

CANADA / JUDGMENT

Lahti v. Chateauvert

2019 BCSC 1081

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1081 Lahti v. Chateauvert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lahti v. Chateauvert,

2019 BCSC 1081

Date: 20190704

Docket: VA S157202

Registry: Vancouver

Between:

Norma Jean Lahti and Keijo Ilmari Lahti

Plaintiffs

And:

Janis Kelynn Chateauvert and Chris Chateauvert

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Plaintiffs:

C. Harvey, Q.C.

Counsel for the Defendants:

P. R. Higgs

Place and Date of Trial:

Campbell River, B.C.

April 2 - 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 4, 2019

I. INTRODUCTION

- [1] This is an action in trespass. The plaintiffs say that on or about August 25, 2013, the defendants engaged a contractor to cut down 14 large trees on the plaintiffs' property unbeknownst to the plaintiffs. The defendants say the trees were cut with the plaintiffs' knowledge and consent.
- [2] The plaintiff, Keijo Lahti, passed away on October 29, 2016 and so was not present to testify. I have relied on the examination for discovery transcript of Mr. Lahti and the evidence of his widow, the plaintiff Norma Lahti, to ascertain what the plaintiffs' evidence is.
- [3] The key issue is whether the plaintiffs gave the defendants permission to cut the trees. If there was no consent, trespass will be established and the plaintiffs will be entitled to damages. The quantification of those damages is also in dispute.
- [4] For the reasons that follow, I find the defendants trespassed on the plaintiffs' property to cut trees. The plaintiffs did not consent to the cutting of trees and should be compensated for their loss.
- [5] I will begin by setting out the law of trespass before reviewing the evidence.

II. 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.

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]

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.

C. Joint Tortfeasors

[9] If the tort of trespass is established, the Court will need to consider whether Ms. Chateauvert is liable as a joint tortfeasor with Chris Chateauvert or whether Mr. Chateauvert is solely liable.

[101] The legal principles relating to joint tortfeasors were set out in the context of a trespass case in *Burnaby (City) v. Thandi et. al.*, 2005 BCSC 1478 at paras. 118-120 as follows:

[118] In *Fridman*, *supra*, 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.

[119] In *Insurance Corp. of British Columbia v. Vancouver (City)*, (1997), 38 B.C.L.R. (3d) 213 (B.C.S.C.) (affirmed on appeal on this definition, but reversed on the application of the facts to the law), (2000), 73 B.C.L.R. (3d) 1 (B.C.C.A.), Harvey J. stated the law as this:

Where two or more persons agree on a common course of action which is unlawful and tortious in itself, and in furtherance of the agreement one of the parties commits a tort, the tort will be imputed to the others. However if the common course is not unlawful or tortious in itself, and in furtherance of the agreement one of the parties commits a tort, that tort will not be imputed to the others merely by reason of the agreement. Where the common course is not unlawful or tortious in itself, the relationship between the parties must be such that they can be said to be joint tortfeasors.

[120] In *Bains v. Hofs* (1992), 76 B.C.L.R. (2d) 98 (B.C.S.C.), Boyd J. considered the issue of joint tortfeasors and said the following at p. 103:

The issue is whether in these circumstances, Langbroek is, in law, a joint tortfeasor. In *The Law of Torts*, 7th ed. (The Law Book Company Ltd.) c. 11, p. 229, Fleming discusses the concept of joint tortfeasors:

"A tort is imputed to several persons as joint tortfeasors in three instances, viz. agency, vicarious liability, and concerted action ... The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. There must be 'concerted action to a common end', not merely 'a coincidence of separate acts which by their conjoined effect cause damage' (*The Kursk* [1924] P. 140 at 156). Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise that they are committing a tort. All persons acting in pursuance of a common end, being thus identified with each other, are accordingly responsible for the entire result and so it was laid down in 1612 that 'all coming to do an unlawful act, and of one party, the act is the act of all the same party being present' (*Heydon's Case*, 77 E.R. 1150 at 1151)."

It is the question of concerted action that arises in the case at bar. On this issue, the learned author continues on to say at p. 230:

"While the requisite degree of participation has not been precisely defined in modern decisions, there is a cogent support both in principle and ancient authority for the suggestion that it may well correspond with the description attached by the criminal law to principles in the first and second degree. This would include, besides the actual perpetrator, anyone who 'aids and abets', whether or not he actively intervenes. Knowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice."

Thus, one who knowingly assists or encourages another to commit a tort, or one who is merely present as a conspirator in the wrong that is done, is, in law, a joint tortfeasor.

