SUPREME COURT OF NOVA SCOTIA

Citation: Little v. Jost Mission Day Care Society, 2014 NSSC 86

Date: 20140305
Docket: Hfx. No. 311550
Registry: Halifax

Between:

Wayne Little and Anne Little

Plaintiffs

- and -

Jost Mission Day Care Society

Defendant

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	September 9, 10, 11, and 12, 2013 at Halifax, N.S.
Counsel:	John T. Shanks and Tipper McEwan, counsel for the Plaintiffs Cory Withrow, counsel for the Defendant

By the Court:

[1] John Patrick Little and Anne Little live at 47 Punch Bowl Drive in the Armdale area of Halifax, Nova Scotia. Their property abuts property owned by the Jost Mission Day Care Society. The Little property is lower than the Society's land. While renovating the basement Mr. Little removed a portion of the foundation and saw water. Mr. Little installed a sump pump. It would take a large or severe rain to start the pump. In 2007 new playgrounds and parking area were constructed on the Society's property. In August 2007 there were heavy rains. The basement of the Little residence flooded causing damage. Mr. and Ms. Little sued the Society in negligence and nuisance claiming the Society's actions caused the flooding of their basement.

[2] John Patrick Little testified he resides at 47 Punch Bowl Drive in the Armdale area of Halifax, Nova Scotia. Mr. Little purchased the property in 2002. The house, including the basement, was in poor shape. The plumbing was old and the electrical system needed to be replaced. The air in the basement was damp. The basement floor and walls were dry. Mr. Little assumed there was water in the foundation.

[3] Mr. Little, a certified electrician, considered there was nothing structurally wrong with the property, renovated the property himself. After tearing out the basement, Mr. Little first installed new steps and a landing into the basement.

[4] Then Mr. Little installed plumbing for a bathroom in the basement. He removed about twenty square feet of the foundation to put in the plumbing and backflow protectors. The old backflow protectors were under the slab while the new ones are accessible. While digging to place the pipes, Mr. Little saw about six inches of water. After seeing the water, he waited two to three months. He watched the water level. In a week the water dropped down to nothing. When it rained very little water came in.

[5] Mr. Little installed a sump pump. He had previously installed sump pumps. He installed two outflows from the sump pump. The main outflow fed into the main sewer pipe. The second outflow ran out to the driveway. Mr. Little installed the second outflow as he considered the main sewer could back up.

[6] Every time it rained Mr. Little would check the sump pump well. It would take a long or severe rain storm to start the pump. The well was approximately twenty-eight inches deep. In order to start the pump the well would have to be half full of water. The pump only started one, two or three times. In a year the water did not fill above half the depth of the well.

[7] Mr. Little commenced his renovations in 2003. He does not know when the sump pump was installed but thinks it was before 2006. He did his renovations between 2003 and 2007. He does not know when he started work in the basement but it was at least a year after the sump pump was installed. Although Mr. Little did not know when the basement was finished, he said it was finished sometime in 2007. Most of the work in the basement was finished in 2007 before the flood.

[8] The Little property abuts property of the Society which operates the Edward Jost Child Care Centre (Centre) located at 7 Mont Street, Halifax, Nova Scotia. The Little property is lower than the Society's property. The area around the Little residence is flat behind the house for twenty to twenty-five feet, then there is granite ledge rock which runs along half the width of the property. The land then rises four or five feet to the boundary of the Society's property. After the property line, the property rises again.

[9] Mr. Little erected a chain link fence on his property, next to the Society's property. He testified there was a ditch on the Society's side of the boundary, then a three or four feet rise up to a plain. There was then an area where garbage cans were located. Next to the garbage cans was a parking area. Around the perimeter of the parking area were eight by eight pressure treated timbers. The level of the driveway was lower than the plain. The timbers were three high which were over time reduced to two high and then further reduced to ground level.

[10] Mr. Little testified he noticed changes to the Centre's parking area in late July or the first of August 2007. The garbage cans were moved and there was gravel right to the chain link fence. Previously, he would see garbage cans and no gravel. The eight by eight timbers were gone except one at ground level. The Centre was constructing new playgrounds. Mr. Little stated he noticed trucks with gravel and saw lots of activity in July and August 2007. He stated he observed work in the back lot area. He saw a Bobcat coming and going bringing debris out and other material in. Debris was dumped in the woods. He saw rocks and dirt put

there. The Bobcat brought it down and dumped it load after load and levelled the material. Prior to that it was a level area. Now it was a sloping playground. On two or three different days Mr. Little saw a Bobcat on the Society's property dumping material in the woods. Although he was at work when the work was being carried out, Mr. Little once observed a backhoe removing sand from the property.

