

[2] Mr. Warren discussed the matter with Mr. Gluppe in the summer and fall of 2016. Mr. Gluppe acknowledged the flooding but failed to remediate the issues. Mr. Gluppe informed Mr. Warren that he did not have property insurance and could not afford to fix the problems. Eventually, the Frontenac County Planning Department (“Planning Department”) intervened and ordered Mr. Gluppe to dig a trench and redirect the sump line pipe to the opposite side of the property along Mr. Gluppe’s driveway. This would redirect the water to the main road where municipal culverts could potentially collect it. For reasons discussed below, this remediation did not succeed. The redirected water travelled through a white pipe that had not been removed and drained back to the area where the pooling first occurred. As of January 2023, pooling water was still observed in the same spot and the area along the property line remained saturated.

[3] Mr. Warren contends that by the end of 2016, the pooling water undermined the foundation of his home resulting in its structural collapse to the point where it was no longer safe for him to live there. On December 19, 2016, Mr. Warren brought an action in nuisance against Mr. Gluppe. The trial proceeded seven years later before me in September 2023.

[4] In addition to his own testimony, the Plaintiff called four witnesses: Tiago Caldas, an engineer qualified as an expert to opine on the cause of the collapse of Mr. Warren’s home; Michael Cotman, a property appraiser to opine on the diminution value of Mr. Warren’s home; and Tom Streek and Chris Bosiak to provide quotes for rebuilding of Mr. Warren’s home. Counsel also read into the record admissions made by Mr. Gluppe, as well as excerpts from Mr. Gluppe’s testimony at the examination for discovery on November 19, 2017.

[5] Mr. Gluppe testified in his own defence, but it is unclear what precisely his position is. He made a considerable number of admissions during discovery and at trial that acknowledge his misconduct and liability for the various torts. While Mr. Gluppe did present photographs of puddles on Mr. Warren’s property to suggest that any pooling was from rainwater, the photos were of marginal value because they depicted puddles from the spring run off and which were located 80 to 100 feet away from the back of Mr. Warren’s house. Mr. Gluppe sought to tender expert evidence about the topography of Mr. Warren’s house as a potential source of the pooling

waters, but I ruled that Mr. Gluppe's proposed expert, Curtis Vreugdenhill, was not qualified or impartial to give opinion evidence.

[6] The issues to be decided are: first, whether the Defendant is liable in nuisance, negligence, and under the doctrine of strict liability in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; and second, if liable, what is the appropriate damages award?

[7] Upon consideration of all the evidence, I find the Plaintiff has established on a balance of probabilities that Mr. Gluppe failed to (i) adequately address the water flowing from his sump pump; (ii) maintain his septic system; and (iii) repair his eavestroughs to minimize water saturation along the property line. This resulted in water pooling along the northern wall of Mr. Warren's house, saturating the area along the property line, and contaminating the same area with *E. coli* and Coliforms. I find that by early December 2016, the pooling water compromised Mr. Warren's foundation resulting in the collapse of his home and interfering with his ability to safely live in his home or resell his property.

[8] I find Mr. Gluppe's failures make him liable in three respects: (i) the *Rylands v. Fletcher* doctrine of strict liability; (ii) negligence; and (iii) nuisance. Based on the expert opinions provided of the replacement cost of Mr. Warren's home and the accommodation and other costs he incurred as a result of the damage to his home, Mr. Warren is awarded \$505,354.53 of damages with pre- and post-judgment interest along with costs.

[9] My detailed reasons are set out below.

II. Evidence Presented at Trial

A. Did Mr. Gluppe fail to manage the water discharging from his sump pump?

[10] Mr. Warren is 46 years of age. He received an undergraduate degree from Queen's University in geography as well as two college diplomas. While he initially worked a variety of jobs, employment has been challenging because Mr. Warren suffers from an auto-immune disorder. He is presently on a disability allowance and earns about \$1300 per month. His doctors have warned that his mobility will deteriorate, and he will eventually require a wheelchair.

[11] Mr. Warren testified at trial about Mr. Gluppe's failures to manage the water from his stump pump, to maintain his septic system, and to maintain his eavestroughs and the damages that resulted. I found Mr. Warren to be a very credible witness. He was clear and measured in his responses and frank when he could not remember certain details including dates. More importantly, his evidence is corroborated by the photos and videos he took, the evidence of expert Tiago Caldas, as well as Mr. Gluppe himself.

[12] Mr. Warren testified that in October 2005, he purchased a single-story 960 square foot bungalow at 741 County Road 28 ("Warren property"). The legal description of the Warren property is PT LT 86 PL 3 Rossmore Ameliasburg PT 1, 47R3118, Prince Edward County. The property is 60 feet wide and 300 feet deep. It has its own septic system consisting of two septic tanks and a weeping tile bed located in front of the house. The house was built in the 1960s. With a loan from his mother, Mr. Warren renovated his house from 2007 to 2011 to make it wheelchair accessible. The renovations included widening doors, installing hardwood floors, and adding accessibility fixtures. He intended to retire in the home.

[13] The Defendant's property is at 745 Country Road 28 ("Gluppe property") and neighbours the Warren property. Mr. Gluppe's father purchased the property on November 29, 2013 for \$230,000. Mr. Gluppe has lived there since that time. Mr. Gluppe's father and sister previously lived with him, but his father died in 2014 and his sister died a year later. The Gluppe property contains a bungalow with a finished basement that was built in 2005. The house is set back on the lot and closer to the back property line. Mr. Gluppe has a septic tank and septic bed mount at the front of his house and along the north side of Mr. Warren's back deck and house. Mr. Gluppe has a long driveway on the opposite side of the Warren property. According to Mr. Warren, Mr. Gluppe's property is similar in size to his – about 71 feet wide and 301 feet deep.

[14] Mr. Warren did not experience any issues with his property until about late 2014 when he first noticed that his doors and windows were tight and a little more difficult to open and close. He did not think too much of it. By the winter of 2015, he noticed that both bedroom doors and some windows were starting to stick. One window would not close and he had to push it to seal

it shut. In the spring of 2016, Mr. Warren observed water pooling near the northwest corner of his house and that the area along the property line up to the road was saturated. Usually, water that accumulated from the spring run off would dissipate after 10 to 14 days, but Mr. Warren observed the area stayed wet well into May/June of 2016. Mr. Warren became concerned that the pooling water could be damaging his foundation given its proximity to his house.

[15] In June 2016, Mr. Warren explored the area along the property line and noticed that Mr. Gluppe had a black pipe coming out from his basement which he had jammed into a white pipe running along the property line towards the road. The white pipe was situated on Mr. Gluppe's property along the base of his septic mound. The white pipe was six inches from the property line and about six feet from Mr. Warren's home. Mr. Warren observed that water from the sump pump line was discharging every 15 to 20 minutes at the point of connection between the black and white pipe and flooding the ground. He believed the white pipe was blocked and as a result, water was backing up and discharging into the ground.