[11] With those principles of trespass in mind, I will analyze the evidence.

III. UNDISPUTED FACTS

[12] The Lahtis and the Chateauverts are neighbours in Sointula on Malcolm Island, B.C. The Lahti property is registered to Ms. Lahti and the Chateauvert property is registered to Ms. Chateauvert.

[13] The Chateauverts have a deck on the southwest corner of their house. Prior to the tree cutting, their late afternoon and early evening sun was blocked by tall trees on the Lahti property.

[14] The parties agree that there was a discussion between Mr. Lahti and Mr. Chateauvert about cutting trees. Ms. Lahti says that one of their trees was leaning toward the Chateauverts' property (the "Leaning Tree") and one tree looked like it had been hit by lightning (the "Lightning Tree").

[15] Prior to the tree cutting incident, the Lahtis and the Chateauverts had a friendly neighbourly relationship. The Lahtis parked vehicles on the Chateauverts' property with the Chateauverts' consent and the Chateauverts grazed horses on the north part of the Lahtis' property with the Lahtis' consent.

[16] After the trees were cut, the two families stopped talking to one another.

[17] Fourteen mature trees on the plaintiffs' property were cut down by the defendants.

IV. DISPUTED FACTS

A. Evidence of Norma Lahti

[18] Ms. Lahti's recollection is that her husband was concerned about the Leaning Tree. It was located on the east side of the Lahtis' property. He was also concerned about the Lightning Tree on the northern part of their property that looked like it might be dying. She believes that Mr. Lahti had a discussion with Mr. Chateauvert early in the summer of 2013 about doing something with these trees. She was not present during the discussion. She is not aware of Mr. Lahti ever deciding to remove trees. She testified that there is no reason why they would want to cut the trees down. The ocean view from their property was to the south

and not obstructed by trees.

- [19] In cross-examination, Ms. Lahti said that Mr. Lahti never told her about the discussion about cutting the trees. Mr. Lahti had overheard a conversation between Mr. Chateauvert and Ken McGregor. Ms. Lahti was not involved in the discussion.
- [20] Ms. Lahti also agreed in cross-examination that she and Mr. Lahti were worried that the Leaning Tree might fall on the Chateauverts' house and that the Lightning Tree could have fallen in any direction.
- [21] The first she heard about the trees being cut was after she and Mr. Lahti had arrived back from their 2013 summer vacation on their boat. She believes they came home late on September 1 and went to bed. The next morning she was in the garden and Mr. Lahti was still sleeping. Mr. Chateauvert came over to her when she was in the front yard and asked what they wanted to do with the wood. Her response was "what wood?" Mr. Chateauvert responded "from the trees". She did not know what he meant. She walked around the back of her garden and saw that trees had been cut. She said, "it was awful -- it was just gone".
- [22] She woke Mr. Lahti up. When he saw the trees were cut he was angry. He went over to the Chateauverts' property and started screaming and swearing at Mr. Chateauvert.
- [23] Mr. Chateauvert said he was sorry. He said, "Janis said I should have waited until you were back". He also said, "what can I do to make it right? We have machines, I can make it right for you." Ms. Lahti testified that she answered, "put all the trees back!"

B. Evidence of Keijo Lahti

- [24] On July 20, 2016, counsel for the defendants examined Mr. Lahti for discovery. The plaintiffs seek to rely on this discovery transcript pursuant to R. 12-5 (54) of the Supreme Court Civil Rules. The defendants do not object. I granted an order to permit the transcript of his discovery evidence to be admitted as evidence in this trial.
- [25] Mr. Lahti recalled a conversation that happened in the fall before the trees were cut. He believed the conversation occurred in September or October 2013. He was working underneath a truck trying to repair it and overheard Mr. Chateauvert and Mr. McGregor having a conversation about cutting trees. He deposed at his examination for discovery that he got up from under the truck and went around and said "what the hell are you guys talking about? I told you twice before you can't cut down my Goddamned trees".
- [26] He recalled Mr. Chateauvert saying to him "what if we topped them?" He deposed that he said, "I hate topped trees. I'd rather cut them down." At that point, he saw a smile on Mr. Chateauvert's or Mr. McGregor's face and he figured they were up to something.
- [27] Mr. Lahti claims to have gone over to the Chateauverts' property on two previous occasions to tell them not to cut his trees. The Chateauverts have no recollection of him doing so.

