SUPREME COURT OF NOVA SCOTIA

Citation: *Pettigrew v. Halifax Regional Water Commission*, 2019 NSSC 362

Date: 2019 12 04
Docket: Hfx No. 452928
Registry: Halifax

Between:

Marie Theresa Line Pettigrew
and Linda Bernice Poole

Plaintiffs

v.

Halifax Regional Water Commission

Defendant

DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: November 4 and 5, 2019 in Halifax, Nova Scotia

Decision: December 4, 2019

Counsel: Peter M. Landry for the Plaintiffs
Robert Mroz and Michael Ng for Peter M. Rogers, Q.C.
for the Defendant

By the Court:

[1] The Plaintiffs are homeowners in Eastern Passage. The Plaintiff Line Pettigrew owns and resides in the property located at 1870 Shore Road, Eastern Passage, Nova Scotia. The Plaintiff Linda Poole owns and resides in the property at 1868 Shore Road, Eastern Passage, Nova Scotia (collectively referred to as the "Properties"). The Properties are semi-detached dwelling units.

[2] In November 2015, the Defendant, the Halifax Regional Water Commission ("Halifax Water"), constructed a stormwater sewer main line pipe in the street fronting the Plaintiffs' properties. In the weeks following the completion of the construction work the Plaintiffs encountered a backup of their respective sewer laterals, causing damage to their homes requiring cleanup and remediation. They claim against Halifax Water for damages in negligence or, alternatively, nuisance.

Facts

[3] There was no substantial dispute of fact between the parties.

[4] The Plaintiffs were, of course, unable to testify to the circumstances that caused the sewer backup. All they could say was that they experienced the

backup; what they did to clean up and remediate the results; and the inconvenience and expense they were put to in the process.

[5] The Defendant called the following former and current employees as witnesses: Anthony Makin (retired supervisor); Richard Masters (equipment operator) and Sheldon Parsons (Superintendent of wastewater and stormwater, East Region). The Defendant witnesses provided evidence on the construction plan, what occurred during the construction, and what was done by Halifax Water in response to the reported sewer backups at the properties.

[6] I found each of the witnesses who testified to be reliable and credible.

[7] On or about November 23, 2015, Halifax Water started work on a project in an area of Shore Road near the Properties, which involved rerouting a section of the stormwater system (the "Project").

[8] It is important to understand that at the location in question, the stormwater system (which removes runoff water from properties and streets) is a separately piped system from the wastewater or sewage system.

[9] The Project, as planned, was to install a new manhole and a length of new stormwater main pipe to connect an existing pipe that emptied directly into the harbour to an existing stormwater pipe system further north on Shore Road. This

required a trench to be dug in the street in front of the Properties. As designed, the installation of the new stormwater main pipe did not impact the existing sewer system, including the lateral sewer lines from the Properties to the main sewer line. Specifically, it was not intended that the existing sewer main pipes or lateral pipes from the adjoining properties would be affected in any way.

[10] During the construction, an excavator accidentally damaged the street end of the Pettigrew sewer lateral. Halifax Water replaced three or four feet of the lateral pipe. Ms. Pettigrew testified that on December 1, 2015, a Halifax Water Supervisor came to her door and told her that her sewer lateral had been damaged and repaired. He asked her to fill her bathtub one third full and then release the water and to advise if there were any noted problems. There was no problem experienced at that time. The trench was backfilled and paved.

[11] On December 15, 2015, Ms. Pettigrew experienced sewer backup from the toilet in the bathroom on her main floor and the floor drain in her basement. She contacted Halifax Water. A customer service representative for Halifax Water told her to contact a plumber to investigate the issue, which she did. The plumber was unable to clear a blockage in her lateral sewer pipe. He identified the location of the blockage as being near the street end of the lateral. Ms. Pettigrew contacted Halifax Water again.

[12] The next day, December 16, 2015, Halifax Water staff came to the Pettigrew property, did their own inspection, and discovered gravel present in Ms. Pettigrew's lateral sewer line. They were able to dislodge the obstruction using a plumbing snake and no further backup was experienced.

[13] On Thursday, December 24, 2015 (Christmas Eve), Ms. Poole experienced sewer backup from a floor drain in her basement and from the toilet in the main floor bathroom. She contacted Halifax Water, who told her to hire a plumber to investigate where the blockage was. She did so. The plumber was unable to remove the blockage which he located close to the street end of the sewer lateral.

[14] On the following Tuesday (the next working day following the Christmas holiday), Ms. Poole contacted Halifax Water and arranged for them to pick up the video of the blockage that was taken by the plumber. Halifax Water staff arrived at her home the following day. After being unable to clear the obstruction using a plumbing snake, Halifax Water dug up the road, located the sewer lateral and repaired it. The work was completed on December 31, 2015. Ms. Poole did not experience any issues with her sewer lateral after this work was completed.