[16] Mr. Warren took a video of the water discharge on June 24, 2016, in which one can see the water coming out of a hole where the black and white pipe connect and hear gurgling sounds of the water. Mr. Warren took additional videos in the summer and fall of 2016 of the same location to document the continuous discharge from the sump pump line. In a second video, taken in October 2016, one can see the water flowing and hear the water gurgling as it discharges from the sump pump line. Mr. Gluppe admitted at discovery and at trial that his sump pump line came out of the basement of his house. As explained by engineer Tiago Caldas, while the sump pump water was supposed to discharge through the white pipe into the municipal culvert, the videos taken in 2016 indicate it was not doing so.

[17] Mr. Warren testified the pooling was near the back corner of his deck in an area eight feet behind and eight feet across from the northwest corner of his house. Mr. Warren prepared a diagram with measurements to identify the location of the pooling, house, and property line. Mr. Warren's counsel also filed a Google Earth map as a demonstrative aid that depicted the location of both properties, the property line, the location of the respective septic systems, the pipes, and

the area of pooling water. Mr. Warren identified the area of pooling in a circled area on the Google Earth map as “Area of Pooling, Leaks, and Runoff.” The circled area extends from the northwest to the northeast corner of the house. While the pooling occurred mainly in the circled area, Mr. Warren observed water saturation along the property line all the way to the road. There was so much water along the length of the property line that when Mr. Warren tried to mow the grass, the lawn mower would sink into the ground.

[18] Upon discovering the pipes and pooling water, Mr. Warren spoke immediately to Mr. Gluppe. Mr. Gluppe admitted that he was having issues with his sump system but stated he did not have money to fix the problem. According to Mr. Warren, Mr. Gluppe asked him if he would pay for the reconfiguration of the sump line which he did not agree to. Mr. Warren did, however, offer him suggestions and at a later point in time, even supplied him hardware to assist with the joiner of the two pipes. The flooding from the sump pump line continued after their initial conversation in June 2016. Mr. Warren spoke to Mr. Gluppe six or seven more times to determine if he was going to fix the problem, but at one point, Mr. Gluppe stopped answering the door. Consequently, Mr. Warren lodged a complaint with the Planning Department.

[19] In December 2016, just after the first freeze, Mr. Warren’s pipes froze in his bathroom, something which he had never experienced. Weeks later, in the middle of the night, Mr. Warren heard a loud crash and banging. It felt as if his whole house had shifted. The following day he observed that his tv had fallen and shattered. Mr. Warren testified from that point on, it was noticeable that his house has sunk. Cracks appeared in the walls. The walls gradually started to separate from the doors, windows, ceilings, and floors. Mr. Warren’s bedroom floor started to sink. Some doors and windows separated from their frames to the extent that you could no longer close them. Mr. Warren took multiple photos and videos documenting the gradual collapse of his house, many of which were shown in court.

[20] Mr. Warren understood the house at collapsed on initial point of collapse was at the northeast corner of his house. Mr. Warren confirmed his theory by videotaping the release of marbles onto the floor, all of which rolled towards that corner of the house. By the summer of

2017, with his father's financial assistance, Mr. Warren obtained a shipping container to store his household belongings and protect them from damage. Mr. Warren continued to reside in the house from May to October when the weather was warm, but during the winter months he had to reside with friends or live with his family overseas. In January 2023, engineer Tiago Caldas informed Mr. Warren that it was unsafe to be in the house, and he has since stopped living there.

[21] Between the fall of 2016 and into the winter of 2017, inspectors from the Planning Department visited Mr. Gluppe several times. Mr. Warren spoke to the Chief Building Official, Andy Harrison. According to Mr. Warren, the Planning Department instructed Mr. Gluppe to resituate his sump pump line so that the water flowed to the other side of Mr. Gluppe's house along his driveway and away from the shared property line. Mr. Warren took photos of Mr. Gluppe digging the trench as well as a photo of Mr. Harrison in the fall of 2016 showing Mr. Gluppe how to dig the trench.

[22] Mr. Gluppe commenced digging the trench for the sump pump line in November 2016, but did not complete the work until 2017. In March 2017, Mr. Gluppe hired Cleaver Excavating to complete the trench and remove several trees that had leaned over. Mr. Gluppe acknowledged at discovery that there was rot at the bottom of the trees and there were concerns the trees would fall onto Mr. Warren's house. Mr. Warren filed photos taken in 2016, where one sees Mr. Gluppe's septic tile bed and the leaning trees. In March 2017, he took another photo of the excavation machinery on Mr. Gluppe's property. The trees had been removed.

[23] Mr. Warren took a video in the spring of 2017 of the trench that was dug to redirect the water. On the video one can see the sump pump line going along the trench to a set of bricks situated at the front of Mr. Gluppe's house close to the road. There are two pipes coming along the trench: one pipe that is buried and coming out of the bridge of bricks which is the sump pump line; and a second pipe at the top which is a line from a redirected eavestrough. The purpose of the video was to show the large volume of water that continued to flow out of the sump pump line into the ground at repeated intervals. Mr. Gluppe acknowledged at discovery that the water

was indeed from his redirected sump pump line and that his sump pump was continuing to discharge water every 15 or 20 minutes, but he could not be certain of the flow rate.

[24] There were several problems with Mr. Gluppe's attempt to reroute the water from his sump pump. First, the remediation was too little too late. By the time Mr. Gluppe completed the trench in March 2017 and redirected the water, Mr. Warren's house had already collapsed.

[25] Second, in trying to fix the problem, Mr. Gluppe triggered another problem in the winter of 2016/2017. Mr. Warren spoke to Mr. Gluppe on December 26, 2016, about continued flooding happening at the edge of his property. Mr. Gluppe's initial solution in the fall of 2016, before the trench was completed, was to disconnect the black pipe from the white pipe and add a new length of black pipe onto it. Mr. Gluppe then placed the extended black pipe on the top of his septic bed, the top of which is about five and a half feet from Mr. Warren's property. Consequently, the water from the sump pump discharged down Mr. Gluppe's septic slope and continued to flood the area along Mr. Warren's property line.

[26] Mr. Gluppe acknowledged in discovery that Mr. Warren discussed drainage issues with him through these winter months and told him that water was flowing from the sump pump onto the top of his septic bed and down the slope onto the property line. Mr. Gluppe indicated that he did not know if at the time water was indeed going onto the septic bed. He also denied that he observed erosion of his septic bed slope.

[27] I do not accept Mr. Gluppe's evidence that he did not have knowledge that the water from his sump pump was running down the side of his septic slope. Mr. Warren played a ten-minute video taken in January or early February 2017 where Mr. Warren and Mr. Gluppe are conversing. During the entirety of the video, one can see and hear the water discharging out of the black pipe placed on the septic tile bed.

