IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prowal v. Court,* 2025 BCSC 965

Date: 20250526
Docket: S03477
Registry: Abbotsford

Between:

Shelagh Margaret Prowal

Plaintiff

And

Sean Kevin Court, Trista Lynn Court, John Doe and Jane Doe

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff:	B.J. Lorimer
The Defendants, Sean Kevin Court and Trista Lynn Court, appearing in person:	S.K. Court T.L. Court
No other appearances	
Place and Dates of Trial:	Abbotsford May 12, 14-16, 2025
Place and Date of Judgment:	Abbotsford May 26, 2025

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I. INTRODUCTION

[1] The plaintiff claims in trespass and conversion for the felling of five mature Douglas fir trees (each roughly 30 metres tall, with trunk base diameters ranging from 50 to 80 cm) on her property on October 9, 2021, by a tree faller hired by the defendants. The defendants do not dispute that the trees were cut on their instructions, or that the trees were located on the plaintiff's property: they allege that the plaintiff provided consent.

[2] The defendants counterclaim in nuisance and negligence. They claim that the plaintiff has failed to maintain her retaining wall, which has collapsed in two areas near their shed and chicken coop, threatening those structures. They argue that the retaining wall interferes with their use and enjoyment of their property. They seek damages and a mandatory injunction requiring the plaintiff to remediate the stone wall.

[3] The parties own neighbouring properties in Boston Bar, on the east side of Highway 1. The plaintiff bought the north property in 2009 as her primary home. The Court defendants bought the south property in 2013 as a vacation home, anticipated to later serve as their retirement home. Each property has a residence near the west side of each property. Each property has a shed and a chicken coop near the boundary line.

[4] The plaintiff's property is slightly higher than the defendants' property. An uncemented retaining wall, constructed largely of slate plates, but intermingled with other rocks, runs parallel to the boundary line. The wall predates each party's arrival. The wall is not strictly a boundary wall: it is located fully on the plaintiff's property, some 22 inches north of the boundary line. The retaining wall is partly supported by metal posts, with metal wire, in some sections. The wall only runs along the western one-third length of the southern boundary: the remaining eastern portion of the properties is unwalled and open.

[5] The plaintiff's property slopes generally, and then more steeply, upwards as one heads east. To the east of her residence is a chicken coop on the first terrace, and then a vegetable garden on a higher terrace, and then a flat area with two wells. The trees in question are located further to the east, and higher, where the terrain becomes steeper and the foliage more wild. Because of the slope and the foliage, the trees in question are not readily visible from the plaintiff's residence.

II. CREDIBILITY AND EVIDENCE

[6] The two central witnesses were the plaintiff and the defendant Sean Court. Neither were particularly credible or reliable witnesses. Both were argumentative and evasive in answering questions: their mutual antipathy was apparent. Both admitted and displayed that their memories and attentions to detail were imprecise. Their memories of the felling day were also incomplete and hazy.

[7] The Court lacked key testimony and evidence that would have assisted the resolution of the central trial issues. The Court must, as best as it can, decide this dispute on the limited evidence before it.

[8] In particular, Barry Kvist, a former long-term boarder at the plaintiff's home, was a central figure on the felling day, but was not called by either side.

[9] The trees were deliberately felled to land southward on the defendants' property. The defendants acknowledge that they cut up at least some (it would appear most) of the timber and stored it for firewood. The plaintiff apparently sent another boarder, Justin Cairns, to take photographs of the fallen trees: for whatever reason, those photographs are not in evidence, although they could have illuminated a central allegation of whether some or all of the trees were dead

and hazardous at the time of felling. That issue could also have been clarified by photographs from the defendants of their firewood obtained from the felled trees.

III. TRESPASS CLAIM

A. Law

[10] In *Lahti v. Chateauvert*, 2019 BCSC 1081, Madam Justice Young provides a helpful overview of the law of trespass:

> [6] Trespass to land is defined in G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 29:
>
> > Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. To constitute trespass the defendant must in some direct way interfere with land possessed by the plaintiff. The requirement of directness differentiates trespass from nuisance, which is committed when the defendant makes a use of his land that indirectly affects the land of the plaintiff.