[15] Halifax Water completed the repair work to the sewer laterals at the Properties at no cost to the Plaintiffs.

[16] In 2016 the Plaintiffs commenced this action for damages against Halifax Water claiming general, special, aggravated, and punitive damages. At the trial the claim for punitive damages was abandoned.

Issues

[17] The following issues require determination:

- Have the Plaintiffs established that any damage or interruption to the sewer system was caused by gross negligence on the part of Halifax Water?
- Have the Plaintiffs established that Halifax Water is liable in nuisance?
- What is the quantum of damages?

[18] The burden of proof is on the Plaintiffs to establish gross negligence and/or nuisance, as well as the damages claimed, on the balance of probabilities.

The Statute Defence

[19] The legislature has, through the passage of the *Halifax Regional Water Commission Act*, SNS 2007, c. 55 (the "*Act*"), recognized the benefit provided to

the public by the Defendant being responsible for the supply of fresh water and the removal of stormwater and wastewater. As part of that recognition, the legislation creates significant restrictions on the ability of persons to bring claims for damages against Halifax Water. Section 26 of the *Act* states:

> **Exemption from liability re negligence**
>
> 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 officers or 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;
>
> … [Emphasis added]

[20] Section 27A of the *Act* provides:

> **Exemption from liability re nuisance**
>
> 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.

[21] Halifax Water says that by virtue of these two provisions, the claims of the Plaintiffs are defeated and should be dismissed. Halifax Water says that there is no proof of gross negligence.

[22] With respect to nuisance, Halifax Water says there is no evidence that it was aware of a matter that should have been repaired, or that it ought to have been aware of a matter that should have been repaired and that it failed to remedy (s. 26(b)). Further, it says there is no evidence the nuisance could have been avoided by any other practically feasible method of constructing or operating the work (s. 27A).

Gross Negligence

[23] In ***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27, the Supreme Court of Canada defined negligence as follows (para. 3):

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. . . .

[24] There is no dispute that Halifax Water owed the Plaintiffs a duty of care and that the Plaintiffs sustained damage.

[25] The issues are whether Halifax Water breached the standard of care and if that breach amounts to gross negligence as defined by common law.

[26] The standard of care in a negligence claim is determined by asking if a defendant's conduct creates an unreasonable risk of harm. Did the defendant do something that a reasonable person in the situation of the defendant would not have done or, did the defendant omit to do something that a reasonable person in the situation of the defendant would have done? This requires the Plaintiffs, through evidence, to prove the standard of care for a reasonable water utility operator in these circumstances, and that the conduct of Halifax Water fell short of that measure.

[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.

[28] The Supreme Court of Canada described "gross negligence" in ***Holland v. Toronto (City)***, [1927] SCR 242 as "very great negligence":

> The term "gross negligence" used in [the *Municipal Act*, RSO, 1914, c 192] is not susceptible of definition… [it is] much more than merely ordinary neglect that it should be held to be very great or gross negligence…

[29] The Court, in ***Fuller v. Atlantic Trust Co.*** (1967), 62 D.L.R. (2d) 109 (N.S.S.C.), adopted the definition of "gross negligence" from the Supreme Court of Canada decision in ***McCulloch v. Murray***, [1942] 2 D.L.R. 179, [1942] S.C.R. 141, holding that gross negligence implies some form of conscious wrongdoing or "very marked departure" from the standard of care:

> All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people … habitually govern themselves. [***McCulloch*** at 145 (S.C.R.)]

[30] Gross negligence, then, involves a "very marked departure from the standards by which responsible and competent people habitually govern themselves."

[31] The Plaintiffs bear the burden to establish some "very marked departure" from the standard of care by Halifax Water. They must do so on the balance of probabilities. In other words, they must establish that it is more likely than not.

[32] The Plaintiffs allege that gross negligence by Halifax Water is established by the acts or omissions particularized in their Amended Statement of Claim. They say Halifax Water:

- Failed to properly and adequately supervise the work to be carried out;

- Failed to warn the Plaintiffs of the risk of a sewer backup;
- Failed in its duties in the proper management of the subject work;
- Failed in the training, handling, and directing of its workers and agents to carry out the subject work;
- Failed to employ staff and workers as is necessary to carry out its responsibilities in respect to the subject work.
- Failed to carry out inspections during and after its subject work as a reasonable standard would call for in carrying out such work.