[28] Third, the final rerouting of the sump pump water along the trench near the driveway in the spring of 2017 failed to resolve the pooling problem. Mr. Warren continued to observe water pooling in the same area near the exit of the white pipe in the spring of 2017. Mr. Warren took

photos of the white pipe which remained in place after the excavators had completed their work. Mr. Warren believes that the water from the sump pump, which was how discharging at the front of Mr. Gluppe's house, should have drained into the culverts running along the front of the house. However, either the debris in the front yard or the grading of the property was such that the water was returning back onto Mr. Warren's property. Mr. Warren believes the excavator did not remove the white pipe and it ended up being a conduit for the water to flow back into the same area where the pooling first occurred.

[29] Mr. Warren informed Mr. Gluppe in the spring of 2017 that water was still pooling near the exit of the white pipe. Mr. Gluppe denied at discovery that he observed water and did not recall the ground being wet. I do not find Mr. Gluppe's evidence to be credible. Mr. Warren's evidence that water was still discharging from the white pipe in the spring of 2017 is corroborated by the video taken by him at the time as well as the evidence of engineer Tiago Caldas. Mr. Caldas testified that in January 2023, almost six years later, he observed the same white pipe located along the property line and water continuing to discharge from the white pipe which was damaged. Mr. Caldas observed the area was saturated.

[30] Tiago Caldas is a professional civil engineer with Asterisk Engineering Corporation, a firm specializing in structural and municipal design of commercial and residential structures. He has 23 years of experience and has testified as an expert witness in cases related to flooding, structural, and fire damage. Mr. Caldas provided opinion evidence on the flooding issues around Mr. Warren's property, the conditions of Mr. Gluppe's septic system, the grading of the properties, the condition and cause of damage to Mr. Warren's house, as well as recommendations for remediation. His qualifications and expertise in structural and municipal engineering were not challenged.

[31] As part of his analysis, Mr. Caldas reviewed documents including the photographs and videos taken by Mr. Warren since the summer of 2016, the septic site plan and construction permits for Mr. Gluppe's house, and the Trial Record. In addition, Mr. Caldas attended Mr. Warren's property for a site inspection on January 23, 2023 where he took photos of Mr.

Warren's foundation, crawl space, and house interior, the flooded areas along the property, pipe sections, as well as Mr. Gluppe's septic bed.

[32] As Mr. Caldas explained, Mr. Warren's house is built on cinder concrete blocks for its footings and foundation. On his site inspection in January 2023, Mr. Caldas found signs inside the house consistent with a damaged foundation. Upon examination of the crawl space, he observed that the cinder concrete blocks and joists were damaged and collapsed. There was also four inches of water on the ground. In his view, no footings can withstand that much water damage without a risk to the foundation.

[33] Upon reviewing the videos provided to him for the period of 2016/2017, Mr. Caldas observed that Mr. Gluppe discharged water from his stump pump into a two-inch ABS black pipe and a six-inch white pipe. In his view, the black pipe should have been discharging the water into the white pipe and up to the ditch, but instead, the water was reversing back and discharging at the mouth of the white pipe located near Mr. Warren's property. In his view, the amount of water discharging from the white pipe that he observed could fill the crawl space where Mr. Warren's foundation is located within 24 hours and compromise the integrity of the foundation. On cross-examination, Mr. Caldas confirmed that he did not see any blockages in the city culverts along the road that might have contributed to the water backing up. Mr. Caldas observed in the videos a tree along the property line which was slumped over in the direction of the pooling consistent with damage from flooding. The tree was removed at the time of his onsite visit. Given the proximity of the flooding along the north wall of Mr. Warren's house, he opined that the flooding compromised the foundation and integrity of Mr. Warren's home.

[34] Mr. Caldas opined that the flooding and damage to Mr. Warren's house is ongoing. Mr. Caldas testified that in January 2023, almost seven years since Mr. Warren first identified water pooling, he observed that the ground along the property line neighbouring the two properties was extremely soft and wet. While there was a considerable amount of water at the northwest corner of Mr. Warren's house, Mr. Caldas testified that the entire area along the property line was wet to the point that his socks were completely soaked when he walked over the area.

[35] Mr. Caldas also opined on the remediation effort made by Mr. Gluppe. He observed that the sump pump from Mr. Gluppe's basement discharged water through a new two-inch ABS black pipe installed by him into the ditch on the other side of Mr. Gluppe's property. The area of the discharge was extremely wet and there was flooding beyond the ditch corridor. Mr. Caldas knew this was sump pump water because it was discharging at intervals. Mr. Caldas observed the same white pipe laying flat on the ground as described by Mr. Warren. As Mr. Caldas explained, the top of the pipe is partially exposed, and one can see it travels from the base of Mr. Gluppe's septic bed mound along the property line up to the front ditch of Mr. Gluppe's house near the culverts. However, one cannot see where the pipe terminates. In his view, the sump pump water that is being drained into the ditch at the front of Mr. Gluppe's house is channeling back through the white pipe into the same area of the original flooding on Mr. Warren's property. The grading slopes down from the ditch onto Mr. Warren's property. The white pipe is perforated at the top allowing for waters to escape or be penetrated by precipitation. This results in a vicious cycle where the water being taken from one part of Mr. Gluppe's property is being tossed back into the area where it was initially flooding. Mr. Caldas opined that the location, exposure, and damage of the white pipe is detrimental and contributing to ongoing flooding.

[36] Mr. Caldas concluded that the sump pump water discharging from Mr. Gluppe's basement is the proximate cause of the damage observed in Mr. Warren's home and surrounding lands, and that this damage is ongoing. Mr. Caldas concluded that Mr. Warren's house is unsafe and should be demolished. In his view, it would be financially invaluable to try to remedy the deficiencies created by the flooding and compromised foundation soils.

[37] In addition, Mr. Caldas recommended that (i) Mr. Gluppe's septic system be assessed and replaced entirely in compliance with building codes; (ii) the white pipe be removed and the entire area regraded; (iii) there be an analysis to determine best practices for the discharge of sump pump waters from Mr. Gluppe's house; and (iv) a new grading plan and stormwater management report be prepared by a professional engineer before Mr. Warren's house is rebuilt.

[38] Mr. Warren's evidence regarding the flooding, his discussions with Mr. Gluppe, the visits from the Planning Department, and the rerouting of the sump pump line along the new trench was corroborated by Mr. Gluppe himself.