[11] Prior to September l, 2007 Mr. Little saw a large Tandem dump truck dumping a large pile of gravel on the driveway in the parking area behind the Centre. In July or August, Mr. Little saw a Bobcat remove a couple of loads of gravel and dump it in the back of the Centre. He saw a Bobcat pushing material in the woods. He saw a large rock being pushed into a big hole. The flat area of the rear playground was extensively torn up and replaced with new dirt and resodded. The new playground was sloped toward to the back - prior to the construction it was not sloped as much.

[12] Mr. Little testified prior to 2007 water never flowed to his property from the Society's property. When it rained the surface water on the Society's property flowed down the driveway. He did testify perhaps one quarter to one half inch of water would gather on his patio.

[13] In the period before the flood of September 1, 2007, Mr. Little checked his sump pump daily because of the water in the sump pump well. On August 17th water came up to within one or two inches of the top of the well. Then the water level dropped four to six inches. The water level went up and down. Mr. Little did not recall opening the second outflow at that time.

[14] Anne Little, wife of Wayne Little, testified. She did not observe any of the work done to the Centre's parking lot in 2007. She was not aware of the topography of the Centre's driveway or property prior to mid August 2007. Until it was brought to her attention in mid August 2007, she knew nothing about the Day Care Centre. She did not recall if water pooled in their patio area before 2007. She testified the sump pump had been installed in their house in the fall of 2004.

[15] In August 2007 Mr. Little pointed out he thought the fish in their fish pond may be affected by run off from the Society's property.

[16] In mid August 2007, Ms. Little observed silt on her patio. She and Mr. Little went to the Centre and told Kathleen Couture, the Centre's director, the Centre had damaged their property and endangered their fish. Mr. Little was upset and left. Ms. Little stayed to discuss the matter. Ms. Couture said the Centre had not done anything to change its property. Ms. Couture called Peter Haas and later that day Ms. Little met with Mr. Haas and Ms. Couture. Mr. Haas said the Centre had not made changes to the parking lot other than plowing in the winter caused a build up of rocks and debris at the end of the driveway which was levelled out in the spring to make it a little more even. Mr. Hass explained how water flowed on the Centre's property which flooded its basement. He said the solution was to drain across the Little's property. Ms. Little did not agree.

[17] Ms. Little testified in August there was a lot of rain. The water situation was getting worse.

[18] In 2007 Kathleen Michelle Couture was director of the Edward Jost Child Care Centre. She worked in the child care field for twenty-five years. Ms. Couture was hired as assistant director of the Centre in August 2005, appointed acting director in August 2006, and director in February or March 2007. One of her duties was to oversee the building including exterior and interior maintenance.

[19] The Child Care Centre was built on a swamp. It had a lot of water issues. The Centre would flood two to five times a month. If there was any rain during the rainy months of late spring, June and July, the Centre would flood.

[20] Water flowed down a hill on to the Society's property. Water came into the Centre's basement from the perimeter of the building where the floor and walls met. Water flowed down the driveway, toward the back of the parking lot, typically flowing to the west. When it reached the gravel it started to be absorbed in the gravel and pool near the corner of the Centre. The balance of the water flowed into Mont Street or pooled in the parking lot near the dumpsters or the first two or three parking spaces. During the rainy season the parking lot would have four to six inches of water.

[21] The driveway did not have much of a slope. There were no barriers on the driveway. The gravel which was typically level was the lowest part of the land.

The rain created puddles and potholes in the gravel. In 2005 a load of gravel was used to fill potholes. Snow plowing pushed gravel to the back of the parking lot. In the spring a snowplow dragged the gravel back. Every year the driveway got larger because of the gravel being moved. The driveway was not slopping in any direction.

[22] The Centre was aware it could not redirect the flow of water. In 2007 the Centre installed new front and back playgrounds as well as parking area. The parking area was not paved because the Centre needed a place for the water to go. The work commenced in mid to late June and was finished by the end of August. Ms. Couture supervised the work. She delegated most of her other duties to her assistant. There was no change to the dimensions of the front playground or the topography of the land. The height of the front playground was the same after as before construction.

