NOVA SCOTIA COURT OF APEAL

Citation: *Pettigrew v. Halifax Regional Water Commission*, 2020 NSCA 82

Date: 202012115
Docket: CA 496027
Registry: Halifax

Between:

Marie Theresa Line Pettigrew and Linda Bernice Poole

Appellants

v.

Halifax Regional Water Commission

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	By written submissions (last submission filed October 22, 2020)
Subject:	*Halifax Regional Water Commission Act*, S.N.S. 2007, c. 55, amended by S.N.S. 2012, c. 60 and S.N.S. 2016, c. 23—Negligence—Nuisance—Damages
Summary:	**[1]** Ms. Pettigrew and Ms. Poole are homeowners. Their houses suffered sewage backup from trenching work done by the Halifax Regional Water Commission on the stormwater system. They sued the Commission for negligence and nuisance. The Supreme Court of Nova Scotia dismissed their claims. The court held the homeowners (1) had not proven negligence, (2) had established nuisance, but (3) the Commission could rely on statutory defences to nuisance. The homeowners appeal.
Issues:	Did the judge err by dismissing the claims in negligence and nuisance?

Result: The ground of appeal respecting negligence was dismissed. The statutory standard was gross negligence for which the legal onus rested on the plaintiffs. The judge made no palpable and overriding error by finding there was no gross negligence.

The ground of appeal against the dismissal of the nuisance claims was allowed. The judge erred in law by (1) interpreting s. 26 (b) of the *Halifax Regional Water Commission Act* as applying to nuisance and (2) assigning to Ms. Pettigrew and Ms. Poole the onus under s. 27A of that *Act*.

The Halifax Regional Water Commission was ordered to pay damages of $19,534 to Ms. Pettigrew and $9,172 to Ms. Poole.

NOVA SCOTIA COURT OF APEAL

Citation: *Pettigrew v. Halifax Regional Water Commission*, 2020 NSCA 82

Date: 20201215
Docket: CA 496027
Registry: Halifax

Between:

Marie Theresa Line Pettigrew and Linda Bernice Poole

Appellants

v.

Halifax Regional Water Commission

Respondent

Judges:	Bryson, Fichaud and Bourgeois JJ.A.
Appeal Heard:	By written submissions (last submission filed October 22, 2020)
Held:	Appeal allowed and damages awarded with costs, per reasons for judgment of Fichaud J.A.; Bryson and Bourgeois JJ.A. concurring
Counsel:	Peter Landry for the Appellants Robert Mroz for the Respondent

Reasons for judgment:

[2] Ms. Pettigrew and Ms. Poole are homeowners. Their houses suffered sewage backup from trenching work done by the Halifax Regional Water Commission on the stormwater system. They sued the Commission for negligence and nuisance. The Supreme Court of Nova Scotia dismissed their claims. The court held the homeowners (1) had not proven negligence, (2) had established nuisance, but (3) the Commission could rely on statutory defences to nuisance. The homeowners appeal.

[3] The questions are: (1) does the Commission have the onus to disprove its negligence for loss caused by activities within the Commission's control, and (2) may the Commission rely on the statutory defences to the tort of nuisance? In my view, the answer to each question is no.

Background

[4] The Appellants Line Pettigrew and Linda Poole own and live at 1870 and 1868 Shore Road, respectively, in Eastern Passage, Halifax Regional Municipality.

[5] The Respondent Halifax Regional Water Commission ("Halifax Water") is a not-for-profit public utility that operates under the *Halifax Regional Water Commission Act*, S.N.S. 2007, c. 55, amended by S.N.S. 2012, c. 60 and S.N.S. 2016, c. 23 (*"Act*"). Halifax Water supplies water for consumption and fire protection and provides wastewater and stormwater services to its customers in Halifax Regional Municipality.

[6] The stormwater system diverts runoff from properties and streets. Along the Shore Road, stormwater is piped separately from wastewater and sewage.

[7] From the trial judge's findings (2019 NSSC 362, paras. 7–15), I take the following:

- On November 23, 2015, Halifax Water began to re-route a section of the stormwater system along Shore Road near the Pettigrew and Poole properties. The project installed new piping to connect an existing stormwater pipe north on the Shore Road with an existing pipe that emptied into the harbour. This involved digging a trench in front of the Poole and Pettigrew properties. The

project was not designed to affect the separate sewer main line or sewer laterals to the Poole and Pettigrew properties.