[39] During examinations for discovery in November 2017, Mr. Gluppe acknowledged that he discussed Mr. Warren's concerns about flooding at their initial meeting in June 2016, and following those discussions, the Chief Building Official, Andy Harrison, attended his home a few times. Mr. Gluppe agreed that Mr. Harrison expressed concerns about water flowing onto Mr. Warren's property and directed him to move his sump pump line. Mr. Gluppe also admitted that he saw the white pipe at the time and recognized he had to reconfigure or move the sump line pipe. He was concerned in 2016/2017 with the amount of water that was flowing from his property over to Mr. Warren's property and that it might be damaging Mr. Warren's property. Mr. Gluppe acknowledged he built a trench to redirect the water. Despite these admissions, Mr. Gluppe maintained that he never saw water flowing out of the white pipe. If that was the case, it is difficult to understand why Mr. Gluppe admitted there was pooling water in that area, that he understood he had to move the sump pump line, that city officials ordered him to move the line, and that he proceeded to dig a trench to redirect the sump pump line.

[40] Mr. Gluppe admitted both in discovery and during his own testimony that there had been instances of flooding in his basement, that he used a sump pump to discharge water from his basement, and that in 2016, the sump pump line was discharging water from a black pipe in the area identified by Mr. Warren.

[41] More specifically, Mr. Gluppe indicated in discovery that the sump pump is set in a cylindrical hole in the basement floor and situated in the room closest to Mr. Warren's house. There is a window nearby and the sump pump propels water into a black pipe out through the window. Mr. Gluppe stated a sump pump was present when he moved into the home in November 2013. He has since changed the pump himself, but the configuration is the same.

[42] Mr. Gluppe did not deny his basement floods. According to him, the first flooding incident occurred following a power outage in the late fall of 2015 resulting in an inch of water

in his basement. He recalls that his sister assisted him with filling buckets of water that were in the sump pit and pouring them out of the window. Mr. Gluppe described a second incident of flooding a year later in the fall/winter of 2016 which resulted in close to two feet of water in his basement because his sump pump froze and then broke. Mr. Gluppe purchased a new pump but did not hire a contractor to install it. A third flooding incident occurred about a month later.

[43] At discovery in November 2017, Mr. Gluppe indicated that he had another recent flooding incident because the sump pump had an electrical problem and he had to replace it. This fourth flooding incident resulted in two inches of water in his basement.

[44] Mr. Gluppe acknowledged that since the initial flooding in the fall of 2015, he has not obtained the assistance of a contractor to address the failures of the sump pump or considered having a second sump pump running. There has always been one sump pump evacuating water through a line from the interior of his house to the outside. He also acknowledged that during the four flooding events, he may have used the downstairs bathtub to drain the water.

B. Did Mr. Gluppe fail to maintain his septic system?

[45] During the summer of 2016, Mr. Warren also had concerns that the water from Mr. Gluppe's septic tile bed was toxic because it smelled like fecal matter. Consequently, in June 2016, Mr. Warren took two water samples. He took the first sample from the pooling water where the sump pump line (black pipe) and white pipe joined, and a second sample from the side of Mr. Gluppe's septic bed. He submitted the samples for complimentary testing with Public Health Ontario in Belleville. Public Health Ontario provided reports dated June 27, 2016, indicating that both samples contained E. coli and Coliforms.

[46] Mr. Caldas obtained and examined the 2004 septic system permit for Mr. Gluppe's property. According to the septic permit, the septic bed should have been 18 feet away from the property line, but he observed it to be just 12 inches away from the property line. Mr. Caldas observed that the distance from the bottom of Mr. Gluppe's septic slope to the property line is zero. In other words, Mr. Gluppe's septic slope terminates exactly at the property line which is, in turn, five and a half feet from Mr. Warren's house.

[47] As Mr. Caldas opined that the incorrect placement of the septic unit is not only a significant violation of the Ontario *Building Code*, O. Reg 332/12, which requires septic units to be a minimum of ten feet from property lines, but it has exasperated the flooding issues. During his site visit, Mr. Caldas observed layers of sand along the septic slopes that were exposed, which he described as holes. The combination of the foul odours from the septic bed and the substantial holes in the ground suggested that the leaching bed is failing, resulting in water run off down the septic slope which contributes to the flooding. According to Mr. Caldas, the leaching bed has failed, and since Mr. Gluppe's septic system and slope are located so close to Mr. Warren's property, the waters from septic system have adversely affected his property.

[48] In addition, Mr. Caldas explained that the ongoing discharge of water from the white pipe located along the base of the septic slope can simultaneously overload the soils for the septic system and potentially cause the septic system to back up causing further flooding.

[49] Like Mr. Warren, Mr. Caldas noted foul odours emanating from both the septic system and white pipe on his site visit in January 2023. He opined that these odours corroborate the test results from Public Health Ontario which found the presence of E. coli and Coliforms. According to Mr. Caldas, wastewater leakage from Mr. Gluppe's septic system onto Mr. Warren's property poses health risks to Mr. Warren and anyone else living on the site.

[50] Mr. Warren shared the 2016 test results received from Public Health Ontario with Mr. Gluppe within days of receiving them. According to Mr. Warren, Mr. Gluppe did not seem concerned or take it seriously because he stated he was not using his septic system, and therefore did not think it could be contaminated. When Mr. Warren asked him what he was using as a facility, Mr. Gluppe told him that he was using a bucket and burying his waste in his backyard.

[51] During examination of discovery in 2017, Mr. Gluppe acknowledged that he told Mr. Warren he was no longer using his septic system, but placing his fecal waste in buckets and emptying them in his backyard. He also stated he was only using the septic system for the limited purpose of washing his hands, giving water to his rabbits, and filling his teapot. He indicated that

he stopped using his septic system in a significant way because Mr. Warren had expressed concerns about contamination.

[52] At discovery, Mr. Gluppe testified he does not know who installed his septic tank or when. He stated it was serviced once around 2015 by Kyle Tursky, from an agency called “Mr. Plumber”, because there was a “clog” caused by toilet paper in the tank blocking the line. He believes Mr. Tursky cleaned it with a shovel, and that resolved the problem. Mr. Gluppe believed the tank was emptied twice by Eugene’s Septic Service. Mr. Gluppe acknowledged he had never done any work on his septic bed.

[53] At trial, Mr. Gluppe testified that he did not use his septic system from 2016 to December 2022. When asked how he managed his waste during this time, he indicated that since one is not supposed to bury waste outside, the waste remains in buckets located within his house.

[54] I do not find Mr. Gluppe’s evidence regarding the use or management of his septic system reliable. Evidence that he stored his waste in buckets which remain in his home for over seven years lacks credulity. Even if it is true, it is of little consequence. The Public Health Ontario test results indicate the presence of E. coli and Coliforms as early as 2016. Mr. Warren noted foul smells as early as June 2016 which, seven years later, were still present upon Mr. Caldas’s visit to the property. This evidence along with Mr. Caldas’s observations that the leaching bed is failing establishes that Mr. Gluppe has not adequately maintained his septic system. Furthermore, while Mr. Gluppe suggests he has emptied the septic system, he did not file any receipts or invoices from Mr. Plumber or Eugene’s Septic Service. If his septic system had been emptied or was being properly serviced, it is questionable why he would stop using it.