- [28] Mr. Lahti agrees that there was one tree that was leaning just slightly and he was concerned it might fall on the Chateauverts' property.
- [29] In his examination for discovery, Mr. Lahti was confused about when the trees were cut. He believed the trees were cut in 2014. As discussed below, they were in fact cut on August 25, 2013.
- [30] The trees were cut when he and Ms. Lahti were on holiday. The morning after they returned, Ms. Lahti woke him up and said Mr. Chateauvert wanted to know where to put the logs. Mr. Lahti responded, "what logs?" She told him that they had cut down their trees.
- [31] Mr. Lahti went out to the back of the house and was furious. He said he was devastated. He went over to yell at Mr. Chateauvert and he was swearing. Mr. Chateauvert said, "I'm sorry, I'm sorry". Mr. Lahti deposed that he was yelling, "I told you not to cut down my Goddamned trees. I told you at least three times".
- [32] Mr. Lahti's evidence about the conversation regarding topping or removing trees is corroborated in part by Mr. Chateauvert and Mr. McGregor. The evidence that he told Mr. Chateauvert three times not to cut his trees is not corroborated. All parties agree that he was shocked and irate when he saw that the trees had been cut.

C. Evidence of Chris Chateauvert

- [33] Mr. Chateauvert built a sundeck on the west side of his house sometime in 2011. The trees on the Lahti property blocked the sun to the sundeck between 4:30 and 5:30 PM.
- [34] Mr. Chateauvert recalls having a beer on the deck with his brother-in-law, Mr. McGregor, after work one day in the summer of 2013. They commented about the lack of lighting. He believes it was in August 2013. Mr. McGregor suggested they should talk to Mr. Lahti. He had just seen him trying to fix a blue vehicle and so they invited Mr. Lahti over for a discussion about topping the trees. In cross-examination, Mr. Chateauvert could not remember who initiated the idea to speak with Mr. Lahti. When he was confronted with his statement in examination in chief he said, "if I said that earlier it must be right".
- [35] I am left with the impression that Mr. Chateauvert was trying to fill in the details after the fact but did not have a clear memory of what was said by whom.
- [36] Mr. Chateauvert testified that he and Mr. McGregor walked down to the vehicle where Mr. Lahti was working and invited him to come and look at the trees and have a beer. Mr. Chateauvert spoke to Mr. Lahti about hiring Devon Miller to remove tops and limbs and that he would pay for everything.
- [37] He testified that he recalled Mr. Lahti saying, "you should get your brother-in-law to cut them down and it wouldn't cost you anything".

- [38] Mr. Chateauvert testified that Mr. McGregor then started talking to Mr. Lahti about which trees they wanted to cut and they moved off the deck and moved toward the field and identified certain trees which were to be taken down. They pointed to the trees they were discussing. Those were the trees that were impeding the Chateauverts' sunlight. They were easy to identify. As I will set out later, Mr. McGregor does not corroborate this evidence.
- [39] Mr. Chateauvert's recollection is that Mr. Lahti did not protest. The conversation was cordial. He did not touch the trees that were to be cut nor did he mark the trees. He believes the conversation lasted 45 minutes to an hour.
- [40] It is apparent from Mr. Chateauvert's testimony that he honestly believed he had permission to cut down the Lahtis' trees.
- [41] On Sunday, August 25, 2013, Mr. McGregor came over to the Chateauverts' property and suggested to Mr. Chateauvert that they should start cutting the trees.
- [42] Mr. Chateauvert testified in chief that he was aware that the Lahtis were away, yet in cross-examination, he said he had no clue whether they were there or not. In further cross-examination, he said that when he walked down the driveway, he saw no vehicles were there and so he assumed they were not home.
- [43] He did not feel it was necessary to speak further to the Lahtis because he said they had a very clear understanding that they could go and cut the trees.
- [44] Mr. Chateauvert was asked at question 212 in his examination for discovery, which was read into the record in part, how he decided which trees to cut. He answered:
- Because it was the trees' impediment onto our property and the block line for the sun. They were very noticeable, and can't confuse them with any other ones there.
- [45] Mr. Chateauvert agreed that, prior to the cutting, there had been no discussion about the cleanup and there had been no discussion about what to do with the logs.
- [46] In cross-examination, Mr. Chateauvert was asked, "what were you going to give [Mr. Lahti]?" To this he gave several answers. He said, "they were still using my property, my real estate. I would clean up. It's expensive to get trees removed." When he was asked again what he gave them in return, he said there was no cost to them to clear the land.
- [47] It is clear to me that the only people who benefited from the cutting of the trees were the Chateauverts. The Lahtis had no reason to clear the trees other than the possible exception of the Leaning Tree and the Lightning Tree.

