

CANADA / JUDGMENT

Avender v. Western Canadian Timber Products Ltd.

2018 BCSC 1711

COURT

Supreme Court of British Columbia

DECIDED

5 October 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1711 Avender v. Western Canadian Timber Products Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Avender v. Western Canadian Timber Products Ltd.,

2018 BCSC 1711

Date: 20181005

Docket: S76933

Registry: Nanaimo

Between:

James Stuart Avender, also known as James Stewart Avender

Deborrah Valeda Avender

Plaintiffs

And

Western Canadian Timber Products Ltd., George Brian Dorman,

Donald Andrew Banasky, John Doe 1 and John Doe 2

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiffs:

T. Beaubier

Counsel for the Defendants:

G. Phillips

Place and Date of Trial:

Nanaimo, B.C.

August 13, 14, 15, 16 and 17, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2018

Table of Contents

INTRODUCTION. 3

THE TRESPASS. 4

The Law. 4

1. The Nature of the Trespass. 7

2. What damages should be awarded for the cost of restoring the Avender property?. 11

Background. 11

Position of the Parties. 15

Analysis. 17

Debris removal and initial restoration. 17

Replacement costs of the trees and shrubs. 19

Plant restoration and establishment and future consulting. 20

3. What amount should be awarded for loss of amenities?. 21

4. What, if anything, should be awarded for punitive damages?. 23

Position of the Parties. 23

Analysis. 23

SUMMARY. 26

INTRODUCTION

- [1] James and Deborrah Avender own property on Christopher Lane in a rural area close to Nanaimo. Ms. Avender has lived in that neighbourhood her whole life. She was raised on a larger parcel of land owned by her parents. When she married Mr. Avender they acquired a four-acre lot that was subdivided from the larger property. They have lived on that property ever since (the "Avender property"). After Ms. Avender's mother died, the estate sold the remainder of the larger property to Tamihi Logging Company Ltd., one of the defendants. I will refer to that as the Tamihi property, although the company has now changed its name to Western Canadian Timber Products Ltd. ("Western"). The defendant, Brain Dorman, is the principal of Western which operates an office on property adjacent to the Tamihi property. Western is a forestry company with operations in southern British Columbia.
- [2] Some portion of the Avender and Tamihi properties was covered with deciduous and coniferous trees. A fish bearing stream, McNeil Creek, passes through the Tamihi property very close to the Avender property. On December 19, 2014, without any notice to the Avenders, the defendant, Don Banasky, an employee of Western, arranged for a feller buncher to harvest timber from the Tamihi property. In addition to harvesting timber from the Tamihi property, the machine operator cut approximately 55 trees in the riparian area adjacent to McNeil Creek. Most of those trees were on the Avender property. The trees were felled in the span of 45 minutes early in the morning when Mr. Avender was at work and Ms. Avender was out for her morning walk. On her return from the morning walk, Ms. Avender was shocked to see the large machine clear-cutting a portion of her property.
- [3] After several months of denying that their operator cut trees on the Avender property, the defendants admitted to the trespass. The Avenders bring this action to recover damages for the cost of restoring their property, and for loss of amenities. They also say that the actions of the defendants were highhanded and deserving of punitive damages.
- [4] The defendants admit the trespass and also admit that they are jointly and severally liable for any damages awarded. However, they take serious issue with the damages claims advanced. The defendants say the trespass was inadvertent and that they took reasonable steps to determine the property boundaries. They say the amounts claimed to restore the Avender property are excessive and that there is no basis for punitive damages.
- [5] These circumstances and the arguments of the parties raise the following issues:
- i. What is the nature of the trespass?
 - ii. What damages should be awarded for the cost of restoring the Avender property?
 - iii. What amount should be awarded for loss of amenities?
 - iv. What if anything should be awarded for punitive damages?

THE TRESPASS

The Law

- [6] The parties referred to a number of decisions considering damages for trespass for the removal of trees on a neighbour's property. Some of the cases examine the nature of the trespass in order to arrive at an award of damages. For example, in *Bower v. Rosicky*, 2000 BCSC 85, the defendant accidentally trespassed onto adjacent ranch lands and cut down 17 trees. The plaintiff sought \$18,500 for the lost trees but was awarded only \$331, comprised of "\$231 for the saw log value of the trees plus an additional \$100 to reflect the measure of culpability" of the defendant. In arriving at that award Mr. Justice Melnick referred to two types of trespass depending on the degree of culpability and awarded damages based on the "less severe rule." In doing so he referred to the summary of law set out in *Bawa v. Noton* [1994] B.C.J. No. 1703 (B.C.S.C.) and in particular to the comment of Hollinrake J.A. in *Shewish v. MacMillan Bloedel Ltd.*, (1990) 48 B.C.L.R. (2d) 290 (B.C.C.A.) at p. 297:

What the law has looked for in assessing damages in cases such as this is what I see as the degree of culpability, or want of bona fides, in the trespasser. I do not think it can be said that the law has developed to the point that it sees negligent trespass in cases such as this as necessarily attracting the severer rule for the assessment of damages. There are degrees of negligence and I think the degree of negligence in terms of culpability and bona fides must be looked at in determining the rule to be applied to the assessment of damages in cases such as this.

- [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.