[11] *Lahti* discusses the present defence, of consent:

> A. Defence of Consent
>
> [7] There is no trespass if the plaintiff consents to the defendant entering on the plaintiff's land. The Saskatchewan Court of Appeal provided an overview of the defence of consent in *Montreal Trust Co. v. Williston Wildcatters Corp.*, 2004 SKCA 116 (Sask. C.A.) at paras. 23-24, which was adopted by this Court in *Urbanczyk v. 1128 Enterprises Ltd.*, 2019 BCSC 117 at para. 74. I summarize the principles most relevant to this case as follows:
>
> > 1) The defence of consent or "leave and licence" provides that no trespass will be committed if the defendant acted with the express or implied consent of the plaintiff: *Montreal Trust Co.* at paras. 23, 29.
> >
> > 2) If the defendants' conduct goes beyond the permission given, those actions exceeding the scope of consent will not be protected by leave and licence: *Montreal Trust Co.* at para. 31.
> >
> > 3) The burden of proving leave and licence rests on the defendant: *Montreal Trust Co.* at para. 23.
> >
> > 4) Leave and licence can be proven:
> >
> > 1) by an express agreement that amounts to leave and licence; or, 2) it can be implied (a) through conduct; (b) through acquiescence; or, 3) a combination of all three. All relevant circumstances must [sic] examined to determine whether the conduct of the plaintiff amounts to leave and licence on the facts of the case. [*Montreal Trust Co.* at para. 23]

[12] *Lahti* confirms that mistake is not a defence to trespass:

> B. Mistake
>
> [8] Mistake is not a defence to trespass: *Scott v. PDF Training Inc. et al.*, 2004 BCSC 1646 at para. 174, aff'd 2008 BCCA 35; *Shaman v. Meek,* 2019 BCSC 9 at para. 31; *Peter Ballantyne Cree Nation v. Canada (Attorney General),* 2016 SKCA 124 at para. 132, leave to appeal ref'd [2017] S.C.C.A. No. 95. Rather, for the tort of trespass, "[i]t is generally viewed that 'intentional' does not mean that the defendant intended to do a wrongful act against the plaintiff, but that the defendant completed a voluntary and affirmative act. Trespass will occur, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so" [citations omitted]: *Peter Ballantyne* at para. 132, quoted in *Shaman v. Meek* at para. 31.

B. Neighbourly difficulties

[13] Soon after the defendants' purchase of their property, the new neighbours got off on the wrong foot. Mrs Court admits that she and one of her children trespassed on the plaintiff's property, although she says that they did so unintentionally. While exploring their new property, they came across a pipe. They followed the path of the pipe northwards and discovered an old well, which turned out to be just over the boundary, on the plaintiff's property. The plaintiff claimed that the well was surrounded with a wire fence with metal posts, to guard against injury; the defendants claim that there were "only a few sticks and some barbed wire: a single strand." In any case, Mr Court covered over the mouth of the plaintiff's well: he explained that he feared that the well was in fact on his property, and that he might be responsible for its upkeep and safety. He claimed that he later apologised to the plaintiff for covering her well.

[14] The plaintiff also claims that Mr Court threatened her around this time. She says that he stated that he wished to access the water from her well, believing that the discovered pipe was originally connected to that well. According to the plaintiff, that pipe was originally connected to a different well, located on the property north of hers, which well provided water to the remaining properties to the south. When the plaintiff refused access to her well, she claims that Mr Court said words to the effect of "I'm going to get you." Mr Court vehemently denied that he has ever threatened the plaintiff, or used any harsh words.

[15] I need not resolve this issue, as the plaintiff does not seek damages for these earlier incidents. Suffice to conclude, the neighbourly relationship was rocky

from the start.

[16] In any case, soon after this incident or incidents, the plaintiff says that she feared for her safety. She filed a police report. She bought a surveillance camera system. She also placed “no trespass” signs on the well, as well as on three of the trees that were eventually felled, as well as a previously fallen tree. The defendants acknowledge that they were aware of some of the signs, but dispute the number. The plaintiff also let the brush grow high in the back area around the trees, and stopped visiting that area of her property.

[17] The neighbours avoided speaking to each other in the years between the defendant’s arrival and the felling of the five trees. There appear to have been only a few interactions. On the first, the plaintiff filed a police report after guests of the defendants illegally parked near her house. On the second, the plaintiff alerted the defendants to the potential danger of their children playing between the retaining wall and the defendants’ chicken coop. On the third, there was an exchange about the plaintiff allegedly throwing garden cuttings behind the defendants’ shed.