- However, during the trenching, an excavator accidentally damaged the street end of Ms. Pettigrew's sewer lateral. Halifax Water replaced three to four feet of damaged pipe. On December 1, 2015, Halifax Water's supervisor told Ms. Pettigrew her sewer lateral had been damaged and repaired. He asked her to fill one-third of her bathtub, drain the water and advise if there were problems. She did so, and there was no problem. Halifax Water backfilled the trench and paved the road.

- On December 15, 2015, Ms. Pettigrew's main floor bathroom and basement floor drain experienced sewer backup. She called Halifax Water who told her to hire a plumber. Her plumber could not clear the blockage, which was near the street end of Ms. Pettigrew's sewer lateral. She again notified Halifax Water. On December 16, Halifax Water inspected her property and found gravel in Ms. Pettigrew's sewer lateral. Halifax Water dislodged the gravel with a plumbing snake. Ms. Pettigrew had no further backup.

- On Thursday, December 24, 2015, Ms. Poole's main floor toilet and basement drain experienced a similar sewer backup. She called Halifax Water who told her to hire a plumber. Her plumber was unable to dislodge the blockage, which was near the end of Ms. Poole's sewer lateral. On Tuesday, December 29 (the next working day after Christmas), Ms. Poole again called Halifax Water. Halifax Water came to her house on December 30. They could not dislodge the blockage with a plumbing snake. On December 31, Halifax Water dug up the road and repaired Ms. Poole's sewer lateral. Ms. Poole had no further backup.

- Halifax Water did not charge Ms. Pettigrew or Ms. Poole for the repair work.

[8] In 2016, Ms. Pettigrew and Ms. Poole sued Halifax Water for negligence and nuisance.

[9] On November 4 and 5, 2019, Justice Scott Norton heard the trial in the Supreme Court of Nova Scotia. He issued his Decision on December 4, 2019. The judge dismissed Ms. Pettigrew's and Ms. Poole's claims. Later I will discuss his reasons.

[10] In the event his ruling was overturned on liability, Justice Norton provisionally assessed Ms. Pettigrew's special damages at $14,534 and general damages at $5,000, and Ms. Poole's special damages at $2,172 and general damages at $7,000.

[11] By a Decision dated January 13, 2020 (2020 NSSC 13) Justice Norton ordered that Ms. Pettigrew and Ms. Poole each pay trial costs of $5,000 all inclusive to Halifax Water.

[12] Ms. Pettigrew and Ms. Poole appealed to the Court of Appeal.

Issues

[13] Ms. Pettigrew and Ms. Poole submit the judge erred by dismissing the claims in negligence and nuisance. They also say the judge gave insufficient weight to the opinion of their expert, Frank Lockyer. I will address (1) negligence and (2) nuisance and discuss Mr. Lockyer's evidence during the analysis of the negligence issue.

Standard of Review

[14] On appeal from the Decision of a judge after trial, this Court applies correctness to issues of law and palpable and overriding error to issues of either fact or mixed fact and law with no extractable legal issue.

First Issue—Negligence

[15] Sections 26 of the *Act* limits Halifax Water's liability as follows:

> **Exemption from liability re negligence**
>
> 26 The Commission, its officers and employees, are not liable for damages caused:
>
> (a) directly or indirectly by
>
> (i) the design, construction, operation, maintenance, repair, breaking or malfunction of wastewater facilities, a stormwater system or a water system, or
>
> (ii) interference with the supply of water through a water system,
>
> unless the damages are shown to be caused by the **gross negligence** of the Commission or its employees;

> (b) by the discharge of sewage or water into premises from a sewer unless the discharge was caused by improper construction or neglect in the maintenance of the sewer, or a failure to remedy a matter that was known, or should reasonably have been known, to the Commission and should reasonably have been repaired; or
>
> (c) in any case where this Act or the regulations have not been complied with by an owner or previous owner of premises that have been damaged.
>
> [bolding added]

[16] The judge interpreted s. 26(a) to require that Ms. Pettigrew and Ms. Poole prove gross negligence by Halifax Water:

> [27] In this case, by statute, any breach of the standard of care must be measured against an elevated threshold of "gross negligence" as that term has come to be defined by the courts.

[17] As to the evidence of gross negligence, the judge found:

> [33] The evidence at trial failed to establish any breach of a reasonable standard of care or ordinary negligence. It follows logically that the Plaintiffs did not meet the burden of establishing gross negligence.
>
> [34] The Plaintiffs adduced little relevant evidence of what the standard of care on the part of a water utility should be. …
>
> …
>
> [41] The only evidence before the court on the standard of care was (1) the Halifax Water internal Design and Construction Specification Manual produced by the Defendant in their Trial Exhibit Book and (2) the Expert Report of Frank Lockyer, a professional engineer … .
>
> [42] The Plaintiffs did not identify, by evidence or in argument, a single relevant failure on the part of the Defendant to follow its internal specifications.