[55] Mr. Gluppe stated in discovery that when his father bought the property in 2013, the septic bed was covered with grass and, in his view, the septic bed slope was more or less the same in as when the property was purchased. This is in stark contrast to the photos shown at trial which showed the septic bed in 2017 covered with grass and today with large stones. Mr. Gluppe had no explanation for this. As Mr. Caldas opined, the replacement of the vegetation with rocks leads to less water being absorbed by the vegetation and more pooling at the base of the septic system.

[56] Mr. Warren informed Mr. Gluppe as early as 2016 that replacement of the septic would be about \$25,000. Mr. Gluppe claims he did not make reparations to his septic system because he could not afford to. Mr. Gluppe testified he is on Ontario Works, earns approximately \$750 per month, and has no assets other than his home. During cross-examination, Mr. Gluppe was asked why he did not obtain a loan or line of credit given his mortgage was discharged in 2014 at which time he was still employed. Mr. Gluppe had no effective response to this. According to Mr. Warren, the Planning Department condemned Mr. Gluppe's house in November 2022 and issued an eviction notice, but he believes Mr. Gluppe still resides there. Mr. Gluppe confirmed that he did continue to reside there.

C. Did Mr. Gluppe fail to maintain his eavestroughs?

[57] Mr. Gluppe indicated in discovery that he made repairs to his eavestroughs. In 2015, he screwed the eavestroughs against the wall of his house because they were coming off. In the winter of 2016/2017, after Mr. Warren raised concerns about water from his property, Mr. Gluppe added a length of pipe to the downspout that was directed towards Mr. Warren's property. However, the pooling continued. Mr. Gluppe then installed a pipe in the eavestroughs to direct the water away and secured the pipe with duct tape.

[58] Mr. Warren took a video of Mr. Gluppe's attempt to fix the eavestrough by duct taping the black pipe around the exit of the eavestroughs. The pipe was redirected around the back of Mr. Gluppe's house but did not solve the problem. The water could not flow up the hill, so it continued to flow downwards and flood near his home.

[59] In addition, Mr. Warren testified that the eavestroughs were often clogged and therefore, water would overflow from the eavestroughs and flood the area around his back shed. Pictures taken by Mr. Warren show a considerable amount of water flooding near the back side of his garage. One can also see, about 40 feet deeper in his lot, more flooding from the eavestroughs. For these reasons, I find that Mr. Gluppe's failure to maintain his eavestroughs resulted in additional water saturation along the northern wall of Mr. Warren's house up to the area of his back shed. While this water was not flooding the area along the northern wall of Mr. Warren's

house in regular intervals like the sump pump water, it certainly would have contributed to the saturation of the area which in turn, would have put Mr. Warren's foundation at risk.

[60] Mr. Gluppe forwarded an email on September 27, 2023 to the court following trial indicating he recently found some new evidence. He attached an image which he described as "a damaged drain pipe downstream from my house." Mr. Gluppe did not file this evidence in a timely manner and moreover, I find this evidence, on its own, does not alter my findings.

[61] In addition to failing to address the flooding from the sump pump waters, the failing septic bed, and the eavestroughs, Mr. Warren observed that from the time Mr. Gluppe and his family moved onto the property in 2013, they stopped performing regular maintenance around the property and that it started to deteriorate. For example, Mr. Warren observed that no one ever cut the grass. Debris had built up around the front of Mr. Gluppe's property, which could have contributed to the blockages of the pipes and culverts. In addition, Mr. Gluppe removed trees and vegetation near the septic bed that may have affected the grading of the land and absorption of water. Mr. Gluppe acknowledged in discovery that he was solely responsible for maintaining the house and yards after his sister passed away in 2015.

III. Analysis

A. Is Mr. Gluppe strictly liable under the doctrine of *Rylands v. Fletcher*?

[62] Neighbours can be found liable for the passage of water from one property to another. Under the doctrine of *Rylands v. Fletcher*, strict liability will be imposed with respect to the discharge of water onto the property of an adjoining neighbour where there is: (a) a non-natural use of the land; and (b) an escape resulting in some form of mischief to the adjoining property.

[63] Case law differentiates between water that naturally accumulates and runs off the property onto neighbour's land and situations where a person brings water onto their land, keeps the water there, and then the water escapes onto the adjoining property causing injury. In these latter circumstances, liability will result regardless of whether the landowner acted with due care and attention: *Rylands v. Fletcher*, at p. 341.

[64] “Non-natural” use of land has come to mean in the jurisprudence “special, exceptional, unusual or out of the ordinary” where as “natural” is construed to mean “normal, common, everyday or ordinary rather than primitive or in a state of nature”: *Alfarano v. Regina*, 2010 ONSC 1538, 92 R.P.R. (4th) 53, at para. 60.

[65] Mr. Gluppe’s discharging of water from his basement through faulty black and white pipes placed along Mr. Warren’s property line constituted a non-natural use of the land. The discharge onto the area along the north wall of Mr. Warren’s house was not a natural occurrence, but the product of deliberate conduct by Mr. Gluppe in trying to manage his own flooding basement. Mr. Gluppe was informed of the problem by Mr. Warren and directed by the Chief Building Official, Mr. Harrison, to reroute his sump pump line away from the house, but failed to remediate the problem in a timely or effective manner.

[66] Similarly, I find Mr. Gluppe’s temporary fix of the problem in the winter months of 2016/2017 which consisted of adding a piece to the ABS black pipe and placing it on the top of his septic bed where it risked escaping down his septic slope onto Mr. Warren’s property was not a natural use of the land. It would have been apparent to Mr. Warren that discharging water at regular intervals of 15 to 20 minutes would result in a high concentration of water on his septic system that that would potentially flood the septic bed and run off the slope. Using one’s septic bed to absorb large volumes of water from one’s basement is not a natural use of the land.

[67] In addition to the non-natural water accumulation, I find there was an escape of water from the sump pump line onto Mr. Warren’s property. Prior to the spring of 2016, Mr. Warren had never observed this level of pooling water along the north wall of his house. The water he had observed in this area was precipitation from melting snow or rain that would dissipate after several days. In short, this was not simply surface water from Mr. Gluppe’s property that was passing by “operation of the laws of nature” onto Mr. Warren’s property. Rather, it was water coming from Mr. Gluppe’s faulty and improperly placed sump pump lines and septic system along his property line. This flooding and Mr. Gluppe’s failed remediation efforts resulted in the

collapse of Mr. Warren's house and contamination of his land. It intervened not simply with Mr. Warren's ability to enjoy his property, but eventually to even live on it.

[68] I find Mr. Gluppe strictly liable under the doctrine of *Rylands v. Fletcher*.