[23] Although the contractors were told any material brought to the site had to be placed on the asphalt, material was placed on the rear playground when work was done and then moved. A Bobcat brought gravel into the rear playground. The dimensions of the rear playground did not change. New equipment was placed in the playground and the area resodded. The topography of the area was not changed. The rear playground never had water issues. After the construction water never puddled on the playgrounds. Rain soaked into the playgrounds which were covered with a porous material. There was a fence around both playgrounds. The parking lot was the same after as before the construction with the same depth of gravel.

[24] The construction took place during the hours the Child Care Centre was open, Monday to Friday from 7:30 a.m. to 5:30 p.m.

[25] There were heavy rains in August 2007. The Child Care Centre flooded at the beginning of the month, the middle of the month, and at the end of the month. In the middle of the month the Centre purchased a second shop vac. At the end of August there was an inch of water over the Centre's basement floor.

[26] On August 17, 2007 Mr. and Mrs. Little came to the Centre complaining of the flood of water coming from the Centre's property onto their property. It was

the first time Ms. Couture had spoken to them. Mr. Little was quite upset, used foul language and left. Ms. Little apologized.

[27] Ms. Couture said nothing had been done to the Centre's backyard. Ms. Little and Ms. Couture spoke about the water. Ms. Couture stated the Centre had not changed anything and the flow of water caused gullies which brought the water onto the Little's property. August 17, 2007 was the first time Ms. Couture went on the Little's property.

[28] Later that day, Peter Haas, a director of the Child Care Centre involved for many years with the maintenance of the Centre, met with Ms. Little. Mr. Haas explained the flow of water on the Centre's property. Mr. Haas testified this was the first time he had knowledge of water going from the Centre's property onto the Little's property. Mr. Haas confirmed the Centre was aware they could not take any action to redirect the flow of water or change grades of the property, having been told after losing a law suit, the Centre was not allowed to redirect the flow of water.

[29] On August 31, 2007 there was a heavy rainstorm. Mr. Little testified the whole area was saturated with water. Between two and three a.m. on September lst, Mr. Little woke in the basement bedroom. He got out of bed and stepped into approximately six to six and a half inches of water. It was the first time water was in the basement. The sump pump was working and water was coming in. He went upstairs and then returned to the basement and opened the valve of the second outflow.

[30] By four a.m. the rain had stopped and most of the water was gone by six a.m. There was still two inches of water in the bedroom, bathroom and part of the storage room. Mr. and Ms. Little mopped all of the floors.

[31] To repair the basement Mr. Little took up all interior and exterior walls, removed the membrane black plastic, and sopped up the water. The contents of the bottom shelves were soaked and water damaged and put in the garbage. The book shelves were not salvageable. Ms. Little was a mental wreck. Mr. Little repaired the basement. It was the same as before the flood except the flooring was replaced with ceramic tiles.

[32] I find the following facts have been established.

[33] There were very heavy rains in August 2007.

[34] Mr. and Ms. Little had water problems in their basement at 47 Punch Bowl Drive before any construction was done at the Child Care Centre in 2007. When initially installing plumbing for the bathroom in the basement, Mr. Little saw six inches of water. After a week the water level dropped. Mr. Little installed a sump pump to deal with the water. If a long or severe rainstorm occurred water would come into the sump pump well. The water would get as high as half the depth of the twenty-eight inch deep sump pump well. I accept Mr. Little's evidence that prior to 2007 water would gather on their patio.

[35] I accept Ms. Couture's evidence of the water problems experienced by the Child Care Centre, including the frequent flooding and the run off of water. The Centre was aware the flow of water across its property could not be redirected.

[36] Although construction on the Society's property took place from 7:30 a.m. to 5:30 p.m. Monday to Friday, Mr. Little described in great detail what he observed. In direct examination he stated he saw work in the Centre's back lot area daily. In cross examination Mr. Little testified he was at work when construction took place. Mr. Little testified both he and his wife observed a backhoe taking sand from the front of the Daycare and dumping the sand in the back. Mr. Little also testified his wife took a video and photos of the backhoe moving the sand. No such video or photos were entered into evidence. Ms. Little testified she did not see the work on the parking lot and knew nothing about the Centre until mid August 2007. I find Mr. Little exaggerated what he observed of the construction on the Society's property.

[37] I accept Ms. Coutrue's evidence and find the construction undertaken in 2007 did not change the topography of the Centre's property. I am not satisfied, on a balance of probabilities, that the 2007 construction or any action by the Jost Mission Day Care Society caused the flooding which occurred in Mr. and Ms. Little's residence at 47 Punch Bowl Drive, Halifax, Nova Scotia on September l, 2007.