- [8] In *Konno*, the defendant cut down 31 trees in a ranch or rural setting. The court found that the trespass was inadvertent as the defendant relied on a GPS survey that was inaccurate. The trees were in an area affected by the pine beetle. The court awarded \$3,000 for the loss of the trees and \$5,000 for loss of amenities. The court of appeal upheld that decision: 2011 BCCA 50.

- [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.

- [10] In *Kates* the defendant cut down 13 of his neighbours' 40 foot tall evergreen trees knowing that he did not have permission to do so but believing that the plaintiffs would probably not care. The plaintiffs obtained an injunction to prevent further damage and brought a claim seeking approximately \$200,000, the estimated cost of planting 13 trees of a similar size to the trees that were cut down. The trial judge awarded \$21,000 for the cost of restoration, plus \$13,000 (\$1,000 per tree) as compensation for the loss of amenities during the time it would take for the trees to grow back to the height at the time of cutting, and \$26,000 (\$2,000 per tree) as punitive damages.
- [11] The plaintiffs appealed the damages award, arguing for the full cost of restoring the property to the same condition it was in before the trespass including the replanting of mature trees. The appellants took the position that where the trespass is wilful, the measure of damages should be based on the express wishes of the plaintiffs, not on the basis of a reasonable person. The court of appeal rejected the appellants' arguments and upheld the trial decision. In doing so, it approved of the statement of Taylor J.A. in *Dykhuisen v. Saanich (District)*, [1989] B.C.J. No. 1964, (B.C.C.A.) at para. 16:

The damages in such cases may extend to the cost of restoration or restitution, within reasonable bounds, together with compensation for loss of amenity to the extent that complete restoration cannot reasonably be affected.

- [12] In *Kates*, the court summarized the proper approach to assessment of damages emphasizing the importance of reasonableness and fairness at para. 33:

The trier of fact is required to consider and weigh all of the evidence and to apply common sense and the basic principles of *restitutio in integrum*, and reasonableness and fairness as between the parties in light of all the circumstances. The trier of fact is also required to draw conclusions that are supported by the evidence but there is no requirement that any of the conclusions presented to the court be accepted.

- [13] In upholding the trial decision on punitive damages, the court rejected the appellants' submission that \$26,000 was too high an award for actions that were not malicious. The court stated at para. 46:

The trial judge did not err in his application of the appropriate legal principles in making the award for exemplary or punitive damages. The amount of \$26,000 is not excessively high. In fact, in my opinion, the amount could well have been higher, and this court should not interfere with the award.

[14] Applying the reasoning in *Kates*, I need not consider the nature of the trespass when determining a fair award for compensatory damages. Instead I must arrive at an award that is fair and reasonable between the parties applying common sense and taking into account the basic principles of *restitutio in integrum*. However, the nature of the trespass remains an important issue in considering the plaintiff's claim for punitive damages.

1. The Nature of the Trespass

[15] In the present case, the evidence about the defendants' efforts to determine the property boundary between the Avender property and the Tamihi property is not controversial. However, the parties disagree as to the proper characterization of those efforts. The plaintiffs say that the defendants' actions were "reckless and careless, amounting to a gross negligence" and that the trespass was "willful, intentional and with a purpose".

[16] The defendants characterize the nature of the trespass in their written argument:

There is no evidence that the defendants acted intentionally. The mistake was one of inadvertence. The defendants exercised due diligence in comparing their walk of the site and view of flags to the map, which confirmed their understanding. It was based upon information provided by a governmental authority, BC Hydro. The defendants here took reasonable steps to ascertain the boundaries of their property by comparing a map provided by a governmental authority to the conditions on the ground.

[17] In my view, the plaintiffs' characterization of the defendants' actions accurately describes the nature of the trespass. The defendants failed to call Mr. Dorman, the only witness who could have given reliable evidence about steps taken by the defendants to determine the property boundary. Instead of presenting evidence from Mr. Dorman, Don Banasky testified about his understanding of the boundaries. That understanding was gleaned almost entirely from a single conversation with Mr. Dorman as they walked through the Tamihi property four months before the trees were cut.

[18] However, Mr. Banasky's role changed prior to the logging. His first involvement with the properties was as an employee of Copcan, a logging contractor that was asked to submit a bid to Western for the logging of timber on the Tamihi property. When he walked the Tamihi property with Mr. Dorman in August 2014 he was representing Copcan, not Western. He prepared a bid for the logging that was ultimately accepted by Western. The significance of Mr. Banasky's role as a representative of the contractor is that he had no knowledge of the boundaries of the Tamihi property when he met with Mr. Dorman to learn about the potential contract.

[19] Mr. Banasky described the route taken and the information he was given when he walked the Tamihi property with Mr. Dorman. A large B.C. Hydro transmission line passes through the properties on a right of way that appears to be about 160 feet wide. Mr. Dorman and Mr. Banasky walked down the Avender property near the right of way. They did not walk all the way to the south end of the Tamihi property. I conclude that the two men had a very casual

discussion about the job because Mr. Banasky recalls that both men were on their cell phones during much of the walk. Mr. Banasky was trying to determine the volume of wood that could be harvested and was looking for hazards or areas of concern for Copcan as a logging contractor.