B. Is Mr. Gluppe liable for negligence?

[69] Neighbours owe a duty of care to each other not to use their respective properties in a way that would pose a foreseeable risk to another's property and cause it damage: *Alfarano*, at para. 69.

[70] Where a person breaches the duty and standard of care owed as a neighbour, they may be found to be negligent. The requirements of this tort are: (i) the existence of a duty of care; (ii) breach of the standard of care; (iii) causation; and (iv) ensuing damages. The court may also consider whether the plaintiff contributed to the damages: *Alfarano*, at para. 68.

i. Standard of care and breach of that standard

[71] In trying to manage the flooding in his own basement, Mr. Gluppe owed a standard of care to his neighbours to not discharge that water in a manner that would flood their properties. This is simply good common sense. Furthermore, the Chief Building Official issued a work order for Mr. Gluppe to reroute his sump pump line to the opposite side of his property and bury it in a trench making it clear that the municipality also expected the same standard of care with respect to discharge of water from one's house.

[72] Mr. Gluppe admitted that since the initial flooding in his basement in late 2015, his sump pump was discharging water out of his house through the ABS black pipe. While he may have expected that the water would continue to discharge through the black pipe, into the white pipe, and then to the municipal culverts, he took no steps to confirm this was indeed the case.

[73] When Mr. Warren indicated to him in June 2016 that flooding was occurring at the joiner of the two pipes, Mr. Gluppe failed to take action. The Chief Building Official came over and physically showed him how to dig the trench. Even then, Mr. Gluppe did not complete the

rerouting until the spring of 2017 by which time I find he was in breach of the standard of care expected of a neighbour with respect to the management of his basement flood waters.

[74] Mr. Gluppe's failure to ensure the effective rerouting of the sump pump waters constituted a further breach of the standard of care. After Mr. Gluppe completed the trench, Mr. Warren told him that water was still discharging from the white pipe into the same initial area. Mr. Warren's photos and videos from 2017 and thereafter confirm the continued flooding and saturation of the area. One cannot see where the white pipe terminates at the front of Mr. Gluppe's house, but given water is flowing back through it and discharging at the other end, it is self evident that the white pipe is collecting waters from somewhere. As both Mr. Warren and Mr. Caldas surmised, the white pipe was collecting the sump pump waters now discharging at the front of Mr. Gluppe's house and bringing it back to the original flood zone along the north wall of Mr. Warren's property.

[75] Despite being alerted to the issue, Mr. Gluppe has not taken steps to address the continued flooding of waters along the property line. As Mr. Caldas explained, the white pipe was damaged and improperly placed on the surface of the property, rather than being buried, and is at the base of Mr. Gluppe's septic slope. Mr. Gluppe failed to have anyone examine the condition of the white pipe or its placement, whether there were blockages or drainage issues in his front yard that was impeding the sump pump waters from draining into the municipal culverts, and whether his property had to be regraded, particularly after the trees were removed, to resolve the flooding issues. I find Mr. Gluppe's failure in ensuring that the rerouting of his sump pump waters resolved the flooding problem along the property line constitutes a breach of the requisite standard of care.

[76] I also find that Mr. Gluppe breached the duty of care to ensure his septic system was in compliance with zoning bylaws and was adequately serviced to prevent contamination of the neighbouring property. Mr. Gluppe was alerted as early as June 2016 of the presence of E. coli and Coliforms in the flooding area along the property line.

[77] Mr. Gluppe's septic bed was located 12 inches away from the property line whereas according to the septic permit submitted, it was to be 18 feet away. The *Ontario Building Code*

requires that septic units to be at least three metres (ten feet) away. Construction in a manner that is inconsistent with common sense, municipal bylaws, and grading requirements constitutes a breach of the requisite standard of care for use of one's property: *Alfarano*, at paras. 70-72.

[78] The fact that the placement of the septic system was a pre-existing condition at the time Mr. Gluppe's family purchased the property in 2005 is of no consequence. What matters is that the damage occurred when Mr. Gluppe was the sole owner of the property. Mr. Gluppe also admitted in discovery that Mr. Warren told him his septic system was not to code.

[79] Mr. Warren asked Mr. Gluppe if he had contacted companies to provide him with an estimate for remediation work of his sump line, including burying the line, and replacing his septic system in its entirety. Mr. Gluppe said he had not done so and hence, Mr. Warren offered to do it and provide him the information. Mr. Warren obtained estimates in 2016 that it would cost Mr. Gluppe about \$1000 to fix the sump pump line and about \$20,000 to \$25,000 to replace his septic system. Mr. Gluppe stated he could not do that because it was the middle of the winter. As already noted, Mr. Gluppe has still not taken steps to ensure the proper placement and functioning of his septic system.

[80] Furthermore, Mr. Gluppe's idea that avoiding the use of the septic system for waste would resolve the contamination or flooding problems, even if true, is nonsensical. It was incumbent on Mr. Gluppe upon being alerted of the contamination to have his septic system examined to ensure it was properly functioning and if not, to repair it to avoid further contamination. He did neither.

[81] Finally, for the reasons set out at paragraphs 57 to 59, I also find that Mr. Gluppe's failure to repair and maintain his eavestroughs breached the requisite standard of care.

ii. Causation and damages

[82] To establish causation, courts must apply the "but for" test on a balance of probabilities. Specifically, the plaintiff must show that "but for" the negligence of the defendant, the plaintiff would not have suffered damages: *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22.

[83] As explained by Mr. Caldas, the amount of water observed coming off the sump pump line in the June 2016 videos would be sufficient to cause damage to Mr. Warren's property within 24 hours. In this case, Mr. Gluppe admitted that he was using his sump pump to discharge water through pipes that were placed at the area of the pooling and near his septic bed since his basement first flooded in 2015. It is unknown if initially the water was travelling successfully from the black pipe into the white pipe and if so, when it ceased to work. Mr. Warren only examined and discovered the pipes in the spring of 2016 upon seeing increasing signs of flooding. At that time, Mr. Warren observed water flowing out of the black pipe where it joined the white pipe. Nonetheless, given that Mr. Warren's doors and windows were starting to malfunction in late 2015 and the level of saturation Mr. Warren observed along the property line in the spring of 2016, it is reasonable to conclude that the sump pump line was flooding water along the property line and causing structural damage to Mr. Warren's home by the latter part of 2015.

[84] Mr. Gluppe admitted there were two further flooding incidents in his basement in 2016. Mr. Warren's various videos depicted Mr. Gluppe's continued use of the sump pump lines in June 2016 and thereafter and the resulting flooding where the black and white pipes joined. In December 2016, Mr. Warren experienced a sudden shift and sinking of one side of his house. At this point, it was apparent that the flooding had undermined the integrity of Mr. Warren's foundation resulting in the gradual collapse of his house. Mr. Warren's photos and videos document the structural collapse over time.