[18] The judge (paras. 44–46) discounted several aspects of Mr. Lockyer's Report, then concluded:

> [47] In the result, I am unable to accept any of the conclusions of the Lockyer Report.

[19] At trial, the plaintiffs pleaded *res ipsa loquitur*. Justice Norton (paras. 50–51) noted that, in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, Justice Major rejected the notion that *res ipsa loquitur* shifted the legal

onus of proof to the defendant. According to Justice Norton, after *Fontaine* the finder of fact is entitled, but not required, to infer a breach of the standard of care from circumstantial evidence.

[20] From the evidence in this case, Justice Norton declined to infer Halifax Water breached its standard of care. He said:

> [53] On this evidence I am not prepared to draw an inference of negligence or, even more tenuously, gross negligence. The evidence falls far short of establishing a marked departure from the standard of care bordering on recklessness, as is required to establish gross negligence.

[21] In this Court, Ms. Pettigrew and Ms. Poole rely on *Snell v. Farrell*, [1990] 2 S.C.R. 311. Justice Sopinka for the Court said (page 321):

> … In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

[22] Ms. Pettigrew and Ms. Poole submit that the evidence respecting causation of their sewer backups lies entirely within Halifax Water's knowledge and Halifax Water should have the burden to disprove gross negligence.

[23] I respectfully disagree.

[24] In *Snell*, Justice Sopinka said there were two broad principles.

[25] The first is that the party who asserts should prove. Ms. Pettigrew and Ms. Poole assert.

[26] The second is that where the subject matter lies within the knowledge of one party, that party may have the onus. For a negligence claim, the second principle formerly took the form of *res ipsa loquitur*. In *Fontaine*, issued eight years after *Snell*, the Supreme Court held *res ipsa loquitur* did not shift the legal burden of proof to the defendant. *Fontaine* is the governing precedent on the former principle of *res ipsa loquitur* in negligence claims.

[27] In *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, paras 61–74, this Court discussed the effect of *Fontaine*. I incorporate the detailed analysis from *Johansson*.

[28] In short, from these authorities: Justice Major's ruling in *Fontaine* clarified that, in circumstances where formerly *res ipsa loquitur* governed [*i.e.* (1) the loss would not have happened without negligence and (2) the cause of loss was entirely within the defendant's control], there is no shift to the defendant of the *legal* burden of proof. Rather the finder of fact may, if he or she considers it appropriate, *infer* the defendant's breach of the standard of care caused the loss.

[29] Justice Norton declined to draw that inference. On appeal, this factual matter is assessed for palpable and overriding error.

[30] Halifax Water's equipment damaged the Appellants' sewer laterals. Mr. Lockyer opined that before or during the repairs, gravel may have entered the laterals and later caused the blockages and back up into the homes of Ms. Pettrigrew and Ms. Poole. That is the only evidence to explain causation of loss. I will assume that was the cause.

[31] Did Halifax Water breach the standard of care? There is no evidential basis for this Court to say the trial judge should have inferred Halifax Water committed the reckless or marked disregard which is required for gross negligence.

[32] The trial judge made no palpable and overriding error. I would dismiss the ground of appeal respecting negligence.

Second Issue—Nuisance

[33] The trial judge held that Halifax Water had committed the tort of nuisance against both Ms. Pettigrew and Ms. Poole.

[34] The judge's Decision (paras. 54–57) cited the definition of the elements of nuisance by *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 and *Antrim Truck Centre Ltd. V. Ontario (Transportation)*, [2013] 1 S.C,R. 594. Justice Norton then found:

> [56] In the present case I find that the interference with the Properties was substantial in the sense that it was not trivial. Sewage backed up into the Properties through the main floor toilets and the basement drains. It caused significant disruption to the Plaintiffs' lives and forced them to endure the cost

> and inconvenience of the cleanup and remediation of the damage. In addition, they had to endure the loss of use of the sewer lines until they were repaired, requiring them to forego flushing toilets, washing clothes and dishes, and taking baths and showers. Finally, they had to endure the odor from the sewage that backed up into their homes.
>
> …
>
> [58] In my view, the question of whether the damage flowing from the interference should be properly viewed as a cost of "running the system" and therefore borne by the public generally should be answered in the affirmative in this case. It is unreasonable to place the cost of such interference on individual property owners.
>
> [59] I find that the Plaintiffs have made out their claim for nuisance based on the authorities.