C. October 9, 2021 felling of five trees

[18] I turn to the felling of the five trees.

[19] In July 2021, Mrs Court placed a Facebook advertisement seeking a local faller to fell two dead trees from their own property. Fred Raphael, a local faller, responded. After a series of communications over the summer and autumn, the defendants retained Mr Raphael to fell their two trees. On October 9, 2021, Mr Raphael and a helper, who did not testify, attended and cut them down. The price was $1,100.

[20] Sean Court testified that at around 1 pm, while he stood in their garden, he yelled up to Mr Kvist, on the plaintiff’s property. He asked about cutting down the plaintiff’s five trees, which he considered to be hazardous: he described them at trial as two dead trees, with the remaining trees leaning towards his property from their upslope positions. He says that he asked Mr Kvist to go back to the house and bring the plaintiff into the conversation. He says that the plaintiff came out right away. He claims that the plaintiff told him that he could cut down the trees “as long as it doesn’t cost too much.” Mr Court said that he replied words to the effect of, “$100 a tree: no more than $500 because that’s what Fred [Raphael] quoted.”

[21] The plaintiff adamantly denies that she said those words, that she was part of the conversation, or that she was even at home when the trees were being cut or the alleged conversation took place. She testified that she did not even learn that the trees had been cut until several weeks later, when she held a bonfire hotdog roast with some of her foster children near the location of the felled trees, and noticed their absence. When she discovered that the trees were gone, she filed a police report, on October 27, 2021.

[22] Again, Mr Kvist was not a witness and cannot resolve this irreconcilable evidentiary contradiction. His absence more harms the case of the defendants, who listed him as a witness on both iterations of their trial brief; there was also evidence that Mr Kvist is presently unfriendly towards the plaintiff, notwithstanding his long-term boarding at her residence, and might reasonably have testified if requested or subpoenaed by the defendants.

[23] Based on direct credibility findings, I cannot say that I believe one of the two testifying witnesses over the other: again, neither provided particularly convincing or reliable testimony. Ultimately, the evidentiary onus lies on the defendants to establish the defence of consent to their admitted trespass: *Lahti*. They have failed to acquit their burden.

[24] In any case, Mr Court's account, and the defendants' version of the story, suffered multiple difficulties. In his testimony, Mr Court himself was hazy on the location of the trees that were felled, both at the time of the felling, and when he revisited the stumps to gather evidence. These five felled trees were not solitary and obvious: there are other trees in the area on the plaintiff's property, and the density and number of trees increases around the eastern boundary of the plaintiff's property. Further, the trees were some distance away from where the conversation with Mr Kvist, and, allegedly, the plaintiff, was taking place. It would have been difficult to specify and describe in a brief conversation the five trees Mr Court was requesting to fell. Some detail, both with respect to the trees to be felled, and the plaintiff's authorisation, would have been necessary and expected, and, indeed, prudent, given the repeated past tensions between the neighbours, and given the plaintiff's "no trespassing" signs.

[25] Given the tensions, and the rarity of communications between the neighbours, it is implausible that Mr Court would casually call over the wall, and

propose or request the significant undertaking of felling five trees, in a very brief and sudden conversation. Nor is plausible that the plaintiff would casually, promptly and unambiguously provide authorisation for the felling of these trees: it is clear that she is not a casual or easy-going person, especially in her dealings with the defendants.

[26] Further, the October 9th conversation alleged by Mr Court, which, if true, would provide a compelling defence, is not asserted in either the defendants' opening statement (provided the very same day as Mr Court's testimony), or in their response to civil claim (which was drafted by their then-counsel, at a time closer to the tree felling date than Mr Court's testimony at trial). Their opening statement simply asserts that "[t]he plaintiff was present and did not object to the work." It also describes the felling as what "…the Defendants believe was a consensual or at worst incidental event." The response to civil claim asserts that there was a long and seemingly detailed series of communications between the defendants and the plaintiff, facilitated throughout by Mr Kvist, about felling the five trees, with the plaintiff agreeing to reimburse the defendants for that cost. It asserts that on some unspecified date in October 2021, the plaintiff and defendants entered into an agreement to that effect, and that only *after* that agreement was reached, the defendants engaged a tree faller: again, wholly at odds with their own evidence about their retainer of Mr Raphael. Mr Court's evidence at trial differed considerably from his pleaded defence.