[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. This would usually be established by reference to a defendant's internal policies, procedures, and standards, by calling same-industry actor(s) to describe accepted industry standards, or by producing qualified expert opinion evidence on the standard of care in an industry.

[35] Taking the first of the particulars of negligence listed above, the failure to properly and adequately supervise the work, the burden was on the Plaintiffs to establish by evidence what a proper and adequate level of supervision should have been, and then to ask the court to measure what Halifax Water did against this standard.

[36] With regard to the second particular, was there an accepted standard in the utility business regarding how customers should be warned of risks of sewer backup during construction and, if so, how did Halifax Water measure up against that standard?

[37] Third, what would "proper management" of the Project require, and did Halifax Water fall short of that?

[38] Fourth, what is the usual training, handling and directing of employees in the industry and how did Halifax Water do their training, handling, and directing of employees?

[39] Fifth, what employment of staff and employees was "necessary" for this job, and how did Halifax Water measure?

[40] Sixth, what inspections are accepted in the industry as being reasonable for this type of work? Did Halifax Water meet or fall below that level?

[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 at Contrast Engineering Limited, filed by the Plaintiffs with the court on December 6, 2018 (the "Lockyer Report"). Halifax Water did not challenge Mr. Lockyer's expert qualifications, nor did it challenge the compliance of the Lockyer Report with Civil Procedure Rule 55.

[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.

[43] As to the expert evidence, it is clear from the report that Mr. Lockyer was not at the site during the Project and that he did not witness the work that was carried out by Halifax Water. He relied on no testimony or statements from Halifax Water employees with knowledge of the job site.

[44] Mr. Lockyer drew inferences from the sewer backup incidents at the Properties and what he describes as "procedural failures" and concluded that Halifax Water allowed gravel to enter the Plaintiffs' lateral sewer lines. The various alleged "procedural failures" in the Lockyer Report are based upon

speculative inferential reasoning from the resulting sewer backups, and are largely irrelevant to the Plaintiffs' pleaded allegations of negligence.

[45] The entire Lockyer Report is premised on a wrong assumption of fact. Mr. Lockyer assumed that the work carried out by Halifax Water included a planned severance of the lateral sewer lines leading from the homes in question to the main sewer line in the street so as to allow room for the installation of the new stormwater main. This was not the case. Halifax Water never intended and so never planned to sever the lateral sewer lines from the Plaintiffs' homes. The criticism in the Lockyer Report is that Halifax Water did not specify or require in the construction plan that the workers cap the lateral sewer lines when they were intentionally severed and did not require that the lateral lines be inspected before they were reconnected (i.e. a standard of care). Unfortunately, this criticism is completely irrelevant because Halifax Water never intended to sever the lateral sewer lines from the Plaintiffs' homes. The severance was unplanned and accidental.

[46] Other conclusions in the Lockyer Report were based on assumptions proved false by the evidence at trial:

- Lockyer concluded, based on what he was provided, that the residents received no communication regarding the sewer work that was to take place. The evidence showed there was no planned work to the sewer lines and that the Plaintiffs were provided reasonable notice of the intended work on the stormwater system;

- Lockyer concluded that Halifax Water failed to prepare appropriate project documents meeting minimum requirements. This was also premised on the false assumption that Halifax Water intended to sever the sewer laterals, which they did not;

- Lockyer assumed that the sewer laterals started "backing up immediately". The evidence clearly showed that the first notice of backup was on December 15, 2015 - 15 days after the work was completed; and

- Lockyer criticized Halifax Water for not conducting a water flow test from the houses through the sewer laterals to identify the presence of debris. Lockyer was apparently not aware that Halifax Water did conduct a successful flow test at the Pettigrew house after repairing the lateral and before backfilling and paving the road.

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

[48] In the alternative, the Plaintiffs argue that the court should infer gross negligence from the facts. Their argument is that there was a sewer backup and such could not occur without gross negligence. I reject that argument.

[49] The Plaintiffs in their Amended Statement of Claim expressly pleaded *res ipsa loquitur*, a discarded doctrine of law that was historically used to imply negligence, as the Plaintiffs seek to do here.

[50] In ***Fontaine v. British Columbia (Official Administrator)***, [1998] 1 S.C.R. 424, [1997] SCJ No 100, the Supreme Court of Canada abolished the doctrine of *res ipsa loquitur* as a standalone pathway to a finding of liability.

[51] In ***Johansson v. General Motors of Canada Ltd.***, 2012 NSCA 120, the Nova Scotia Court of Appeal considered ***Fontaine***, *supra*, and held that it is open to a court to draw inferences based on circumstantial evidence; however, a plaintiff is still required to satisfy his or her burden of proof to the civil standard.