- [48] In cross-examination, Mr. Chateauvert agreed that no notes were taken of the agreement. He testified that they did not need to be taken as Mr. McGregor was there to verify the agreement. He did not send an email to the Lahtis confirming the agreement. There was no further discussion with Mr. Lahti. He did not ask the Lahtis if they wanted to be present when the trees were cut. There was no record of which trees were included in the agreement.
- [49] Mr. Chateauvert agreed that there had been no discussion about whether he could take his machine onto the Lahtis' property.
- [50] Mr. Chateauvert builds houses for a living and testified that he has not had a written contract in 16 years, even for a \$1 million house. He just trusts people.
- [51] A few days after the trees were cut, Mr. Lahti came running up the driveway screaming at him and swearing. Mr. Chateauvert believes this was three days after the trees were cut. Ms. Chateauvert and Ms. Lahti say it was in early September.
- [52] Mr. Chateauvert testified that Mr. Lahti was very upset that he had cut the trees. He said "how dare you". Mr. Chateauvert agrees that he did apologize. He says he was trying to diffuse the situation. He says he was extremely surprised by Mr. Lahti's response and it caught him off guard. He apologized because he was trying to deflect the anger in front of his daughter. He was trying to deflate the situation and not have an outburst in front of his child.
- [53] Mr. Chateauvert testified in cross-examination that Mr. Lahti was inebriated when he came running up the driveway yelling. He suggested that Mr. Lahti drank a lot of beer and that it was hard to tell with "people like that" if they had been drinking a lot. This evidence is contradicted by Ms. Lahti who said she woke Mr. Lahti up and that he had had nothing to drink. She also testified that she had not seen Mr. Lahti run in years because of problems he had with his legs.
- [54] Mr. Chateauvert said he offered to fix everything and do anything they needed him to do to try to diffuse the situation. There was no further communication between the two families.

D. Evidence of Janis Chateauvert

- [55] Ms. Chateauvert was informed by her husband that he and Mr. McGregor had a conversation with Mr. Lahti about cutting trees. She was not party to the conversation. She was in the kitchen doing dinner preparation. She believes the conversation occurred in August 2013. She could not say that she saw the three men were moving in the field where the trees were located. She did not observe anyone being upset.
- [56] She testified that she thought they had it under control and did not need her involvement.

- [57] She found the sundeck on their home to be cold and damp because it was not getting enough sun. She had previously had a discussion with her husband about topping the Lahtis' trees. She was aware that Mr. Chateauvert was going to talk to Mr. Lahti.
- [58] In her examination for discovery, Ms. Chateauvert said that she knew the Lahtis were not home at the time the trees were cut. She knew they were on their boat or at least that they were away.
- [59] She was concerned about one tree along the ditch line between the two properties, which was leaning.
- [60] Ms. Chateauvert was home when the Lahtis discovered the trees were cut. She was sitting on her sundeck and heard Mr. Lahti screaming and yelling at them and calling them names. She just heard the yelling but could not hear specific words.

E. Evidence of Ken McGregor

- [61] Mr. McGregor is Ms. Chateauvert's brother. He is employed as a forest manager and is a certified faller. He was involved in a conversation with Mr. Lahti one Friday in August after work. He was on Mr. Chateauvert's back porch between 5:00 and 5:30 PM. They were enjoying the sun and then the trees blocked the sunshine. He commented that it was too bad the trees were there shading the sundeck. As they sat there discussing it, Ms. Lahti and Mr. Lahti had come home and were in the front yard around their vehicle. He and Mr. Chateauvert came up with the idea of talking to the Lahtis about the trees. They walked down the driveway. The original conversation was at the truck. The main conversation was in the backyard.
- [62] He hesitated to say who said what about cutting down the trees. He admits to not remembering the specifics of the conversation because it was a long time ago and he was not willing to fill in details after the fact.
- [63] Either he or Mr. Chateauvert suggested limbing or topping the trees. He believes it was Mr. Lahti who offered to have the trees removed, but he was not certain. When asked if they walked around the trees they were considering cutting, Mr. McGregor said absolutely not. When he was asked how he decided which ones to cut he could not say.
- [64] He testified that there was a dramatic difference in the height of the trees. It was obvious which trees had to be removed to allow sunlight on the sundeck. He does recall one tree leaning toward the Chateauvert property.
- [65] His recollection is that the demeanour of the conversation was cordial, friendly, and neighbourly and he does not recall Mr. Lahti making any protest. He was asked if he marked any trees. He said there was no reason to mark trees. They were only talking about a small handful of trees. He did not mark them and he did not count them or flag them.