[27] The defendants called Mr Raphael, the faller. He claimed that he saw a woman matching the plaintiff's description watching him fell the trees without protest. His distance from the house, and the intervening structures and foliage, and his focus on felling these large trees, challenges this evidence. His memory was somewhat hazy and imprecise: "… Not too sure: it was a while ago…": this is perhaps understandable, as he has no doubt felled many trees before and after that fateful day. Mr Raphael's evidence is also undermined by other aspects of his testimony. He at first said that he would never fell a neighbour's tree without the permission of the owner, and then admitted that he had not received such permission from the plaintiff.

[28] Mr Raphael emphatically—too emphatically—repeated the phrases "red, dead, and dangerous" and "danger trees" to describe the felled trees, as justifying

their necessary removal. This conclusion is contradicted by the defendants' own photographs showing the majority of the felled trees to be bushy and alive. Jason Emery, the arborist who inspected the stumps for his expert report, noted some decay in one of the trees, but found the remaining trees to have been in good health. The photographs of the stumps do not indicate any acute decay or abnormal discolouration. Again, the defendants likely still possess logs from the felled tree in their woodshed, and in any case provided no photographs, which might be readily available, to establish that the trees were dead or diseased.

[29] While I reject Mr Court's evidence that he received clear and direct authorisation from the plaintiff to fell the trees, I am satisfied that there was an interaction with Mr Kvist that may have led him, incorrectly and recklessly, to believe that he had authorisation. This finding is important to the consideration of punitive damages, below.

[30] I am satisfied that something that Mr Kvist said in his conversation with Mr Court, and possibly in their several previous conversations about trees, led Mr Court to believe that the plaintiff was agreeable to the tree removal, even in a general and imprecise way. While Mr Kvist did not own the property and was not in a position to authorise the felling, he was a tenant and occasional business associate of the plaintiff. Anything that Mr Kvist said to indicate some sort of endorsement to the felling might reasonably, if mistakenly, be seen by Mr Court as authorisation from the plaintiff. Absent Mr Kvist, we only have Mr Court's evidence of the conversation and his ongoing conversations with Mr Kvist.

[31] Further, the plaintiff's own evidence indicates that she herself may have caused Mr Kvist to give Mr Court to some extent a mistaken sense that the plaintiff authorised the cutting of the trees. She acknowledged that when she saw the faller arrive in his truck in the morning, she asked Mr Kvist to go and ask him how much he was charging per tree. She explained that she did not do so out of an interest to retain him to cut her trees, but rather to find out if she herself had received a good rate from another faller she had hired to top a tree the previous year. Objectively viewed, such an inquiry, delivered through an imprecise vessel such as Mr Kvist, may well have been misinterpreted, and now misremembered by Mr Court, as consent to fell the trees.

D. Trespass: compensatory damages

[32] In *Avender v. Western Canadian Timber Products Ltd*., 2018 BCSC 1711, Justice Butler, then of this Court, noted that while some cases consider the defendant's level of culpability in assessing damages for trespass, such consideration should be limited to punitive damages:

> [7] Other cases have wrestled with the characterization of a defendant's actions in awarding damages for trespass. In *Konno v. Harrison-Jones*, 2010 BCSC 1034, the court referred to the decision in *Voss v. Crooks et al.*, 2002 BCPC 3, in which Judge Brecknell set out four types of trespasses as described in *Arboriculture and the Law in Canada*:
>
> - Technical trespass, where boundary lines are crossed accidentally with minimal damage;
> - Inadvertent trespass, where boundary lines are crossed by mistake when the trespasser believed it to be at a different location;
> - Wrongful trespass, where a boundary line is crossed because of indifference or negligence in determining its location; and
> - Wilful trespass, where a boundary line is crossed deliberately and damage is inflicted in full knowledge of being beyond the boundary line.
>
> ….
>
> [9] While many cases have considered the question of damages for a wrongful removal of trees, the leading decision remains *Kates v. Hall*, [1991] B.C.J. No. 263 (B.C.C.A.). The court set out the principles to be applied when quantifying damages for trespass involving the cutting of trees. ***When awarding compensatory damages, there is no need to characterize the nature of the trespass. As set out in Kates, the damages must be reasonable and fair to both parties. The nature of the trespass however remains relevant when considering whether to award punitive damages.***
>
> [emphasis added]

[33] Based on these principles, I will consider the defendants' degree of culpability below, in considering punitive damages. In the next section, I will decide compensatory damages for the trespass represented by the cutting of the five trees, striving to reach an award that is reasonable and fair to both parties.