[52] In this case we know from the admission of Halifax Water that they damaged the end of the sewer laterals during the excavation. There was no evidence before the court as to whether this is an ordinary or extraordinary risk in

the installation of a stormwater main. There was no evidence of what a water utility should do to ensure this did not happen or, if it did happen, what is the reasonable method of response. The evidence did show that Halifax Water knew of the damage to the Pettigrew line, repaired it, tested it, and it thereafter appeared to be working properly. Halifax Water was not aware of any damage to the Poole lateral until the backup was reported.

[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.

Nuisance

[54] The Supreme Court of Canada in ***St. Lawrence Cement Inc. v. Barrette***, 2008 SCC 64, defined nuisance at para. 77 (references omitted):

> 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. … The interference must be intolerable to an ordinary person. … This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. … The interference must be substantial, which means that compensation will not be awarded for trivial annoyances. …

[55] The Supreme Court of Canada in ***Antrim Truck Centre Ltd v. Ontario (Transportation)***, 2013 SCC 13, dealt with the question of whether an interference with the private use and enjoyment of land is unreasonable when it results from work done that serves an important public purpose. Citing ***Barrette***, *supra*, Justice Cromwell defined the elements of private nuisance in these terms (para. 19):

> The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial and unreasonable.* A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. …

[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.

[57] As to the issue of how reasonableness is assessed in the context of projects that further the public good, the Court in ***Antrim***, *supra*, held as follows (at paras. 2, 38, and 48):

> [2] The main question on appeal is this: How should we decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose? The answer, as I see it, is that the reasonableness of the interference must be determined by balancing the competing interests, as it is in all other cases of private nuisance. The balance is appropriately struck by answering the question whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation. Here, the interference with the appellant's land caused by the construction of the new highway inflicted significant and permanent loss on the appellant; in the circumstances of this case, it was not unreasonable for the Board to conclude that an individual should not be expected to bear such a loss for the greater public good without compensation.
>
> …
>
> [38] Generally speaking, the acts of a public authority will be of significant utility. If simply put in the balance with the private interest, public utility will generally outweigh even very significant interferences with the claimant's land. That sort of simple balancing of public utility against private harm undercuts the purpose of providing compensation for injurious affection. That purpose is to ensure that individual members of the public do not have to bear a disproportionate share of the cost of procuring the public benefit. <u>This purpose is fulfilled, however, if the focus of the reasonableness analysis is kept on whether it is reasonable for the individual to bear the interference without compensation, not on whether it was reasonable for the statutory authority to undertake the work. In short, the question is 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, or as the type of interference that should properly be accepted by an individual as part of the cost of living in organized society: *Tock*, at p. 1200</u>.
>
> …
>
> My view is that the reasonableness inquiry should not be short-circuited on the basis of certain categories of interference that are considered self-evidently unreasonable. To the extent that cases such as *Jesperson's* and *Airport Realty* suggest that balancing can simply be dispensed with in the face of material or physical interference, I respectfully disagree. The sort of balancing inherent in the

> reasonableness analysis is at the heart of the tort of private nuisance. As La Forest J. put it in *Tock*, the law only intervenes "to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances": p. 1191. The legal analysis in a nuisance case is more likely to yield sound results if this essential balancing exercise is carried out explicitly and transparently rather than implicitly by applying a murky distinction.
>
> [Emphasis added]

[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.

[60] However, that is not the end of the inquiry. I now must consider the statutory restrictions on nuisance claims against Halifax Water.

[61] Section 26 of the *Act* states:

> **Exemption from liability re negligence**
>
> The Commission, its officers and employees, <u>are not liable for damages caused</u>
>
> ….
>
> (b) <u>by the discharge of sewage or water into premises from a sewer</u> unless the discharge was caused by improper construction or neglect in the maintenance of the sewer, or a <u>failure to remedy a matter that was known,</u>

> or should reasonably have been known, to the Commission and should reasonably have been repaired;
>
> [Emphasis added]

[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.

[65] Section 27A of the *Act* states:

> 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.
>
> [Emphasis added]

[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.

[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*.

[68] Accordingly, the Plaintiffs' claims against Halifax Water are dismissed.

[69] I will provisionally assess the damages claimed.

Ms. Pettigrew

Special Damages

[70] Ms. Pettigrew had the benefit of a policy of homeowner's insurance. The insurer arranged for a remediation firm, Paul Davis, to conduct the clean up and remediation of the physical damage to her property. The evidence established that the insurer paid these expenses in the amount of $13,643.65, inclusive of her $2,000.00 deductible.