- [20] As the two men walked towards the southern end of the property, Mr. Banasky saw flagging (ribbon) on some of the trees on the Tamihi property. He pointed out the flagging and assumed it marked the area to be cut. Most of Mr. Banasky's logging experience has been in more remote locations where the timber is on Crown land. In those situations, cut blocks are often marked by flagging placed on trees in a heavily forested setting. The two men did not have a map or plan with them to show the extent of the property or the location of the boundaries. As they approached what Mr. Banasky believed was the end of the property he saw ribbon or flagging at what he believed to be the southern terminus of the cut block. He believed that all of the property belonged to Western. He did not relate any discussions with Mr. Dorman about the property boundaries. Instead, he explained how he made assumptions based on observations.
- [21] Mr. Banasky and Mr. Dorman had no discussions about permits or licenses. Mr. Banasky assumed that Western would have taken out any required permits. They did not have any discussions about the location of the property boundaries or the riparian area around McNeil Creek. Mr. Banasky does not recall seeing any fences although the photographs clearly show a fence that Ms. Avender said is the dividing line between the Tamihi and Avender properties. Mr. Banasky and Mr. Dorman had no discussions about property markers and did not look for them. Photographs of the property taken after the trees were cut show white survey stakes marking the location of iron pin survey markers that are also visible. Mr. Banasky did not see or look for anything that would mark the property boundaries. He simply assumed the flagging in the trees marked the edge of the area to be harvested.
- [22] Mr. Banasky did not return to the property until shortly before the timber was cut. On that visit he walked a similar route with Dan Williams of Copcan and Todd Bloskiy, the feller buncher operator. By that time, Mr. Banasky had obtained a Google Earth satellite image or aerial photograph (the "Google Earth photo") of the two properties and surrounding areas from BC Hydro that showed the location of the transmission towers. He showed the aerial photo to the two men as they walked the site. The Google Earth photo appears to have a rough outline of the Tamihi property marked on it. This was part of a package of information Mr. Banasky obtained from BC Hydro because of his concern about the proximity of the transmission lines. The information included BC Hydro's requirements for cutting timber near a right of way.
- [23] The Google Earth photo is the document the defendants rely on as "information provided by a governmental authority, BC Hydro". They say it provides information that confirmed the defendants' understanding of the property boundaries. Mr. Banasky used that document to help outline the scope of work for the two men who would be performing the work. A

cursory examination of the Google Earth photo calls the defendants' contention into serious question; it does not provide any useful information about the location of the property boundaries. It is nothing more than an aerial photograph obtained from Google Earth. It does not purport to be a plan or survey and does not show property boundaries. Someone appears to have sketched an outline of the Tamihi property on it; but the outline has no directional or measurement markings that could give it any value or reliability as a survey document. Mr. Dorman and Mr. Banasky are experienced executives in the logging business who must know the difference between an aerial photograph obtained from the internet and a survey plan.

- [24] I have no hesitation concluding that the defendants' approach to determining the property boundaries for the purpose of cutting timber was careless and reckless. In the absence of evidence from Mr. Dorman, I must find that the defendants took no steps to determine the location of the property boundaries. The properties are not in an area of undeveloped Crown land. They are in a rural area within the Nanaimo Regional District that is comprised of small acreage properties with homes. The land is subdivided and subject to zoning and regulation by the Nanaimo Regional District. It would have been a simple matter for the defendants to obtain a survey plan that would show the extent of the Tamihi property. It would have been even easier for them to investigate the location of the boundaries. Had they done so, they would have located fences and survey markers showing those boundaries.
- [25] It would have been easier still for the defendants to contact the Avenders to inquire about the property line. Mr. Dorman knew that Ms. Avenders' family sold the property to Western and that the Avenders were very familiar with the details of the property. Indeed, Mr. Banasky left Mr. Avender a voice mail message early on the morning of December 19, 2014, the day of the trespass, to ask about the location of the septic tank on the Tamihi property. The defendants were well aware of the Avenders' knowledge of both properties and could have approached them to determine the boundaries.
- [26] The defendants were similarly careless and nonchalant about their approach to the riparian area around McNeil Creek. Mr. Banasky had no knowledge that the area was a Riparian Assessment Area or that a development permit from the Regional District was required for any human activity including alteration of the land or cutting of trees. He made no inquiries to find out about the riparian setback but assumed his equipment was under the same constraints that applied when working on remote Crown lands. No evidence was presented to show that Western made inquiries or took steps to find out about regulations for riparian areas.
- [27] Rather than investigate or make inquiries about property boundaries or the riparian area, the defendants decided to harvest the timber because they had equipment available that was not being used elsewhere. They were motivated only by an efficient use of their resources to generate a small profit. Given the location of the properties and the easy availability of accurate information about boundaries, the actions of the defendants are properly characterized as reckless and reprehensible. They showed a complete disregard for the

rights of the plaintiffs.