[35] Halifax Water has not filed a Notice of Cross-Appeal or Notice of Contention. Subject to the statutory defences that I will come to next, the judge's ruling that Halifax Water committed the tort of nuisance toward both Appellants stands.

[36] Justice Norton dismissed the claims for nuisance based on the two statutory defences in ss. 26(b) and 27A of the *Act*. I have quoted s. 26(b) above (para. 14). Section 27A was added by S.N.S. 2012, c. 60, s. 13. It says:

> **Exemption from liability re nuisance**
>
> 27A The Commission is not liable for nuisance as a result of the construction or operation of any work owned or operated by it, including, without limiting the generality of the foregoing, any water system, stormwater system or wastewater facilities, if the nuisance could not be avoided by any other practically feasible method of constructing or operating the work.

[37] Respecting s. 26(b), the judge reasoned:

> [62] I find that this section applies to a claim in nuisance. Paragraph (b) of the Section is distinct from the paragraph that clearly deals with negligence. There is no restriction on the causes of action that are captured by (b). The section is drafted to capture all damages caused by the discharge of sewage into premises from a sewer, regardless of the legal cause of action engaged.
>
> [63] There is no evidence of improper construction or maintenance of the sewer. The evidence does not support a finding that Halifax Water knew or ought to have known that there was a problem with the laterals that should reasonably have been repaired. In relation to the Pettigrew lateral, they recognized that it was damaged during the excavation, conducted repairs, and successfully tested its

> operation. More than two weeks passed before the backup occurred. There was no factual basis upon which to find that Halifax Water should have known that there was more to be done.
>
> [64] In relation to the Poole property, the first sign of difficulty was December 24th, more than three weeks after the work was completed and an even weaker basis upon which to argue that Halifax Water should have known there was a problem.

[38] Respecting s. 27A, the judge simply said:

> [66] There was no evidence to establish that the nuisance could have been avoided by any other practically feasible method of constructing the installation of the stormwater pipe in front of the Properties.

[39] The judge then dismissed the nuisance claims based on each of the two statutory defences:

> [67] I find that the Plaintiffs' claim for damages in nuisance is barred by the operation of Sections 26(b) and 27A of the *Act*.

[40] On appeal, the issues are whether the judge misinterpreted ss. 26(b) and 27A. Those issues were not canvassed in the parties' factums. The Court sent counsel a letter that clearly identified the issues and requested supplemental submissions. Each party filed a supplemental submission followed by an opportunity to reply.

[41] I will start with s. 26(b), then s. 27A.

[42] **Section 26(b):** It is helpful to requote s. 26(b) and set out the legislative history of ss. 26(b) and 27A.

[43] The *Halifax Regional Water Commission Act* of 2007 included:

> 26 The Commission, its officers and employees are not liable for damages caused:
>
> …
>
> (b) by the discharge of sewage or water into premises from a sewer unless the discharge was caused by improper construction or **neglect** in the maintenance of the sewer, or the failure to remedy a matter that was **known or should reasonably have been known**, to the Commission and should reasonably have been repaired; [bolding added]
>
> …

> 27(2) The Commission is **not liable for nuisance** as a result of the construction or operation of a work, if the nuisance could not be avoided by any other practically feasible method of constructing or operating the work. [bolding added]

The 2007 *Act* had no s. 27A.

[44] In 2012, the Minister of Service Nova Scotia and Municipal Relations introduced Bill 156, a Government Bill, to amend the *Halifax Regional Water Commission Act* of 2007. Bill 156, as introduced, included the explanatory note:

> Clauses 12 and 13 move the Commission's exemption from liability for nuisance to a separate provision and clarify it.

[45] Bill 156, as enacted, became S.N.S. 2012, c. 60 ("*2012 Amendment*"). The *2012 Amendment* included:

> 12 Subsection 27(2) of Chapter 55 is repealed.
>
> 13 Chapter 55 is further amended by adding immediately after Section 27 the following section:
>
> > 27A The Commission is **not liable for nuisance** as a result of the construction or operation of any work owned or operated by it, including, without limiting the generality of the foregoing, any water system, stormwater system or wastewater facilities, if the nuisance could not be avoided by any other practically feasible method of constructing or operating the work. [bolding added]

[46] The current consolidated statute includes the headings "Exemption from liability re negligence" before s. 26 and "Exemption from liability re nuisance" before s. 27A.