E. Damages

[34] The plaintiff seeks general damages of $50,000, based on her loss of enjoyment and amenities, coupled with the replacement value of the trees.

[35] The plaintiff testified, reasonably, that the trees are irreplaceable: given her age, no replacement tree will grow to 30 metres in her lifetime. She recounted her happiness at having once seen a bear and its cubs climb one of the trees. She used the westernmost tree as a laundry line. She also claims to have lost shade in her garden provided by the tall trees (although it was the expert arborist's opinion that the trees would not have provided shade). At the same time, the fact that the plaintiff did not notice the loss of the trees until two weeks after the event somewhat undermines her testimony as to their importance in her daily life.

[36] Apart from the plaintiff's subjective loss of enjoyment and amenities provided by the trees, the plaintiff also relies upon the expert report of Mr Emery, a certified arborist with over 25 years of professional experience in arboriculture, including specifically, attending to and assessing large Douglas fir trees.

[37] While the defendants initially raised many objections to his report, in the end, they accepted his qualifications and limited their objections to the assertion that "it relies on assumptions and includes conclusions that lack objectivity, relevance, and proper foundation."

[38] I accept the Emery report in its entirety, under the *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 considerations, and reject the defendants' objections. The brief report contains no hyperbole or bias: its mention of "unlawfully removed trees" merely references the legal claim for which his report is obtained. The report prosaically and clearly sets out the means of appraising the value of each of the trees. Mr Emery responsibly acknowledges that the process was hindered by the fact that he had to extrapolate the height and quality of each tree based on the size of the remaining stumps: a situation of course created by the defendants. Similarly, the defendants themselves are in possession of other key evidence that could inform the expert report: the firewood remaining from the felled trees.

[39] His observations about the size, health, and location of the trees is fully within his expertise as an arborist. The report's references to the locations of the property boundary or the felled trees, based on the professional survey obtained by the plaintiff, and accepted by the defendants, is proper, normal, and necessary: an arborist need not be qualified as a surveyor in order to refer to the trees'

location in reference to property lines. The defendants provided no evidence to suggest that Mr Emery considered the wrong stumps.

[40] Using nursery tree methodology based on the size of each tree trunk, he starts with basic tree costs for the five trees, ranging from $23,726 to $60,740. He then applies discounts based upon the condition of each tree along with functional and locational limitations, to arrive at significantly depreciated values ranging from $2,550 to $5,770. He then adds the cost of replacing and replanting the trees, for costs ranging from $4,000 to $7,200, for total damages of $25,900.

[41] This methodology has been regularly accepted by our courts, including in semi-rural properties, such as in the present circumstances and in *Lahti* (Sointula on Malcolm Island, north of Port McNeill: paras. 12 and 108). As noted in *Lahti*:

> [95] The Trunk Formula Method has been recognized by this court as a method for assessing compensatory damages for the loss of trees: *Gibson v. F.K. Developments Ltd.*, 2017 BCSC 2153 para. 40 and *Ovens v. Kirkman*, 2006 BCSC 394. In *Ovens*, Justice Macaulay described the Trunk Formula Method at para. 35 as follows:
>
> > The approach to assessing damages for the loss of mature trees is well established. It would be prohibitively expensive to replace the three trees with comparable growth Douglas fir trees. Accordingly, the arborist calculated the value of the lost trees using the Trunk Formula Method. That formula is based on the cost of purchasing and installing the largest commercially available transplantable tree plus an increase in value due to the larger size of the original trees. The values are then adjusted to reflect amenity factors such as species, condition and landscape location. Under the heading landscape location, the arborist considered the specific amenity factors that I have identified above. He concluded that the value of the lost trees is $16,523.