2. What damages should be awarded for the cost of restoring the Avender property?

Background

[28] On December 19, 2014, after the trees were cut, the Avenders, and Mr. Banasky discussed the situation with police officers. A police officer suggested the dispute could be resolved by obtaining a survey of the property lines. Mr. Banasky stated that he had a survey showing the boundaries and produced the Google Earth photo. The Avenders indicated that this was not a survey and did not assist the parties by showing property boundaries. Eventually, Mr. Banasky agreed that Western would retain a surveyor to determine the location of the property boundaries. Later that day, the Avenders emailed Western to advise:

Under no circumstances can anyone affiliated with Tamihi logging in any way enter for any reason the area in question

The logs etc. on our property are not to be moved or interfered with for any reason. I will expect to hear from you concerning the surveyor after Dec. 29, 2014.

[29] After the confrontation, Ms. Avender contacted Vancouver Island Tree Services ("VI Tree Services") who asked Jenelle Cassidy, one of their sub-contractors, to attend the site. She attended the same day and quickly realized that the scope of work to repair the damage was beyond her expertise. She suggested the Avenders retain Verma Mumby of Mumby's Tree Services to assess the damage and make recommendations to repair the site. After that introduction, Ms. Cassidy continued to work with the Avenders and Ms. Mumby on the project.

[30] On January 7, Ms. Avender was advised by a surveyor who attended at the site (presumably retained by Western) that the trees that had been cut were on their property; in other words, that Western's actions amounted to a trespass. No evidence was led by Western about that survey. Indeed, Western continued to deny the trespass for at least two months. At trial, Mr. Banasky professed to be unaware of the survey that Ms. Avender says he organized. I do not accept Mr. Banasky's evidence. It is clear that he agreed to arrange a survey to help resolve the dispute. I accept Ms. Avender's evidence that she spoke to that surveyor on the site in early January. I infer that Western did not obtain a survey plan from the surveyor, as they did not want to provide proof of the trespass to the Avenders. In any event, it would have been clear to Western by early January that they committed a trespass by cutting trees on the Avenders' property.

[31] With the benefit of advice from Ms. Mumby and Ms. Cassidy, the Avenders had made some progress by early February in finding out what the Ministry of Forests' requirements were to remove the trees and clean up the property. This was difficult because both the Ministry of Forests and the Nanaimo Regional District ("NRD") had to be involved. Further, the Avenders were initially advised that they could not have an assessment of the property when the felled

trees were still in the riparian zone, but were also advised that the trees could not be removed without an assessment. Eventually the Ministry relented and allowed the trees to be removed under the supervision of a Qualified Environmental Professional ("QEP") approved by the Ministry. The QEP appointed was Adam Compton of EDI Environmental Dynamics Inc.

[32] On February 16, 2015 the Avenders' solicitor advised Western that the Avenders were in the process of obtaining quotes for removal of the timber and that the cost of doing so would be high because much of the work was in a riparian area. He also indicated the Avenders would be seeking reimbursement of those expenses from Western. Ms. Avender eventually obtained three quotes that she provided to Western. She indicated that she intended to retain M&J Tree Services, the company that provided the middle quote.

[33] Mr. Banasky responded by letter to the solicitors on February 24, 2015 stating:

Tamihi Logging and its representatives do not acknowledge this proposed trespass, as the land in question has not been clearly identified by your client initiating this action. We are not satisfied that the land in question belongs to your client.

Tamihi Logging Ltd would strongly advise against removal of any trees (As we deem they are ours) and or debris from the subject area, until such time that your client can provide a legal survey of the area in dispute.

If it is found, that there is a factual undisputable (sic) trespass onto your clients property in question, Tamihi Logging Ltd will gladly clean the area at our expense.

Tamihi Logging Ltd and its representatives would like to resolve this outstanding issue in a reasonable neighborly manner, but will not acknowledge a simple unfounded complaint, nor will we acknowledge heavily inflated quotes for work not approved by Tamihi Logging Ltd for a dispute with no merit.

[34] The Avenders retained M&J Tree Services and they started the clean up work in early March, 2015. The Avenders paid their invoice in the amount of \$11,746. The Avenders claim that amount, as well as Ms. Cassidy's fee of \$630 for the work she did to coordinate the mapping of the cut trees with Ms. Mumby and Tom Hoyt, the British Columbia Land Surveyor, who prepared a survey of those trees and the property boundaries. The survey showed that the vast majority of the trees cut were on the Avenders' property and were within the riparian area. The Avenders also claim the fees paid to Ms. Mumby, Mr. Hoyt, VI Tree Services and Mr. Compton. The total claimed for expenses paid for clean up of the property is:

- Ms. Cassidy \$ 630.00
- VI Tree Services 393.75
- M&J Tree Services 11,746.88
- Mr. Compton 2,857.64