[66] Mr. McGregor was asked if he considered talking to the Lahtis on the day that they cut the trees. His response was that he did not believe they were home. He did not consider it at all. He had the impression it was irrelevant whether they were there or not when the trees were cut. There was not much time between the conversation about cutting the trees and the actual cutting of the trees. He believed he did not have to go back to the Lahtis and confirm the cutting. In cross-examination, he freely admitted that his memory of the events was not strong. He did testify that he believed he had permission to be on the Lahtis' property.

V. ANALYSIS ON LIABILITY

[67] I find both Mr. Lahti's and Mr. Chateauvert's evidence to be unreliable because they have embellished their recollection with details which are questionable. Ms. Lahti and Ms. Chateauvert had little directly relevant evidence as to whether Mr. Lahti gave permission to cut the trees. I found Mr. McGregor's evidence to be reliable in that he only testified as to what he remembered.

[68] Based on the evidence of Mr. Chateauvert, Ms. Chateauvert, and Mr. McGregor, I believe Mr. Lahti was mistaken about the timing of the tree cutting conversation. I accept the defendants' evidence that the conversation happened in August 2013 and not the fall of 2012. I accept the evidence of Mr. Chateauvert and Mr. McGregor that they offered to top the trees and limb them so that more sunlight could get onto the Chateauverts' sundeck. I also accept Mr. Lahti's discovery evidence that he said he hated the look of topped trees and that he said "[he'd] rather cut them down".

[69] Mr. Chateauvert took this to be permission to cut down the trees that were blocking his sunlight.

[70] I reject Mr. Chateauvert's evidence that he, Mr. McGregor, and Mr. Lahti walked through the property and identified the trees that needed to be cut. Mr. McGregor, who was a very precise witness, said that absolutely did not happen. Ms. Chateauvert has no recollection of them leaving the deck and going onto the property to identify trees.

[71] I find that the alleged agreement was nothing more than a conversation about the topping or the cutting of trees. I do not interpret Mr. Lahti's statement that he hated the look of a topped tree and that "[he'd] rather cut them down", to mean that he authorized Mr. Chateauvert to come on his property and cut his trees. It is more likely that Mr. Lahti was simply explaining that, from his perspective, a topped tree was not more desirable than a stump. In context, I cannot find that this statement amounted to an invitation to cut his trees while he was away on vacation. I conclude that Mr. Lahti did not provide consent, express or implied, to cut the trees.

[72] I note that there was no clear indication of which trees were to be cut. There was no discussion about what would happen with the wood. There was also no benefit to the Lahtis who did not want trees to be cut. The one exception could be the two trees that Mr. Lahti was worried about. Although the expert witness for the plaintiffs says that these were not

dangerous trees, it is apparent that both Mr. Lahti and Ms. Lahti thought they posed a potential danger and should be removed. The significance of this finding is addressed under my damages assessment below.

- [73] I am influenced by the strong reaction of Ms. and Mr. Lahti to discovering that 14 trees had been cut down. They were shocked and very upset.
- [74] I conclude that Mr. Chateauvert jumped to conclusions about an agreement. Having said that, I accept Mr. Chateauvert's evidence that he believed he had permission to cut the trees that were blocking his sunlight. This explains why he nonchalantly went over to the Lahtis' property to ask what they wanted done with the wood. Unfortunately, his belief was mistaken. As noted above, such a mistake provides no defence to the tort of trespass.
- [75] I find that Mr. Chateauvert, Ms. Chateauvert, and Mr. McGregor knew that the Lahtis were not home when they commenced the tree cutting. They did nothing to clarify whether they had permission or to inform the Lahtis that they were about to start the cutting. However, I do not believe that the defendants chose to cut the trees when the Lahtis were away as part of a scheme to get away with something. Rather, this was a misunderstanding between neighbours. The defendants believed they had permission and had no reason to hide their actions.
- [76] As a result of my finding that Mr. Lahtis did not give permission to cut his trees, I conclude that there was no lawful justification for the trespass. Mr. Chateauvert is liable in trespass.
- [77] Mr. McGregor acted as Mr. Chateauvert's agent, but he has not been sued.
- [78] Ms. Chateauvert is the owner of the Chateauverts' property which benefited from the cutting of the Lahtis' trees. She relied on Mr. Chateauvert's representations that he had lawful justification to trespass on the Lahtis' property. I find that the trespass was committed by Mr. Chateauvert on behalf of both of them. The trespass was performed in furtherance of a common design to benefit their property. I find Ms. Chateauvert to be a joint tortfeasor with Mr. Chateauvert.