[42] In cross-examination, Mr Emery acknowledged that the value of those trees would be less if they were priced as lumber, rather than at nursery rates, based on the trunk formula method that he used. He also acknowledged that in a forested area, a timber market price would generally be used, but noted that the trunk formula method was appropriate, as the trees were located on private land.

[43] While Mr Emery's approach was legitimate and defensible, a timber rate assessment would also be appropriate for these mature Douglas firs, located some distance from the plaintiff's residence, on the back section of this rural forested property, with further forest immediately to the east. In *Bower v. Rosicky*,

2000 BCSC 85, the Court based its compensatory award for trespass on a timber rate, albeit on a larger and more rural property. Unfortunately, we do not have that rate in evidence. Working on Mr Emery's acknowledgement that timber rates would generally be lower, I will discount the value by 25 percent: $19,425. In doing so, I also take note that there was no affirmative evidence from the plaintiff that she has any intention of replacing the trees, such that the $5,400 attributed to nursery delivery and planting costs is only notional, and will likely never be incurred. I also take note of the jurisprudential edict that trespass damages be reasonable to both sides, in all of the circumstances of the individual case: *Lahti* at para. 109.

[44] *Lahti* similarly applied a discount, starting but not finishing with the trunk formula method calculation. In that case, the arborist expert opined a value of $64,780 for the loss of the trees. He recommended adding additional value for aesthetics, wildlife value, privacy, wind protection, shading, and noise buffering: an amount for which the plaintiffs sought $20,000. The Court awarded the lesser amount of $50,000 (a 40% discount from the expert opinion), to reflect the importance of the trees to the plaintiffs, the cost to replace the smaller trees, the cost to clean up the stumps and landscape the area, and the plaintiffs' loss of amenities.

F. Punitive damages

[45] The plaintiff seeks a further award of $50,000 in punitive damages against the defendants. She bases this proposal on the award of $10,000 in punitive damages for the topping of a single tree in *Gibson v. F.K. Developments Ltd*., 2017 BCSC 2153. In that case, at para. 60, Justice Punnett noted that punitive damages have been awarded in numerous trespass cases involving tree removal. He summarised the principles guiding punitive damages:

> [59] Punitive damages arise in tort where there is an actionable wrong, that wrong has injured the plaintiff and the conduct of the defendant demands condemnation (*Vorvis* [*v. Insurance Company of British Columbia*, 1 SCR 1085, 4 WWR 218] at 1108). They are intended to address the need for retribution, deterrence and denunciation (*Whiten* [*v. Pilot Insurance Co.*, 2002 SCC 18] at para. 43). They are a form of punishment. They are intended to both deter the defendant from such conduct in the future and to denounce that conduct. They arise where the defendant's conduct is particularly egregious and a marked departure from ordinary standards of conduct (*Whiten* at paras. 36 and 92). They are sometimes referred to as arising where the conduct in issue is malicious,

> oppressive or high-handed such that the court's sense of decency is offended (*Whiten* at para. 36).

[46] The facts of *Gibson*, summarised in paras. 68–70, distinguish it from the present case. The corporate defendant was financially motivated to cut the tree in order to improve the view for its marketed subdivision. Importantly, there was no possibility of misunderstanding, as here: "the defendants intended to cut down the tree in question knowing full well that the plaintiff was opposed to their doing so and did so in a manner designed to inhibit the plaintiff's ability to interfere." Further, the condemnation of the cutting of a single tree through a $10,000 punitive damages award does not dictate that the present cutting of five trees requires five times that amount: punitive damages requires measured condemnation and deterrence rather than multiplication.

[47] In *Lahti* at para. 116, the Court imposed a "low award of $2,000" of punitive damages, on top of $50,000 for the replacement value of 14 felled trees, along with remediation costs. The primary defendant mistakenly believed he had permission to cut the trees, based upon a prior general conversation about possibly cutting the trees. He did not embark upon a scheme to try to get away with the act while the plaintiffs were absent. At the same time, he showed "reckless disregard for the plaintiffs' interests", in not reasonably investigating whether the plaintiffs had indeed authorised the cutting.