- Ms. Mumby 2,025.29
- Thomas Hoyt 1,207.50

Total \$18,861.06

- [35] The report from Ms. Mumby provides her opinion on the cost of rehabilitating the damage to the property. I admitted her report in evidence over the objections of the defendants. She notes that there are three approaches to valuing damage to plants and trees: cost, income and market approaches. There are four cost methods: (i) replacement cost, (ii) trunk formula, (iii) cost of repair and (iv) cost of cure. She opines that the appropriate method to use to value the damage to the Avender property is cost of cure. She provides an opinion as to the full cost of cure including the amount paid to M&J Tree Service for the cost of cleanup. The cost of cure also includes the cost of replanting the lost trees, shrubs and plants. Her estimate of the replanting cost is based on replanting 265 trees, 110 shrubs, and 875 plants. Ms. Mumby recommends planting 3 trees (five-gallon pot size) for each tree cut down in order to get the riparian area functioning properly as soon as possible. That ratio is required because the replacement trees are much smaller and will take many years to grow to the size of the felled trees. She estimated the number of shrubs and plants needed to cover the rest of the affected area, and assumed that five-gallon shrubs and plants would be used.
- [36] The Mumby estimate also includes an amount for labour equal to the cost of the plants. In addition, Ms. Mumby's estimate includes a total of \$13,383 to cover expected future costs to maintain the replanted trees and shrubs. It allows for deer cages, mowing of the grass, replacement of dead trees based on a 10% mortality, and watering for the first year. The estimated total cost (not including the expenses paid for debris removal and initial restoration) is \$54,199.

Position of the Parties

- [37] The plaintiffs say they should be awarded \$18,208.11, which is the reasonable cost of debris removal and initial restoration plus the cost of consultants. They acknowledge that \$4,227.52, the amount received from the sale of the timber, should be deducted from that total. In addition, the Avenders claim \$40,808 for the cost to replace the trees and shrubs damaged in the trespass plus \$13,383 for plant restoration and establishment, based on the Mumby opinion. The Avenders also say they should be awarded \$1,250 as the cost of anticipated future consulting fees and \$2,056 for the purchase of a cistern for watering the newly planted trees and shrubs.
- [38] The defendants take issue with most of the plaintiffs' claims. In general, they say that expenses claimed to replant or restore the damaged property must be reasonable. The defendants say most of the claimed costs are unreasonable, and that some of the expenses are not properly claimable. They raise the following specific arguments about the claims:

- No amount should be awarded for the cost of cleanup and initial restoration. Mr. Banasky told the Avenders that Western would "clean up the area at its own expense." This offer was made clearly in the letter of February 24th. Western is a forestry company that is in the business of cutting and restoring forests. There is no reasonable explanation for the plaintiffs' refusal of the offer. The plaintiffs' failure to accept the offer amounts to a failure to mitigate its damages.
 - Ms. Mumby's estimate is based on the replacement of 55 conifers, but only 45 were cut from the Avenders' property. Further, there is no evidence to support her opinion that 100 deciduous trees need to be planted.
 - The Avenders indicated that they intend to use Ms. Cassidy's planting plan. Mr. Compton said he would likely approve Ms. Cassidy's plan. Ms. Cassidy's plan is based on smaller plant sizes and lower unit costs than Ms. Mumby's.
 - Ms. Cassidy's plan sets out unit costs for one-gallon plants. If those costs are used, the full cost for 610 shrubs is about \$2,900 compared with Ms. Mumby's cost of about \$14,000.
 - Five hundred of the proposed plants are scheduled to be planted in the right of way area and there is no evidence of damage in that area.
 - The plaintiffs have failed to prove the cost of installation because the only evidence on that point is Ms. Mumby's comments that it is standard industry practice to use the same cost for installation as for plant costs.
 - Some of the fees charged by the plaintiffs' consultants are more properly regarded as disbursements.
- [39] The defendants submit that a fair cost for replacement of a reasonable number of reasonably sized plants is \$2,401 based on 145 coniferous trees (half of which are five-gallon sized plants and half of which are two-gallon size) and 110 one-gallon shrubs. A similar amount should be awarded for installation. The defendants say that the plaintiffs have failed to provide adequate proof to support the plant restoration and establishment expenses claimed, but say an award of \$1,000 is an appropriate measure of damages for ongoing establishment costs for the new trees and plants.

Analysis

- [40] I will consider the following categories of damage: debris removal and initial restoration; replacement cost of the trees and shrubs; and plant restoration and establishment and future consulting expenses.

Debris removal and initial restoration

[41] The main argument raised by the defendants about these claimed expenses is that the plaintiffs failed to mitigate when they turned down Western's offer to do the cleanup free of charge. I do not accept this argument. The defendants have not established a failure to mitigate. In all of the circumstances, it was not unreasonable for the plaintiffs to reject Western's offer to clean up the debris.

[42] The defendants rely on the decision in *Husky Crane Service Inc. v. Danco Equipment Inc.*, 2009 BCSC 906, in support of their argument that the plaintiffs should have accepted the defendants' offer to do the cleanup work. In *Husky Crane*, the court refused to award damages to the plaintiff for the cost it incurred to repair minor deficiencies in a truck-mounted crane. The defendant, the installer of the crane, had admitted the deficiencies and offered to repair them free of charge. In arriving at that decision, Mr. Justice Nate Smith noted that it is generally reasonable in a commercial contract for a party to accept an offer by the other party to remedy a default. In arriving at that conclusion, he referred to *Webb v. Attewell* (1993), 88 B.C.L.R. (2d) 1 (B.C.C.A.) at para. 34, where the Court of Appeal cited *McGregor on Damages*, 15th ed., para. 275 with approval:

The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

[43] There are a number of distinguishing features here. First, the plaintiffs and defendants were not in a commercial relationship; the need for rehabilitation of the plaintiffs' property arises solely because of a wrongful trespass. The circumstances of the defendants' trespass on the plaintiffs' property are such that the plaintiffs have no reason to expect that the defendants would take appropriate care if afforded the opportunity to clean up the damaged land. I have found that the defendants acted recklessly in committing the trespass. Their actions completely disregarded both the property boundaries and the presence of the riparian zone. In these circumstances, there is no reason to conclude the Avenders should have accepted the trespassers' offer to attempt remediation. It would be unreasonable to impose that kind of mitigation requirement on the innocent party in this trespass.