[38] Mr. and Ms. Little claim against the Society in negligence and nuisance. The necessary elements for a successful action in negligence were set out by McLachlin, C.J., in giving the Court's judgment in *Mustapha v. Cullingan of Canada Ltd.*, [2008] S.C.J. No. 27 at paragraph 3:

> 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. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. In other words, his damage is too remote to allow recovery.

[39] The test as to whether a nuisance has occurred was set out by MacKeigan C.J.N.S., in giving the court's judgment in *Loring v. Brightwood Golf & Country Club Ltd.(1974*), 8 N.S.R. (2d) 431 (N.S.S.C.-A.D.) at paragraph 49:

> 49 *Farnham on Waters and Water Rights, supra*, at p. 2619 summarizes the American law respecting surface water in a statement which in my opinion also would describe the present state of Canadian law:
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> > With respect to water as it falls from the clouds the burden must rest where it falls so long as the water remains in a diffused state, without being gathered into any channel. In such condition the water will, ordinarily, do no particular harm, and if it is necessary to obtain drainage for it, resort must be had to the aid of the state by means of public drainage proceedings. While the water is in that condition any landowner may make such improvements upon his property as he chooses. He may build upon or change the surface at pleasure, without liability for the incidental effect upon adjoining property. He cannot, however, by artificial means gather the water upon his property together and throw it upon the property of his neighbour, whether the grade of the latter's land is higher or lower than his. The property of the neighbor is under no servitude to furnish artificial drainage for his property. Furthermore, the upper owner cannot change the course in which the water flows over the surface of his property, nor can he render his surface impervious so as to collect the water at his boundary and cast it on to his neighbor, nor can he do anything to relieve himself of the water at his neighbor's expense.

[40] Based on my findings of fact the Society is not liable to Mr. and Ms. Little in either negligence or nuisance. The action is dismissed.

[41] I will provisionally assess damages. In their Statement of Claim Mr. and Ms. Little claimed special damages of $37,237.74. The Statement of Claim was amended at the commencement of the trial to include a claim for general damages.

[42] At the trial a spread sheet created by Ms. Little was presented in evidence which set out special damages totalling $29,876.29. I have concerns as to the calculation of the claim for special damages. Among the concerns I have are the following.

[43] There is a claim for a platform rocker totalling, including tax, $171.00. The item was purchased sometime before the Littles moved into the Punch Bowl property. The valuation appears to be an estimate or guess.

[44] A rocker/recliner was purchased when the Littles moved into the house. Ms. Little believed it was purchased from Sears and went to the Sears website to see what it would cost in 2007 and claimed $796.86 as that is what the item would cost if purchased new from Sears in 2007. Of course, used furniture does not have the value one would pay for new furniture purchased in a retail store.

[45] There is a claim for damaged suitcases of $114.00 including HST. There is no evidence of the value of the suitcases at the time of the flood. The claim for miscellaneous losses of furniture and suitcases was $1,503.65. Considering the lack of evidence as to the value of these items I value the loss of pillows, comforter set, platform rocker, rocker/recliner, chairs in basement and suitcases at $600.00

[46] Ms. Little operates a business as a seamstress and has collected sewing magazines for over twenty years. Many of the magazines were damaged by water during the flood. As the damaged magazines were thrown out, if it had a price on it, the original purchase price was noted. The total of the purchase prices noted was $5,986.93 and that is the amount claimed. I accept magazines collected by Ms. Little were damaged. However, there is no evidence of the value or details of the magazines. The original purchase price is no evidence of the value of a

magazine at the time of the flood. I assign a value to the magazines damaged in the flood of $1,200.00.

[47] The similar method was used to calculate the claim for hard covered sewing books which were damaged resulting in a claim of $680. Again, there is no way of determining the value of the damaged books. There are no details of the books destroyed. I value the books destroyed at $150.