[48] I will impose the same award of punitive damages, for similar reasons. As set out above, while I found that the defendants had not established clearly that the plaintiff had consented, the murky evidence does not permit me to conclude that Mr Court flagrantly and deliberately proceeded to have the trees felled. Like the *Lahti* defendant, he was reckless in proceeding with the felling given the history and limited communications with the plaintiff.

G. Joint liability

[49] *Lahti* at para. 10, citing *Burnaby (City) v. Thandi*, 2005 BCSC 1478 at paras. 118–120, canvasses the legal principles relating to joint tortfeasors:

> [118] In Fridman, [*The Law of Torts in Canada*, 2nd ed, (Toronto: Carswell, 2002)], at p. 888, joint tortfeasors are defined as follows:
>
> > For two or more persons to be considered to be joint tortfeasors, the tort in question must be committed by one of them on behalf of

> or in concert with another. The acts must be performed in the furtherance of a common design.

[50] At para. 78, Young J found the wife of the primary defendant to be a joint tortfeasor: the tree felling constituting trespass was performed in furtherance of a common design to benefit their property, which she owned.

[51] The Court reaches the same conclusion in finding both named defendants to be joint tortfeasors. Mrs Court herself solicited and retained Mr Raphael, and was present the day of the felling. She is the co-owner of the family property.

H. Injunction

[52] The plaintiff seeks a permanent injunction against the defendants committing further trespass on the plaintiff's property. She cites the defendants' ongoing assertion that they were entitled to cut down the trees, based on the plaintiff's consent. She cites *Minicucci v. Liu*, 2021 BCSC 1640 at para. 40, citing Justice R.J. Sharpe, *Injunctions and Specific Performance*, 1st ed (1983), at p. 180, for the proposition that "[w]here property right[s] are concerned, it is almost that damages are presumed inadequate and an injunction to restrain continuation of the wrong is the usual remedy …"

[53] I am satisfied that there is no real risk of further trespass by the defendants, and that the it would not be appropriate for the Court to exercise its equitable powers in issuing an injunction: *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association*, 2008 BCSC 1676, at para. 3, aff'd 2009 BCCA 457; *778938 Ontario Limited v. Annapolis Management Inc*., 2020 NSCA 19, at para. 20.

[54] The last alleged trespass occurred almost four years ago: the date of the tree felling. Both defendants undertook to the Court that they will not step foot on the plaintiff's property ever again: they have no desire to do so, and given this litigation, it would be madness to do so. The defendants have gone one step further: they have now listed their property for sale.

IV. NUISANCE AND NEGLIGENCE COUNTERCLAIM

A. Law

[55] In *Drager v. Lojstrup*, 2016 BCSC 1447, Justice Kent succinctly describes the law of nuisance:

> [26] To succeed in a private nuisance action, the plaintiff must establish ***significant and substantial interference with the use or enjoyment of his property*** as a result of his neighbour's activities. Unlike the tort of trespass, ***nuisance is not actionable without proof of material loss or damage.*** Actual physical injury to the property can suffice but so too in appropriate cases can intrusions such as excessive noise, odours, fumes, vibrations or similar causes of substantial discomfort.
>
> [emphasis added]

[56] Justice Kent also notes that "the mere proximity of an otherwise safe structure on a neighbouring property" or the mere presence of "unsightly structures" on that property do not, without more, trigger liability in nuisance: paras. 28, 30. Even if a neighbouring structure is potentially dangerous, the evidence must show that the danger is more than a remote possibility: *Suncourt Homes Ltd. v. Cloutier*, 2019 BCSC 2258, at paras. 110–112; *Walker et al. v. Pioneer Construction Co. (1967) Ltd.*, 56 DLR (3d) 677, 1975 CanLII 481 (ONSC).

[57] The leading authority of *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 emphasises that not every interference with land will qualify as actionable nuisance:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: ***to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial.*** Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. …
>
> [21] On balance, however, my view is that we ought to retain the two-part approach with its threshold of a certain seriousness of the interference. The two-part approach is consistent with the authorities from this Court (as I noted above). It is also, in my view, analytically sound. Retaining a substantial interference threshold underlines ***the important point that not every interference, no matter how minor or transitory, is an actionable nuisance;*** some interferences must be accepted as part of the normal give and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.