[44] Further, at the time of the defendants' offer, the defendants had not admitted any fault or liability. Indeed, they continued to deny the trespass. In these circumstances, the plaintiffs' rejection of the defendants' offer was not unreasonable. Indeed, it was completely understandable.

[45] The other expenses claimed under this head of damage are the costs for Ms. Cassidy, VI Tree Services, Mr. Compton, Ms. Mumby and Thomas Hoyt. The fees for Ms. Cassidy, VI Tree Services and Mr. Hoyt are claimable as costs incurred to deal with the emergent situation. While Ms. Cassidy's fee included the cost of her preparation of a planting plan, that is not put forward as an expert report. The plan is a requirement for the Avenders to move forward

with the rehabilitation of the land. While all VI Tree Service did was connect their sub-contractor (Ms. Cassidy) with the plaintiffs, their fee is not unreasonable and was incurred at a time when the Avenders were struggling to find out how to deal with the sudden damage to their property in circumstances where the defendants were denying responsibility and providing no assistance.

- [46] The fees charged by Ms. Mumby are not recoverable. She was retained as an expert witness. It is not clear to me what, if any, portion of her fee could be ascribed to repair work as opposed to the preparation of the report to be used in litigation. I have a similar concern about the recoverability of some of Mr. Compton's fee. It is clear that some portion of his fee was for trial preparation and is thus not recoverable as damages. His fee for work completed after June 2016 totalling \$596.17 (inclusive of admin fee and GST) appear to be for trial preparation. Those amounts are not recoverable as damages.
- [47] In summary, the plaintiffs are entitled to damages of \$16,239.60 for the cost of debris removal and initial restoration.

Replacement costs of the trees and shrubs

- [48] The circumstances of this case are similar to those in *Kates* where the defendant cut down mature trees. Here, as in *Kates*, it is impractical and unfair to the defendants to award damages premised on the cost of replanting trees of a similar size. It would also be unfair to award an amount that would put the plaintiffs in a better situation than before the trespass. However, the award must attempt to restore a reasonable amount of the trees and shrubs to minimize the plaintiffs' loss of privacy and amenities. In other words, the award must be reasonable and fair as between the parties in light of all the circumstances.
- [49] Ms. Mumby provided the only expert evidence on the cost of replanting. I agree with some of the defendants' critiques of her report. The number of trees and, in particular, the number of shrubs and plants that she recommends planting, is excessive. Further, it is not readily evident that the extensive planting recommended for the area of the BC Hydro right of way is related in any way to damage that occurred during the trespass. I also accept that the pricing in Ms. Mumby's report is contradicted to some extent by the factual information provided by Ms. Cassidy. I accept that a fair mark up on the wholesale cost of the plants and trees is 20%, the amount that Ms. Cassidy indicates she would charge, rather than the 30% suggested by Ms. Mumby. However, I accept that Ms. Mumby is highly qualified and I found her to be an excellent witness with extensive knowledge of the applicable regulations. She testified in a balanced and impartial way. I have used her report as a starting point for my assessment of the appropriate award for the cost of replanting the damaged area.
- [50] I would award the sum of \$17,500 for the cost of purchasing and planting the required number of trees and shrubs. This figure is not a precise calculation but a damage award based on all of the evidence including the following assumptions. The 45 conifers that were cut should be replaced on a 3 to 1 ratio with five gallon sized plants. I accept Ms. Mumby's

opinion that five-gallon plants have a better rate of survival than smaller plants. I also accept her opinion that the riparian area regulations require deciduous trees to be planted along with the conifers. I have allowed for approximately 75 deciduous trees. I have also allowed for approximately 175 plants and shrubs. I have not accepted Ms. Mumby's recommendation for a total of 610 shrubs and 375 plants as this would require the defendants to rehabilitate the BC Hydro right of way that was not damaged by the trespass. In fixing the award, I have included a 20% markup to the wholesale price and have allowed for an installation cost that is equal to the cost of the plants.