[48] Mr. and Ms. Little claimed for the value of the labour performed by them in repairing their home. Mr. Little claimed for136 hours at $25 per hour for a total of $3,400 and Ms. Little for 125.5 hours at $25 per hour for a total of $3,137.50. Mr. Little testified Ms. Little kept a record of their labour. Ms. Little testified she could not explain why the spreadsheet she prepared states the labour costs were divided by two. She testified she kept a diary setting out what she did. In cross examination Ms. Little testified she kept track of hours for awhile. She did not know if the record still exists. The hours set out in the spreadsheet were her best recollection of the time spent. The rate of pay she charged at $25 an hour was comparable to her actual salary. The work she performed in the repairs was as a trade's helper. Mr. Little performed the repairs and Ms. Little did things such as holding nails, holding ladders, bringing materials and helping Mr. Little during the repairs. For the work described by Ms. Little she is to be paid at $10 an hour not $25. Mr. Little testified when he performed renovations for other people his rate varies between $30 to $50 per hour - $30 for simple jobs and $50 for more difficult jobs. The rates Mr. Little charges others has a profit margin included in the amount. I find Mr. Little is entitled to $25 per hour for the time spent in repairing his residence. The value of the labour using the hours set out in the spreadsheet and the amounts I allowed is 136 hours x $25 = $3,400; 125.5 hours x $10 = $1,255 for a total of $4,655. I have no confidence in the hours claimed and deduct from the $4,655 a contingency of twenty-five percent or $1,163.75which results in an amount for labour of $3,491.25.

[49] Both Mr. and Ms. Little claimed for loss of business revenue from their home businesses. Mr. Little made jewellery which he sold in various locations as well as carpentry work. He claims $800 as the revenue he lost from these businesses because of the effects of the flood. Ms. Little also claims $800 as the revenue she lost from her sewing business. To calculate their losses, Ms. Little testified she looked at their income tax returns and sales records. The income tax

returns and sales records are not before the court. Mr. and Ms. Little have the burden to prove their damages on a balance of probabilities. I find they have not satisfied their burden with regard to the claim for lost revenue.

[50] The claim for the cost of the clean up totals $3,510.10. This claim includes the cost of a shed used to store materials from the basement during the repairs required as a result of the flood. The cost of the shed is said to be $1,098 plus HST for a total of $1,251.72. No receipt for the cost of the shed is in evidence although many other receipts have been placed in evidence. I accept the plaintiffs purchased a shed and required a facility to store items during repairs. I place a value on the shed of $800 including HST. There is also a claim for bed risers to protect bedroom furniture from future floods. The bed risers are not an item for which the defendant is liable. The cost of the bed risers of $44.43 is not allowed. The cost of the clean up is allowed at $3,013.95.

[51] In addition to the magazines and hard covered books, Mr. and Ms. Little claim certain items used in connection with Ms. Little's sewing business were destroyed in the flood. A claim is made for twenty-six shelves at $99 a shelf. There were different kinds of shelves which had been purchased when the basement was initially renovated. There is really no evidence as to the value of the shelves. I find the shelves have a value of $25 per shelf for a total value of $650. There is a claim for a sewing desk of $2,000 plus HST for a total of $2,280. I find this claim inflated. The desks were computer tables made of pressed board which were purchased in 2006. Ms. Little did not recall what she paid for the desks. A picture of the desks was in evidence. I assign a value of $100 to the sewing table. I accept the value of damaged fabrics at $228 and an iron of $77.48.

[52] The claim for the cost of repairs is $4,318.24 which, when the items are totalled, adds up to $4,604.74. The following items are to be deducted from that claim. A floor register was purchased on September 20,2007 for $11.39. Mr. Little did not know why it was purchased. The rental of equipment to level the basement floor cost $303.10. The levelling of the basement floor was an improvement for which the defendant is not liable. There are no particulars or receipt for building materials purchased on September 25, 2007 for $104.95. There is no evidence of what use was made of building materials purchased on September 28, 2007 for $11.33. The joiners, PVC pipe, etc. purchased on May 17,2008 for $104.49 was used to make improvements to the property to redirect

the gutters for which the defendant is not liable. The bricks purchased on May 17, 2008 were used to build up the fish pond. The cost of the brick totalled $236.17, a cost for which the defendant is not liable. The claim for cost of repairs is allowed at $3,833.31.

[53] Mr. and Ms. Little claim for miscellaneous expenses of $210.98 which claim I accept.

[54] In summary, Mr. and Ms. Little are provisionally entitled to the following special damages:

Damaged furniture and suitcases		$ 600.00
Cost of cleanup		$3,013.95
Office shelves		$ 650.00
Sewing table		$ 100.00
Damaged magazines		$1,200.00
Damaged hard covered books		$ 150.00
Fabrics and iron		$ 305.48
Cost of Labour		$3,491.25
Cost of Repairs		$3,833.31
Miscellaneous expenses		$ 210.98
	TOTAL	**$13,554.97**

[55] Mr. and Ms. Little also seek general damages for the loss of use of their home and the ability to enjoy their home as well as the inconvenience they suffered by the disruption to their life caused by flood. Both Mr. and Ms. Little testified of anguish caused, particularly to Ms. Little, by the flood and its effects. Mr. Little testified Ms. Little was a mental wreck - she was broken. Having read the cases to which I was referred, the evidence and submissions of counsel, I provisionally award general damages of $3,000.