[71] There was much ink spilled in the parties' briefs arguing whether this was or was not a collateral benefit. The insurer who paid gave notice to the Defendant that it sought repayment of its outlay pursuant to the subrogation provisions of the *Insurance Act*, RSNS 1989, c. 231, specifically section 172. As only one cause of action exists for the claim of a party, this subrogated claim must be part of the claim advanced by the Plaintiff Pettigrew. It is up to Ms. Pettigrew to work out the repayment to her insurer from any damages recovered in this action.

[72] In addition to the insurance claim, Ms. Pettigrew incurred the expense of the plumber called on the day of the backup in the amount of $575.00 and for some building materials and paint (due to allergies she had to purchase more expensive non-allergy paint that her insurer would not cover) in the sum of $316.00.

[73] I would provisionally assess special damages to Ms. Pettigrew in the total sum of $14,534.00.

General Damages

[74] No one wishes to have sewage backed up into their home. Ms. Pettigrew was working during the day and would come home from work to see the flooring in her bathroom and hallway removed, the bathroom fixtures removed and industrial fans operating to dry out the house. It caused significant disruption to her life and forced her to endure the cost and inconvenience of the cleanup and remediation. In addition, she had to endure the loss of use of the sewer lines until they were repaired, requiring her to forego flushing toilets, washing clothes, and dishes and taking baths or showers (or standing in dirty water in the shower). Finally, and by no means minimally, she had to endure the odor from the sewage that backed up into her home.

[75] There was no medical evidence produced. Ms. Pettigrew testified that she reported her emotions related to these events to her doctor.

[76] I do not find that the claim meets the threshold for a claim for mental injury as defined by the Supreme Court of Canada in ***Saadati v. Moorhead***, 2017 SCC 28, where the court held that psychological upset and anxieties are not compensable. I endorse the decision of this court in ***Urquhart v. MacIsaac***, 2017

NSSC 313, (affirmed: 2019 NSCA 25) that where mental distress falls short of psychiatric injury, general damages should not be awarded.

[77] In summary, Ms. Pettigrew had failed to satisfy the criteria in ***Saadati***, *supra*, with respect to proving a psychiatric or psychological injury that was "serious and prolonged" that rose above ordinary annoyances.

[78] I have reviewed the authorities provided by the parties dealing with similar claims for general damages. Considering all of the circumstances, and with the guidance of the authorities cited, I would provisionally award Ms. Pettigrew general damages in the amount of $5,000.00.

Aggravated Damages

[79] Aggravated damages are compensatory in nature, while punitive damages (not claimed at trial) are awarded as punishment for egregious conduct. The distinction was explained by McIntyre J. in ***Vorvis v. Insurance Corp. of British Columbia***, [1989] 1 S.C.R. 1085, at 1098-99:

> ... Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory ...

...

> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

[80] In ***Whiten v. Pilot Insurance Co***., 2002 SCC 18, the majority of the Supreme Court of Canada held, at para. 36:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[81] There was no evidence at trial of any conduct on the part of Halifax Water that should attract an award of aggravated damages. Indeed Ms. Pettigrew was complimentary of the way Halifax Water dealt with her and responded to her concerns. I dismiss the claim for aggravated damages.

Ms. Poole

Special Damages

[82] The evidence established that Ms. Poole did not have the benefit of homeowner insurance. She had to tend to the cleanup and remediation of her property on her own. She spent $1,765.00 on plumber services and $407.00 on materials for cleanup and remediation.

[83] I provisionally award special damages in the amount of $2,172.00.

General Damages

[84] I repeat my comments in relation to the Pettigrew claim for this head of damages. There was no evidence on behalf of Ms. Poole to satisfy the threshold for a mental injury claim.

[85] I would provisionally assess $7,000.00 in general damages for Ms. Poole. She had the burden of doing the cleanup and remediation herself and the added inconvenience of having her Christmas holiday ruined by the sewer backup and, in my opinion, is entitled to a higher award for that reason.

Aggravated Damages

[86] For the reasons stated above in respect of the Pettigrew claim, I do not award aggravated damages to Ms. Poole.

Both Plaintiffs

Pre-Judgment Interest

[87] The parties agreed on the rate of 2.5% but wished to make further argument to the court as to the period for which interest would run. As the damages are being assessed provisionally, it will not be necessary to hear submissions on this issue.

Costs

[88] Both parties requested to be heard on costs following the court's determination of liability and damages. If it remains necessary to hear from the parties on costs, I would invite the Defendant to provide its written submissions within 30 days of this decision and the Plaintiffs to respond within 15 days of receipt of the Defendant's submissions.

[89] The Plaintiffs' claims are dismissed.

[90] Order accordingly.

Norton, J.