VI. DAMAGES

A. Expert Evidence of Jake Bapty

- [79] The plaintiffs seek special damages based on the expert evidence of registered professional forester and certified arborist, Jake Bapty. Mr. Bapty prepared a report on September 22, 2018 and was qualified as an expert certified arborist competent to provide opinion evidence on tree valuation.
- [80] The defendants did not call any expert evidence.

- [81] Mr. Bapty went to the Lahtis' property with Ms. Lahti and located 14 stumps from the incident. He measured each stump at 30 cm tall and determined the species of the cut trees. The trees were western hemlock, western red cedar, and red alder. Observations of adjacent trees provided an indication of the growth potential, which he used to estimate the height of the trees that were removed. He also counted tree rings to estimate the possible age of the trees that were removed, although rings were not visible on some stumps.
- [82] Mr. Bapty described two tree valuation methods. The first method is a market value method, which values the market price of wood. It does not consider the replacement value for each tree or the many benefits provided by the tree. The second is a Trunk Formula Method designed by the Council of Tree and Landscape Appraisers used for the appraisal of trees that are too large to replace.
- [83] Since Mr. Bapty was asked to evaluate the replacement value of the trees, he preferred the Trunk Formula Method to assess the structural value of the cut trees. He noted that the trees all looked to be in good condition with no disease. Replacement trees available commercially would be substantially smaller. Based on Mr. Bapty's consultation with nurseries on Vancouver Island and in Vancouver, 10-gallon-pot-sized trees were identified as costing \$45 per container, having an average stem diameter of 4 cm and approximate height of 1.8 m. Mr. Bapty then applied a species rating for each type of tree removed and a condition rating. The condition rating is a scoring system to quantify the condition of the roots, trunk, and scaffold branches. He applied a 'good' condition rating based on his evaluation of the neighbouring trees. A location rating of 82% was applied because the cut trees were well-positioned in the rear yard of a suburban residential area.
- [84] Based on his application of the Trunk Formula Method, Mr. Bapty recommended a value of \$64,780 be used to quantify the loss of the trees themselves. He also recommended that in addition to this figure, additional value for aesthetics, wildlife value, privacy, wind protection, shading, and noise buffering, be considered.
- [85] Mr. Bapty was cross-examined extensively by counsel for the defendants who referred him to several passages from the Council of Tree and Landscape Appraisers' Guide for Plant Appraisal (9th edition), which Mr. Bapty was very familiar with.
- [86] Mr. Bapty agreed that the loss of a tree may have no impact on the real estate value. He was estimating the replacement cost for the trees not the reduction in property value.

B. Evidence of Norma Lahti

- [87] In addition to the evidence of Mr. Bapty, Ms. Lahti testified as to the loss of amenities she suffered when the trees were cut. The trees are visible from her house and contributed to the aesthetically pleasing view. The trees also provided a wind barrier to her property and some additional privacy. She described the increase in wind on her property as a major loss of amenity. Things are always blowing around her property. She had a Canadian Tire shelter flip over. Her umbrella blew over and broke the glass of a table. She does not recall the wind

being as strong prior to the trees being cut.

- [88] Ms. Lahti has not removed the stumps or cleaned up the area and refuses to allow Mr. Chateauvert on her property.
- [89] Some of the logs were purchased by Mr. McGregor for which she received \$386. That amount should be subtracted from my assessment of her damages.
- [90] Her enjoyment of her garden is reduced because the cut trees are visible.
- [91] The assessed value of her property last year was \$198,800. There is no evidence that the cut trees have reduced the value of her property but they have reduced her enjoyment of the property.

C. Positions of the Parties

- [92] The plaintiffs' position is that the full Trunk Formula Method value should be paid to the plaintiffs in the amount of \$64,780. In addition, the plaintiffs seek \$20,000 for loss of amenities, including stumps left behind, wildlife value, reduction in birdlife, windbreak effect, loss of privacy, and emotional damage.
- [93] The plaintiffs also seek \$20,000 in punitive damages. They submit that the trespass was deliberate. As noted above, I have found that it was careless or negligent, but not deliberate.
- [94] The defendants urge the court to consider the value of the property in assessing the damage to the property. They submit that awarding \$64,000 for 14 trees on the property that is only worth \$200,000 is unreasonable.