[56] The Society submits Mr. and Ms. Little are contributorily negligent in that the sump pump in their residence was improperly installed and operated. The Society further submits if Mr. and Ms. Little had opened the second valve on the sump pump the basement would not have flooded.

[57] The test for contributory negligence was set out in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210 where McLachlin, J., as she then was, stated at page 1254:

> "I accept the defendants' submissions. The test for contributory negligence was summarized by Denning L.J. in *Jones v. Livox Quarries Ltd.*, [1952] 2 Q.B. 608 (C.A.), at p. 615:
>
> > Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the forseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

[58] The evidence shows in the period leading up to the flood Mr. and Ms. Little were concerned with the level of water in the sump pump well. Mr. Little was checking the level of water in the well. On August 17th water came up to within one or two inches of the top of the well. The water level in the sump pump well was going up and down. There were heavy rains in August 2007. Mr. and Ms. Little did not have the second outflow open despite the concern about the water level in the sump pump well. After waking between two and three in the morning of September 1, 2007 to a basement with approximately five to six and a half inches of water, Mr. Little opened the valve of the second outflow and by six a.m. most of the water was gone.

[59] I find an ordinary, reasonable and prudent owner of a residence would reasonably foresee if there was water coming from a higher abutting property on to his or her lands and when there was a long or severe rain storm water came into the sump pump well, water could overflow the sump pump well, thereby causing damage. I therefore find Mr. and Ms. Little are contributorily negligent in not having the second outflow opened at the time of the flood.

[60] The damages to be apportioned between the plaintiffs and defendant is $16,554.97. Any negligence in causing the water to come on to the Little's property has a greater degree of responsibility for the damage incurred than the plaintiffs' contributory negligence in failing to take reasonable care in having the second outflow opened during the rain on August 31 - September l, 2007. I

therefore apportion 75% liability against the defendant and 25% liability against the plaintiffs.

[61] In conclusion the Society, if liable in negligence, would pay Mr. and Ms. Little 75% of $16,554.97, being $12,416.23.

[62] The issue remains, is contributory negligence available to a claim based in nuisance.

[63] In *Remedies in Tort* Volume 3 Linda Rainaldi, et al (eds.) Nuisance - paragraph 65 at page 17-56.11 it states:

> 65 While contributory negligence appears to be well established as a defence in cases involving personal injuries suffered as a result of public nuisances on the highway, the availability of the defence in cases where negligence is not at issue in determining liability is unclear. Saskatchewan courts have held that the defence is irrelevant to a finding of liability in nuisance, and other courts have questioned its applicability. At the same time, a plaintiff has been held to be contributorily negligent in a private nuisance action involving negligence on the part of both parties. There also is authority to suggest that the defence is available even where the liability of the defendant is not based on negligence, particularly where the applicable legislation permits apportionment on the basis of "fault" rather than negligence."

[64] The *Contributory Negligence Act*, R.S.N.S. 1989 c. 95 uses the language of fault. Sections 3 and 4 of the Act provide:

> 3(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> (2) Nothing in this Section operates so as to render any person liable for any damage or loss to which his fault has not contributed. R.S., c.95, s.3.
>
> 4 Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault. R.S., c. 95, s. 4."

[65] As the *Nova Scotia Contributory Negligence Act, supra,* speaks of fault, it would apply to claims in which the plaintiff's fault caused damage to him or her. Here I have determined Mr. and Ms. Little's conduct or actions have contributed to the damage they experienced - that is, their fault contributed to the damage or loss they suffered. The *Contributory Negligence Act*, *supra,* applies to claims in nuisance if the plaintiff's conduct contributed to the damage or loss experienced by the plaintiff.

[66] In this case, contributory negligence does apply and therefore the apportionment mentioned above applies to the claim in nuisance as well as the claim based in negligence.

[67] The Society, if liable in nuisance, would pay Mr. and Ms. Little 75% of $16,554.97, being $12,416.23.

[68] If the parties are unable to agree, I will hear them on the issue of costs.

Coughlan, J.