Plant restoration and establishment and future consulting

- [51] I agree with the defendants' submission that the evidence to establish the need for these future expenses was not thorough. On the other hand, it is somewhat difficult to estimate such future costs. In spite of the limited evidence, the court must award damages where the plaintiff has established a real possibility of a future loss and the loss must be quantified taking into account the probability of it occurring.
- [52] Here, I accept the following components of the claim for future expenses: the need to water the newly planted trees and shrubs for one or two years; the requirement to replace some of the plants based on 10% mortality; a need for some deer protection cages for some of the plants; and a need to pay consulting fees to Mr. Compton.
- [53] With regard to the watering, I accept Ms. Mumby's opinion that watering will be required for at least one year. Mr. Compton was of the view that newly planted trees and shrubs should be watered for one or two years given the trend in recent years toward hot and dry summers. The plaintiffs suggest that the practical way to do this is to have a cistern on site. Without regard to how the watering would be done, Ms. Mumby allowed \$2,500 in her costing. I am satisfied that the trees and shrubs will be planted and that it is likely the plaintiffs will arrange for the watering. I award \$2,250 for that future expense.
- [54] I accept the 10% mortality figure as a standard allowance applied for this kind of planting. I award the sum of \$875, which is 10% of the plant cost. While I accept that there will be a need for some fencing to protect the younger shrubs and bushes, the evidence does not support the substantial allowance included in Ms. Mumby's report. I also take into account Mr. Avender's evidence that he has previously used rolls of wire screen for this purpose. I award \$750 for this expense.
- [55] The Avenders claim \$1,250 as the cost of anticipated future consulting fees. I accept that Mr. Compton or another QEP will be required to oversee the work in the riparian area. Mr. Compton gave a rough estimate of future oversight costs that is higher than the amount claimed. I award \$1,250 for that likely future expense.
- [56] In summary, I award \$5,125 for the plant restoration and establishment costs.

3. What amount should be awarded for loss of amenities?

- [57] The plaintiffs says they should be awarded \$30,000 for loss of amenities. The defendants say that a fair award is \$2,000.
- [58] As set out in *Dykhuizen* and in *Kates*, damages in these cases should include an amount to compensate the plaintiffs for loss of amenities to the extent that complete restoration cannot be reasonably affected. The amount to be awarded is necessarily fact specific as noted by Mr. Justice Savage, in *Henderson v. Bakken*, 2010 BCSC 559, at para. 84. In that case the plaintiff was awarded \$3,000 for loss of amenities where the defendant cut more than 200 pine trees along a fence line in a rural area infested with pine beetle.
- [59] The decision in *Hutton v. Morehouse*, [1998] B.C.J. No. 668 represents the higher end of the range for loss of amenities. The plaintiff was awarded \$25,000 for his loss of privacy when the defendant took down a large number of trees on the plaintiff's property while clearcutting his own property. The award for loss of amenities was intended to compensate the plaintiff for the loss of privacy and enjoyment he derived from the trees. Mr. Justice McEwan commented at para. 48:

Having heard the evidence of Dr. Hutton, it is clear that a very significant component of his loss is the sense of invasion or violation he suffered. He has also lost the enjoyment he derived from the trees, particularly those between his house and the Morehouse property.

- [60] In *Kates*, the court of appeal upheld the trial award of \$13,000, or \$1,000 per tree for loss of amenities. The trial judgment noted that the cut trees did not change the character or overall appearance of the property and had the effect of breaching the curtain of privacy in only one area. The quiet forest setting was not noticeably impaired.
- [61] When I consider the circumstances of this case, as well as the principles set out in *Kates* and the range of awards in other decisions, I conclude that the Avenders should receive an award for loss of amenities that is at the higher end of the range. In part, this is because I find that the Avenders experienced a sense of invasion or violation similar to that experienced by the plaintiff in *Hutton*.
- [62] The Avenders considered the area of the property where the trees were cut to be very special. Having grown up on the property, Ms. Avender held it in high value. As she explained, she regarded it as magical; a beautiful, forested section of their property. She recalls her father taking her to the area near McNeil Creek when she was two years old. The Avenders frequently saw deer and other animals in the area. She described it as an amazing place to grow up and felt that she and her husband had been privileged to be able to raise their children with access to the same peaceful area. She described how the damage to that part of the property affected her deeply. The Avenders also lost some privacy as a result of the cutting of the trees, although I conclude that some of that loss was caused by the removal of the trees on the Tamihi property.
- [63] In the circumstances, a fair award to compensate the Avenders for loss of amenities is \$25,000.

4. What, if anything, should be awarded for punitive damages?

Position of the Parties

- [64] The Avenders say the actions of the defendants were malicious and high-handed. They note that Western is a forest company of some size and say that a punitive damage award of some magnitude is necessary to further the objectives of the law. They submit that an award of \$66,000 (\$1,500 per tree) is justified given the nature of the trespass.
- [65] The defendants emphasize that the trespass was unintentional. In all of the circumstances, they say there is no proper basis for an award of punitive damages.

Analysis

- [66] The principles to be applied in considering an award for punitive damages were explained in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. In *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Assn.*, 2009 BCCA 457 Madam Justice Newbury J.A. summarized those principles at para. 23. Given the matters in issue, the following principles are relevant:
1. Punitive damages are not limited to particular "categories" of wrongs, although by their nature they will "largely be restricted to intentional torts";
 2. The general objectives of punitive damages are punishment, deterrence of the wrongdoer and others, and denunciation;
 3. Since the primary vehicle of punishment is criminal law, punitive damages should be resorted to only in "exceptional cases and with restraint";
 4. The use of pejoratives such as "high-handed" or "oppressive" does not provide useful guidance (or discipline) to judges or juries and a more principled approach is desirable. (Notwithstanding this, the Court said at para. 94 that punitive damages are to be imposed only if there has been "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.");
 5. In setting punitive damages, the court should ask itself "in particular" how an award would further one or other of the objectives of the law and what is the lowest award that would serve the purpose;
 7. A "formulaic" approach should be avoided. The court should focus not on the plaintiff's loss but on the defendant's misconduct;
- [67] Punitive damages have been awarded in many cases where a trespasser wrongfully cut trees on a neighbour's property. In some decisions, punitive damages were awarded where the trespass was characterized as intentional: *Kates*, see para. 5. In others, such as *Cook v. Bhanwath*, [1998] B.C.J. No.1026, the court awarded punitive damages without determining if the act was intentional. In *Cook*, at para. 83, Mr. Justice Parrett found that he need not decide if the defendant acted deliberately as it was clear that his actions were reckless and

high-handed:

83 I have reviewed with care the circumstances in which this trespass took place. I have rejected much of Dr. Bhanwath's evidence in particular his denial that the cutting of threes was carried out deliberately in the sense that it was a scheme to enhance the value of and his enjoyment of his own property by opening up his view of and across the river. Whether or not the actions were deliberate and calculated, they were in my view reckless, high handed and completely oblivious to the rights of the adjoining property owner.

[68] In other decisions, punitive damages were awarded for committing a trespass recklessly. For example, in *Kranz v. Shidfar*, 2011 BCSC 686, and *Kachanoski v. Grace*, 2002 BCCA 615, punitive damages were awarded against defendants who acted recklessly by failing to make reasonable efforts to determine the location of property boundaries. In *Kachanoski*, the court upheld the award of punitive damages on the basis that the trial judge's findings as set out at paras. 10-12 of the trial decision, satisfied the test for punitive damages:

[10] Mr. Grace made nothing but the most casual inquiry to establish the property line before he began the cutting. The best that can be said for his evidence is that he formed the general view from some conversations that he had had with the previous owners that the property line must be further over than it actually was. There is no support in any of the evidence for a contention on his part that anyone told him where the property line was except in the very vaguest of ways. He did not attempt to find the iron posts that mark the corner of the property and, therefore, the property line. He did not make any inquiries of his neighbours. He did not consult any plan; although I am satisfied, that he would have had access to plans if he wished which showed the property line between the two properties.

[11] ... Mr. Grace acted almost completely irresponsibly.... I am satisfied that his actions can be characterized as reckless. He simply did not inquire. He wanted to cut the trees down. He thought they may be on his property and so he cut them down.

[12] I am satisfied that there is no basis upon which he could have said, "I honestly thought they were on my property." In order to say that he would have had to make some logical inquiry, some inquiry that was based in reason, and he did not do so.

[69] I have already set out my findings about the steps taken by the defendants to determine the location of the property line between the Tamihi and Avender properties. My findings mirror those made by the courts in *Cook*, *Kranz* and *Kachanoski*. The defendants made no attempt to obtain survey information, look for survey markers or make reasonable inquiries to determine property boundaries. They simply wanted to harvest the timber that they assumed was on the Tamihi property. Their actions can be fairly described as reckless and high-handed. Their failure to take any reasonable steps before harvesting timber with a feller buncher in that setting represents a marked departure from the standard of behaviour expected from a neighbour or a logging contractor. The defendants' actions are deserving of an award of punitive damages.

- [70] The authorities reveal a wide range of punitive damage awards for this kind of trespass. In *Kachanoski*, a punitive damage award of \$3,000 was upheld for the cutting of 21 trees. In *Kranz*, the plaintiff was awarded \$35,000 in punitive damages where the defendant cut down 10 trees in an urban setting. In *Kates*, the plaintiff was awarded \$26,000 for the intentional cutting of 13 large trees from the neighbour's property in an urban setting.
- [71] The particular circumstances of the trespass including location (urban or rural), extent of the loss (number of trees), and whether the actions were particularly egregious, must be taken into account in arriving at an appropriate award. However, the proper approach to quantifying the award is to ask "how an award would further one or other of the objectives of the law and what is the lowest award that would serve the purpose."
- [72] Here, deterrence of the defendants is an important objective. Western operates a successful logging business and the award must be sufficient to deter it and other similar enterprises from cutting trees without taking any reasonable steps to find out if they have any right to do so. The objective of denunciation also requires a punitive damage award that is more than nominal. An award at the low end of the range could be seen as a simple cost of doing business and would not send the right message to members of the public and to those involved in the business of removing trees.
- [73] Considering the circumstances of the case, the relevant objectives and the nature of the defendants' actions, I conclude that an appropriate award for punitive damages is \$20,000.

SUMMARY

- [74] The defendants' actions leading to the trespass were reckless and careless. While they did not intentionally cut trees on the Avender property, they were grossly negligent in deciding where to cut the timber. The plaintiffs are entitled to the following damage awards:
- \$16,239.60 for the cost of debris removal and initial restoration plus court ordered interest on that amount. The sum received from the sale of the logs is to be credited against that amount so the net award is \$12,012.08;
 - \$17,500 for the cost of purchasing and planting trees and shrubs for restoration of the site;
 - \$5,125 for future plant restoration and establishment costs;
 - \$25,000 for the plaintiffs' loss of amenities; and
 - \$20,000 for punitive damages.
- [75] The plaintiffs have been substantially successful and are entitled to costs at Scale B.
- "BUTLER J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/17/2018BCSC1711.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/avender-v-western-canadian-timber-products-ltd-2018>

Prepared on 28 October 2026 · Esheria