering the appropriate column or combination of columns to use in an award of costs, I have to take into account the relatively small amounts claimed by the parties. Richard had only sought \$15,000.00 in respect of the damage to the wharf. While Wallace's claims were higher due to the number of claims, each individual claim was \$30,000.00 or less and, as noted above, there was little to no chance of success in respect of many of those claims. At the end of the day, Richard received an award of \$6,000.00 and Wallace received \$1,500.00. The amounts claimed and received would therefore suggest an award at one of the lower columns.

[420] In respect of the importance of the issues, I recognize that Richard and Wallace both feel very strongly about these issues and that much grief has been caused to their families as a result. This is not unusual when disputes arise between family members over land. However, viewed objectively, the determination of these issues should not have much impact on them.

[421] The next factor to consider under Rule 55.04(4) is the complexity, difficulty or novelty of the issues. As evidenced by this decision, the parties, and in particular Wallace, fully canvassed all possible causes of action, even those that had little to no chance of success. There was no modern case law or any case law at all from this Province on many issues. While I have considered all submissions (totaling hundreds of pages in written submissions) in addition to the case law submitted by the parties, I find that the issues were made far more complex than necessary and some of the causes of action raised were not suitable in dealing with the disputes between the parties.

[422] This then leads to the next consideration under Rule 55.04(4), that is, the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding.

[423] I must consider that some of the claims put forward by Wallace, such as the claim in respect of the utility trailer, were based on speculation only and had no chance of success. Other claims, such as the claim with respect to ownership of the twine shed, had little to no supporting evidence. Dealing with these claims that were

either devoid of merit or without supporting evidence significantly lengthened the trial.

[424] While Richard also submits that Wallace withdrew claims prior to trial, I would characterize this as more of an acknowledgement that matters referred to in his trial brief had not actually been pleaded rather than have been withdrawn. In any event, they did increase the expense to Richard by having to respond to them.

[425] On the other hand, the manner in which Richard framed his claim also partly caused Wallace to raise real property issues relating to ownership that were not actually determinative of the issues at the end of the day. More clarity in the Statement of Claim would have greatly reduced the length of the trial. As well, I agree with counsel for Wallace that counsel for Richard spent an undue amount of time in examination and cross-examination going over issues that had already been fully canvassed. He also spent a significant period of time on collateral matters such as the dash cam incident, despite my interjections.

[426] For his part, Wallace also spent unnecessary court time on matters that had been before the Provincial Court involving Richard and Juanita.

[427] However, Wallace also caused further expense by failing to admit until the trial that his intention was to destroy the wharf. Even when he admitted that, he continued to prevaricate on his position on ownership, causing his testimony to be far longer than necessary. The evasiveness of his testimony and untruthfulness with others caused significantly more trial time than was necessary. This is a consideration under Rule 55.04(4)(e).

[428] I must also consider the seniority at the bar of counsel. Counsel for Richard is a senior member of the bar which would warrant an award on the higher end of the columns. Senior counsel for Wallace, while not having as many years at the bar, also has quite a bit of court experience. He also had co-counsel but I would not have awarded costs for two counsel on this type of claim.

[429] Overall, while there was mixed success on the claims, I find it appropriate to make an overall costs award in favour of Richard. He proved his claim, albeit while not getting the full amount claimed or the nature of the relief sought. Further, the relief he obtained was more than the damages awarded to Wallace.

[430] In deciding on an award, I have attempted to balance the concerns with how each party dealt with the litigation. In doing so, I find that the actions attributable to Wallace noted above would result in Richard obtaining a cost award much higher than the standard column 3 for advancing his claim and for successfully defending all but one of the counterclaims of the Defendant. However, taking into account Wallace's success on the trespass action, which did not require a great deal of court time, the manner in which Richard proceeded with his claims and time spent at trial on unnecessary issues, I would exercise my discretion to award Richard costs on Column 4 of the Scale of Costs rather than the highest scale of column 5.

## CONCLUSION

[431] I find that Wallace is liable to Richard for having ousted Richard from the wharf and stage. Damages are awarded in the amount of \$6,000.0 with pre-judgment interest in accordance with the *Judgment Interest Act*, R.S.N.L. 1990, c. J-2 from July 30, 2016 (being the first date Richard attended at the wharf and discovered the destruction).

[432] I find that Richard is liable to Wallace for the tort of trespass that occurred on September 21, 2016. Damages are awarded in the amount of \$1,500.00 with pre-judgment interest from that date in accordance with the *Judgment Interest Act*.

[433] All other claims in the Statement of Claim and Counterclaim are dismissed.

[434] Richard is entitled to his costs of this proceeding on column 4 of the Scale of Costs appended to Rule 55 of the *Rules*.

---

**ROSALIE MCGRATH**  
Associate Chief Justice