[47] From this background, the legislative intent clearly was that nuisance be governed exclusively by s. 27A and not by s. 26(b). I say this for the following reasons:

- The explanatory note to the *2012 Amendment* says the amendment will "move the Commission's exemption from liability for nuisance to a separate provision". The separate provision was s. 27A, which cited "nuisance". The only other reference to "nuisance"—in s. 27(2)—was repealed by the *2012 Amendment*. Section 26(b) does not mention "nuisance".

- This interpretation is consistent with the headings in the consolidated statute: *i.e.* "negligence" before s. 26 and "nuisance" before s. 27A.

- The interpretation is confirmed by the statute's text. Section 26(b) refers to the Commission's liability for "neglect" and "failure to remedy a matter that was known, or should reasonably have been known". Neglect and conduct that engages reasonable foreseeability of harm are features of negligence. As to nuisance, in *St. Lawrence Cement Inc.*, *supra*, Justices LeBel and Deschamps for the Court said:

> [77] At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. … Nuisance is defined as unreasonable interference with the use of land. … Whether the interference results from intentional, **negligent or non-faulty conduct is of no consequence** provided that the harm can be characterized as a nuisance… . [bolding added]

  The point in this passage was approved in *Antrim*, *supra*, paras. 19 and 21, per Cromwell J. for the Court. The assessment of unreasonable interference with land for nuisance comprises the factors discussed in *Antrim*, paras. 22–45. Those factors differ from the reasonable foreseeability required for the neighbor principle of negligence. Applying s. 26(b) to nuisance would treat neglect and reasonable foreseeability as prerequisites for nuisance which would mis-characterize that tort.

- If s. 26(b) applies to nuisance, then a plaintiff suing Halifax Water effectively would have to prove two causes of action – negligence and nuisance. Nothing suggests the Legislature intended to invent a unique binary tort for Halifax Water.

[48] In my respectful view, the trial judge erred in law by ruling s. 26(b) applies to nuisance. Section 26(b) does not afford to Halifax Water a defence to the torts of nuisance committed by Halifax Water against the properties of Ms. Pettigrew and Ms. Poole.

[49] **Section 27A:** Justice Norton held that, as "there was no evidence to establish that the nuisance could have been avoided …", s. 27A barred the nuisance claims. Clearly the judge assigned the onus to Ms. Pettigrew and Ms. Poole.

[50] The judge had already ruled that Ms. Pettigrew and Ms. Poole had proven the tort of nuisance. Section 27A enacts a statutory defence to the tort.

[51] The onus to prove a statutory defence to a proven cause of action rests on the party who asserts the statutory defence: *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, para. 13; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, para. 95; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, para. 54. This is an aspect of the principle stated by Justice Sopinka in *Snell*, quoted above, that "the onus is on the party who asserts a proposition".

[52] Halifax Water asserted the defence under s. 27A. The onus to establish the defence in s. 27A rested on Halifax Water.

[53] Halifax Water's reply to the supplementary questions from this Court now acknowledges that s. 27A does not afford a defence.

> 19. … Halifax Water acknowledges that if it intended to rely on the statutory immunity at s. 27A of the *Act*, it would have been required to lead evidence as regards, *inter alia*, alternative methods of construction. On further consideration, s. 27A is not engaged on the facts of this case.

[54] The judge erred in law by assigning to Ms. Pettigrew and Ms. Poole the onus under s. 27A.

[55] There is neither a statutory nor an evidential basis to overturn the proven nuisance.

[56] **Summary—nuisance:** I would allow the appeal against the dismissal of the nuisance claims.

Damages

[57] The trial judge quantified provisional damages: (1) for Ms. Pettigrew in the amounts of $14,534 (special) plus $5,000 (general), for a total of $19,534 and (2) for Ms. Poole in the amounts of $2,172 (special) plus $7,000 (general) for a total of $9,172.

[58] On the appeal, there has been no challenge by either party to the provisional quantification of damages. Those amounts stand.

Conclusion

[59] I would dismiss the appeal against the negligence ruling, but allow the appeal against the nuisance ruling. I would allow the claims by both Ms. Pettigrew

and Ms. Poole against Halifax Water for nuisance and order Halifax Water to pay damages of $19,534 to Ms. Pettigrew and $9,172 to Ms. Poole.

[60] I would overturn the trial judge's award of $10,000 costs to Halifax Water and order Halifax Water to return any amount already paid further to the costs ruling.

[61] I would order Halifax Water to pay (1) trial costs of $5,000 all-inclusive to each of Ms. Pettigrew and Ms. Poole, plus (2) appeal costs of $3,000 all-inclusive to each of Ms. Pettigrew and Ms. Poole.

Fichaud J.A.

Concurred: Bryson J.A.

Bourgeois J.A.