[85] Mr. Caldas examined the crawlspace and footings in 2023 and confirmed the structural damage to Mr. Warren's foundation which he opined was caused from the flooding. In addition, Mr. Caldas testified that he observed the following other signs of foundation damage within Mr. Warren's house: i) floorboards were uneven and there were gaps between the floorboards and baseboards suggesting that the floor joists were uneven and not receiving any support from the foundation; ii) cracks on the ceiling, along the top of the walls, around light fixtures, and between the ceiling and crown moulding; iii) sections of the ceiling were warping and sagging under pressure; and iv) cracks along the walls and that some walls were slanted. Mr. Caldas opined that these deficiencies were caused by an uneven or unsupported foundation wall that has been

compromised and that the shifting in a portion of a foundation wall will affect all structural elements of the wall. Mr. Caldas opined that the house is collapsing along the north side. The continued flooding created by the white pipe is one of the reasons why the foundation wall has been compromised and the structural damage continues.

[86] There is no evidence of toxic contamination or even foul odours prior to June 2016. The source of the contamination is at the base of Mr. Gluppe's septic system. According to Mr. Caldas, the failed leaching bed is the probable cause for the soil contamination bordering Mr. Warren's property.

[87] Mr. Caldas opined, Mr. Gluppe's replacement of vegetation with rocks in his front yard leads to less water being absorbed by the vegetation and more pooling at the base of the septic system. I find that Mr. Gluppe's failure to maintain trees and greenery also breached the requisite standard of care resulting in negligence: *Kelley v. Ingersoll (Town)* (1996), 33 M.P.L.R. (2d) 100 (Ont. C.J.), at paras. 41-43.

[88] There is no evidence that the grading of Mr. Warren's property caused the damage to his house. Mr. Warren testified that since the purchase of his home in 2005 he did not make any structural changes to the house or grading to the property. Furthermore, Mr. Warren never experienced any flooding issues around his house between 2005 and 2016. While Mr. Warren acknowledged there was some pooling that would occur after the spring run off in the back of his property, this was at a considerable distance from his home and would only last a brief period.

[89] In cross-examination, Mr. Warren was shown photos taken in the spring of 2023 of pools of water on his property. However, these pools were about 80 to 100 feet behind his house, partly on the property of Mr. Warren's other neighbour, and where, Mr. Warren explained, there would be some pooling from the spring melt. Furthermore, as Mr. Caldas explained, since Mr. Warren did not change his grading or experience flooding issues from 2005 to 2013, when Mr. Gluppe moved in next door, the water issues would not be due to standing water in other areas of his property. For these reasons, I reject Mr. Gluppe's submission that standing water in Mr. Warren's

backyard caused or contributed to the flooding of the area along the north wall of Mr. Warren's house in 2016 and thereafter.

[90] In addition, unlike Mr. Gluppe, Mr. Warren never experienced flooding in his basement such that moisture from his home would have caused or contributed to the undermining of his foundation. Mr. Warren never had issues with the functioning of his septic system or pooling of water around his septic bed. Mr. Caldas also testified that he examined the northern retaining wall running along Mr. Warren's house and did not see anything in the wall that would have caused the house to fail.

[91] Finally, Mr. Gluppe admitted in discovery that in 2016/2017, he was concerned that waters from his own home were damaging Mr. Warren's property. He acknowledged Mr. Warren had shown him the interior of the house and indicated "there was problems closing windows and that sort of thing." Mr. Gluppe also did not deny that he believes Mr. Warren's house is "probably" sinking. Mr. Gluppe agreed that if water damage was the cause of Mr. Warren's house sinking, then that damage would impact Mr. Warren's ability to comfortably live in his home.

[92] For all these reasons, I find on a balance of probabilities that Mr. Gluppe's misconduct in managing his sump pump line, his septic system, and his eavestroughs resulted in flooding that caused the structural damage of Mr. Warren's house and the contamination of his property. The valuation of the resulting damages is addressed further below.

iii. Contributory negligence

[93] Mr. Gluppe suggested that Mr. Warren should have taken steps to repair his own property. There is little merit to this argument.

[94] When Mr. Warren's house started to collapse in 2016, he tried his best to fix what he could by doing things like taping around the windows and doors, but there were limitations to what he could do given the extent of the damage. He also removed his furnishings. Further structural repairs to fix the home would have cost considerable amounts of money. More importantly, none of the contractors that he spoke to were prepared to guarantee such repairs

given the fragile state of the foundation or to rebuild a new home until the flooding had been entirely remediated.

[95] Mr. Warren did not have the financial means to repair or rebuild, and his insurance would not cover the costs of repairs brought on by the neighbour's misconduct. Mr. Warren reached out to his insurance agency almost immediately after he saw the water pooling at the joinder area of the black and white pipes in June 2016. His insurance company sent a representative from Windmar Property Restoration. The representative agreed that there was property damage but stated that because the damage was not due to Mr. Warren's systems failing, he would have to get Mr. Gluppe's insurance involved. Mr. Warren approached Mr. Gluppe to obtain his insurance information in the fall of 2016 at which time Mr. Gluppe told him that he had cancelled his property insurance in 2015. Mr. Gluppe confirmed this in his trial testimony. Sadly, Mr. Warren's insurance company would not assist him further and suggested he make a legal claim resulting in the current action. Moreover, once the insurance company had identified the structural damage to the house, they informed Mr. Warren the cost of his property insurance would increase to \$9,000 per year, approximately 60 per cent of his disability income. Consequently, Mr. Warren was unable to insure his house after 2016.

Is Mr. Gluppe liable for nuisance?

[96] The test for nuisance requires the plaintiff to establish an interference with their use or enjoyment of land that is both substantial and unreasonable. A substantial interference is one that is non-trivial. Where this threshold is met, the court must go onto consider whether the interference was unreasonable in all the circumstances: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at paras. 18-19. In this regard, the focus is on whether the interference with the plaintiff's property was unreasonable, not whether the defendant's conduct was necessarily unreasonable. In this sense, nuisance is a tort of strict liability: *Antrim*, at paras. 28-29.

[97] The courts have found nuisance in a variety of circumstances. First, where physical damage results to the claimant's property, courts have been quick to find that the interference

was substantial and unreasonable: *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, at pp. 914-15. For example, nuisance will be found where a sewer backs up onto one's property resulting in flooding onto another property: *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, at p. 1192.

[98] Second, nuisance has been found where the interference caused a significant diminution of the market value of the claimant's property: *Antrim*, at paras. 28-29.

[99] Third, nuisance will be established where a defendant's use of their property significantly alters the claimant's property or interferes substantially with the claimant's intended use of the property: *St. Pierre*, at p. 915.