D. Law on Assessing Damages for Lost Trees

- [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.

- [96] The defendants urge the court to exercise caution when assessing damages for trespass. They rely on *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322, aff'd (1991), 53 B.C.L.R. (2d) 322 (C.A.), which says that the appropriate award for damages in trespass is the amount required for remedial work that a reasonable person would have incurred to address the loss and the amount needed to compensate fairly the loss of use and enjoyment of the land.
- [97] In *Ovens*, Justice Macaulay considered *Kates* at para. 37 and interpreted the decision as follows:
- [37] Chan involved the application of the principles respecting assessment of damages set out in *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322. I summarize the principles as follows. Damages may extend to the cost of restoration, within reasonable bounds, together with compensation for loss of amenity to the extent that complete restoration cannot reasonably be effected. The trespasser is not required to finance restorative measures which are plainly unreasonable. The damages must represent what is reasonable, practical and fair in all the circumstances, not just from the perspective of the plaintiff.
- [98] Although Justice Macaulay relied on the Trunk Formula Method, he did not adopt the expert's calculation outright. Rather, he reduced the value slightly from \$16,523 to \$16,000 for the cost of replacement and loss of amenities.
- [99] Justice Gerow also considered *Kates* in *Heuser v. Carnovale*, 2016 BCSC 2620. She noted that damages in trespass must have an element of reasonableness and fairness. An award of damages should include: (1) the amount necessary for remedial work that a reasonable person would have incurred to address the loss and, (2) where remedial work cannot fully replace the loss, the amount required to fairly compensate the plaintiff for the loss of use and enjoyment of the land (para. 47). This latter portion of the award is for loss of amenity. Relying on *Graw v. Rockwell*, 2010 BCSC 1295, Justice Gerow noted that damages for loss of amenity "are at large and based on an estimate of the value of the loss of amenities for the plaintiffs" suffered as a result of "the less than perfect restoration" (para. 92). Justice Gerow said that the diminution in the value of the property as well as the cost of reasonable repairs should be considered. The injured party's actual use of the property is also a factor to be considered.
- [100] Justice Gerow outlined the different approaches to damages in cases of intentional trespass versus accidental trespass (paras. 49-50), which were discussed in *Great White North Bar & Grill Inc. v. Tompkins*, 2010 BCSC 1572 and *Bower v. Rosicky*, 2000 BCSC 85. In *Bower v. Rosicky*, the court found that the trespass was inadvertent and took a "less severe" approach in assessing damages. In *Great White North*, the court took a similar approach and noted that the trespass was not intentional or deliberate. The defendant in that case acted carelessly and took minimal steps to confirm a property boundary line. I find those facts similar to the present case. However, the case is distinguishable from the one at bar because the damage to the property was relatively minimal as it represented a small portion of the plaintiffs' property, was not generally accessible, and would regenerate

naturally.

- [101] Justice Gerow noted at para. 51 that there is a substantial difference in the assessment of damages between properties located in rural versus urban settings: see, for example, *Konno v. Harrison-Jones*, 2011 BCCA 50, and *Hutton v. Morehouse*, [1998] B.C.J. No. 668 (S.C.).

E. Analysis

- [102] I find that the Trunk Formula Method is a starting place for assessing damages for the replacement of trees cut during trespass.
- [103] I consider the possibility that there was an agreement to cut the Leaning Tree and the Lightning Tree even though Mr. Bapty did not find any root lifting and did not consider either tree to be a hazard. The evidence is that the Lahtis were concerned about both trees and may have in fact agreed to have them removed. Even if there was no such agreement, the plaintiffs' admitted concern about those two trees should reduce the compensation for their loss.
- [104] The Leaning Tree was a large cedar on the eastern boundary between the two properties. In Appendix 3 of Mr. Bapty's report, the largest cedar in that location has an estimated appraised value of \$18,000. I find it reasonable to remove that amount from the Trunk Formula Method appraisal.
- [105] The Lightning Tree was identified by Ms. Lahti in Photograph No. 3 of Exhibit 1. It appears to be located in a clump of three trees, labeled 11, 12 and 13 in Figure 3 of Mr. Bapty's report. I find that it was likely tree number 11, which was a western hemlock appraised at approximately \$3,250. I find it reasonable to remove that amount from the Trunk Formula Method appraisal as well.
- [106] I have considered the other factors in estimating the reasonableness of damages. The tall trees in the Lahtis' back yard were all visible. They provided a high canopy, which was attractive to them and visible to them whenever they were in their backyard.
- [107] I am not concerned that Ms. Lahti has not done any restoration work. She is living on a disability pension and could ill afford to do so.
- [108] The property is not urban. It is in a residential area outside the town centre so is more of a suburban/rural setting.
- [109] I am mindful of the caution articulated in *Kates* to ensure that trespass damages are reasonable. I have received no estimate of the cost of removing the stumps, clearing the area, and landscaping it. I think it would be unwise to leave this cost to be assessed at a later date and therefore, I will assess it as a general damage item together with the loss of amenities.