[emphasis added]

B. Discussion and decision

[58] The defendants adduced many photographs of the retaining wall. They refer to two “collapses”: the first around 2020, behind their shed, and the second around May 2022 behind their chicken coop. At the first site, the wall and the plaintiff’s property are roughly four feet higher than the surface of the defendants’ land. At the second site, the wall and the plaintiff’s property are roughly seven feet higher than the surface of the defendants’ land.

[59] “Collapse” is an exaggeration. So too is the defendants’ claim that the wall has shifted 5 feet: an assertion belied by their own photographs, and common sense considerations of how an inelastic rock wall could move. It is true that rocks have fallen off the retaining wall, and that, in parts, the retaining wall appears to be held up by metal posts and wiring. No rocks have yet to come in contact with the defendants’ shed or coop.

[60] Further, the defendants were unable to establish that any fallen rocks or portion of the wall have in fact entered onto their property. The surveyor retained for this litigation re-staked the property boundary, confirming that the retaining wall is set back 22 inches from the property boundary, running wholly on the plaintiff’s property; Mr Court had no basis to dispute the retaining wall set back. The defendants did not adduce any surveying evidence to establish that the retaining wall or portions of it encroached upon their property, extending beyond this 22-inch buffer zone: Mr Court acknowledged that it “could be true” that “the base of the wall had not shifted more than 22 inches.” The defendants have not provided any photographs of the fallen rocks with a measuring tape to establish any encroachment.

[61] Nor did they provide any evidence, expert or otherwise, about the current stability of the wall. Specifically, they provided no evidence to establish that the retaining wall posed a significant threat to their property or structures or person, or that it posed the risk of imminent collapse. While it is a retaining wall, the photographs do not indicate that it is supporting any of the plaintiff’s structures, or that further encroachment or degradation would cause anything more than inconvenience and aesthetic harm.

[62] I note this lack of evidence in the context that the defendants, while representing themselves, were articulate and organised, and had generated a bounty of evidence with respect to the claim and counterclaim. Their own arguments, as well as their detailed objections to the arborist expert report, showed that they had a keen understanding of the necessity of proving their case and defence through admissible and persuasive evidence in a trial. In this, the Court commends Mrs Court for her competent and measured organisation and presentation of the evidence and arguments.

[63] While I need not determine the issue, rain and snow sliding off the roofs of the defendants' coop and shed could well have contributed to any degradation of the retaining wall or undermining of the soil at its base. The plaintiff also testified to viewing the defendants' medium-sized dog running along the top of the retaining wall, and asserted that it may have dislodged some of the rocks in the photographs. Several photographs show trees and bushes growing on the defendants' side at its base: those roots could also have affected the wall's stability. Finally, while Mr Court denies having levelled the earth at the base of the retaining wall to construct his shed in 2017, claiming that the surface was perfectly flat when they moved in, I accept that there would have been a natural slope along that portion of the property boundary, rather than a sudden drop off: whether Mr Court or a previous owner levelled that portion of the ground, it could well be that any subsidence of the wall was the result of actions of the southern property owners.

[64] Finally, in 2022, the plaintiff did take steps to address the shifting of the wall, including removal of some of the fallen rocks. Those efforts had to occur solely on her own property, with awkward removal of rocks by lifting them upslope: the defendants did not permit her or her contractors access to their property in order to inspect and repair the retaining wall.[1] In this, it is unfair for the defendants to complain of any failure by the plaintiff to remediate the wall.

V. CONCLUSION

[65] The Court awards the plaintiff $19,425 in general damages, plus $2,000 in punitive damages, plus special damages of $1,500 for the necessary property survey, for a total of $22,925, against the named defendants. The defendants' counterclaim is dismissed.

[66] The plaintiff has been successful, but her damages garnered from this dismal and avoidable exercise fall within the Provincial Small Claims Court damages jurisdiction of $35,000. Under the *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 14-1(10), she is not entitled to her costs, other than disbursements. That is the presumptive costs order.

[67] If any party wishes to dislodge this presumptive costs order, that party will advise the others within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each side will provide a written argument to the other side and to the Court at least seven days before the hearing date. Each side is encouraged to strive for a negotiated settlement to the costs issue prior to the costs hearing, and issue formal offers to settle costs.

"Crerar J"

[1] In their defence, the plaintiff has also been difficult and interfered when the defendants themselves tried to have a contractor inspect and repair the wall.