[110] I have reviewed the authorities provided by both counsel for the plaintiffs and counsel for the defendants and the various awards granted by this court. I conclude that an award of \$50,000 is appropriate taking into account the importance of the trees to the plaintiffs, the fact that 14 trees were removed, two of which I am not including in my damages. I have subtracted the amount Ms. Lahti received for the logs. The \$50,000 includes the cost to replace the smaller trees, clean up the stumps, and landscape the area, as well as the loss of amenities to the plaintiffs.

F. Punitive Damages

[111] The plaintiffs claim punitive damages in the amount of \$20,000. Whereas general damages seek to compensate a plaintiff's loss, punitive damages arise when the court finds a defendant's conduct calls for rebuke.

[112] In *Gibson v. F. K. Developments Ltd.*, 2017 BCSC 2153 at para. 59, Justice Punnett stated that these damages address a need for retribution, deterrence and denunciation and are a form of punishment. Justice Punnett explained at para. 59 that punitive damages may arise "where the conduct in issue is malicious, oppressive or high-handed such that the court's decency is offended (*Whitten [v. Pilot Insurance]*, 2002 SCC 18] at para. 36)"

[113] In *Gibson*, Justice Punnett noted at para. 60 that punitive damages have been awarded in numerous cases involving trespass and tree cutting. He found at para. 70 that "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". He concluded that the defendant's conduct was high-handed and reprehensible and awarded \$10,000 in punitive damages against each of them.

[114] In *Kranz v. Shidfar*, 2011 BCSC 686, Justice Groves awarded \$35,000 in punitive damages. In that case the defendant instructed a tree faller to cut all the trees on his side of the creek. Ten trees were cut in total. It turned out that all 10 trees were actually on the plaintiffs' property and not on the defendants' property. The plaintiffs argued that the defendants were reckless in removing the trees from the property, particularly in the way in which they failed to make any effort to identify the actual property line before removing the trees. Justice Groves concluded that in order for the defendant to say he honestly believed the trees were on his property, he would have had to make some inquiry to establish the property line, which he did not do. After learning that nine of the trees had been cut down, the plaintiffs told the defendant not to cut the last tree down. The defendant ignored this direction and removed the last tree. Justice Groves found this conduct gave rise to punitive damages. Although there was no clear evidence that the cutting of the trees increased the value of the defendants' property, it did improve their view and they benefited from their actions in removing the trees. He awarded \$35,000 in punitive damages.

- [115] In *Ovens*, Justice Macaulay found the defendant's conduct to be high-handed and deserving of censure. He did not accept the defendant's testimony that he believed the trees in question were on his land. If he had held such a belief, he would have at least consulted with his neighbour or taken reasonable steps to determine the actual location of the boundary. He acted solely to improve the view from his own home. He acted without regard to the legitimate interests and privacy expectations of the plaintiff. He was not a good neighbour. He awarded punitive damages of \$5,000, noting that "an award of punitive damages is the one of the few means available for the court to express its disapproval and to send a message to others that they must not trespass and cut trees on their neighbour's land without express permission" (para. 41).
- [116] I find that a low award of \$2,000 for punitive damages is appropriate in this case. As I found earlier, Mr. Chateauvert believed he had permission to cut the trees and his doing so in the plaintiffs' absence was not part of a scheme to get away with the act. However, I find he was reckless in jumping to conclusions about the plaintiffs' permission. He cut the trees when he knew the Lahtis were not home and could not object without clarifying whether he had permission to do so, and if so, which trees could be cut. He and Ms. Chateauvert have benefited from removing the trees that shaded their deck. I find Mr. Chateauvert's reckless disregard for the plaintiffs' interests to be worthy of some rebuke.

VII. CONCLUSION

- [117] The defendants are liable in trespass. I award damages of \$52,000 to the plaintiffs. The plaintiffs are entitled to their costs at scale B.

"B. M. Young, J."

The Honourable Madam Justice Young

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