[100] The negligence claim findings apply equally for the nuisance claim. In sum, I find that Mr. Gluppe's failure to adequately deal with the water from his sump pump line and to properly maintain his septic system and eavestroughs resulted in the flooding along the north wall of Mr. Warren's property. This, in turn, undermined the foundation of Mr. Warren's home resulting in its structural collapse. The misconduct also resulted in the contamination of Mr. Warren's property. Consequently, Mr. Warren is unable to live in his home or resell it and will have to undergo environmental remediation to address the contamination. Mr. Gluppe's interference with Mr. Warren's property as a result of his misconduct is clearly substantial and unreasonable.

[101] Nuisance is a continuing tort. Each continuance constitutes a new cause of action from which damages can flow: *Butt v. Oshawa*, [1926] 4 D.L.R. 1138, at pp. 1139-40. In other words, each instance of water expelling onto the Plaintiff's property is a new cause of action.

[102] Mr. Gluppe was notified as early as June 2016 of the flooding along the property line. The Planning Department directed him to reroute his sump pump line, but he failed to do so in a timely manner resulting in the compromise of Mr. Warren's foundation by December 2016. The remediation efforts he made in the fall of 2016, by attaching a new piece of black pipe to the former one and placing it on the top of his septic tank, only served to exacerbate the flooding with waters running down the side of his septic slope.

[103] Mr. Gluppe's further remediation efforts in the spring of 2017 also failed. While he did reroute the sump pump line in a trench along the opposite end of his property, he failed to ensure the water was properly discharging into the municipal culverts. He was advised in the spring of 2017 that water was flooding in the same area, but refused to fix the problem. His failure to examine the integrity of the white pipe as well as the condition of his septic system has resulted in continued flooding and interference with Mr. Warren's property.

[104] The pooling of water along the property line continues. In the spring of 2023, Mr. Warren took photos of areas along the property line. The dark spots on the photos depict standing water. The ground is moist in the area. The white pipe remains and continues to function as a conduit for water to return from Mr. Gluppe's front yard to the initial area of flooding.

[105] Mr. Warren's evidence of continued flooding was corroborated by Mr. Caldas's own observations of the site in January 2023. According to Mr. Caldas, the continued flooding created by the white pipe is one of the reasons why the foundation wall has been compromised and the structural damage continues. Mr. Caldas observed a failed leaching bed and smelled foul odours consistent with the contamination from Mr. Gluppe's septic system.

[106] I find Mr. Gluppe is liable for nuisance since 2016 and that the nuisance is ongoing.

C. What measure of damages is appropriate?

[107] Mr. Warren seeks general and special damages of \$500,000, pre-judgment and post-judgment interest, and substantial indemnity costs. The original claim was for \$350,000, but leave was granted to amend the amount sought: Rule 26.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Mr. Warren seeks the right to obtain an appraisal of Mr. Gluppe's property and the right to elect to seek a vesting order to obtain title to Mr. Gluppe's property.

i. Financial position had tort not occurred

[108] Plaintiffs involved in negligence claims ought to be returned to the position they would have been in had the tort not occurred. Mr. Warren is entitled to have a home comparable home to the one he lost on a non-contaminated land without incessant flooding from his neighbour.

[109] It is Mr. Warren's preference to remain on his property. Mr. Warren obtained quotes from several contractors for the cost of demolishing and rebuilding his home both in 2016 and in 2023. His instructions were for a home similar to the dimensions of his present home, i.e., a 960 square foot bungalow with standard specifications. Tom Streek, a builder with Harmony Homes, testified that as of December 19, 2022, it would cost \$391,160 plus HST for a total of \$442,010.80 to build such a home. Mr. Streek testified that as of September 2023, approximately ten months later, the same house would cost five to ten per cent more given increased costs in the mechanical, electrical, and plumbing trades. He estimates an additional \$40,000 plus HST bringing the current cost to \$487,211.

[110] Chris Bosiak, another builder in the Quinte region, provided an almost identical quote in December 2022. His estimate for a home with the specifications requested is \$391,484 plus HST. He testified because material and labour costs have since increased, he would have to provide a new quote, but did not believe that the costs would be significantly higher. Neither of these quotes include remediation work for soil contamination or additional landscaping.

[111] Mr. Warren testified that he obtained additional quotes from construction companies that produced higher end homes and received quotes ranging from \$619,240 to \$745,000.

[112] Mr. Gluppe did not challenge any of the estimates provided.

[113] Based on the evidence presented, I find that the replacement cost of Mr. Warren's home at today's current market value is \$487,211.

ii. Special damages

[114] Mr. Warren seeks special damages for costs incurred to manage the nuisance and negligent conduct over the past seven years. In particular, he has incurred:

- a. \$2,584.27 for heating costs that were higher because of challenges with sealing the house shut;
- b. \$3,754.95 in flights to Europe to stay the winter with his parents when he was unable to reside at his home altogether;

- c. \$666 to replace his tv;
- d. \$138.31 in hotel costs on January 15, 2017. On that night, Mr. Gluppe came to his house at 9 or 10 p.m. and informed him that despite his best efforts, his basement had flooded again and water would overflow. Mr. Warren was frustrated by the situation and went to spent the night at a hotel; and
- e. \$11,000 for rental accommodations for December 2022 to October 2023. Mr. Warren testified his parents have rented him a property they had in Canada which recently became vacant at a modest rate of \$1000 per month. Effective October 1, 2023, Mr. Warren will have spent \$11,000 in rent.

[115] Mr. Warren continues to have a \$33,000 mortgage on his property which he pays off at a rate of \$500 per month. However, he also has a \$65,000 equity line of credit with a variable credit rate that has gone from four to six and a half per cent. Mr. Warren is unable to pay off the principal of the loan, but has been making interests payments of \$453 per month. Mr. Warren requests that the special damages should include his monthly interest payment on his home line of credit. However, I do not find that sufficient evidence has been presented to establish that the line of credit was in relation to repairs for the home, and this request is denied.

[116] Applying the damages figures from the negligence claim, I find that Mr. Gluppe is liable in total for general and special damages of \$505,354.53 which consists of \$487,211 to rebuild the house and \$18,143.53 for costs incurred by Mr. Warren for maintenance, repairs, travel, and accommodation since 2016.

iii. Other Damages

[117] The remedies for nuisance are similar to negligence and require that the injured party be placed in the same position they would have been had the damage not occurred. Hence, the award of general and special damages for negligence of \$505,354.53 also applies to the tort of nuisance.

[118] Courts have recognized the tort of nuisance as a useful tool in furthering environmental protection objectives and reinforcing the polluter pays principle: *St. Lawrence Cement Inc. v. Barette*, 2008 SCC 64, [2008] 3 SCR 392, at para. 80. Consequently, liability for nuisance that results in injury to land may warrant additional monetary damages for remediation of the

property: *Ivall v. Aguiar*, 86 O.R. (3d) 111 at para. 42; *Allison v. Radtke*, 2014 BCSC 1832, at paras. 190-192. In some instances, courts have ordered the defendant to remediate the situation as an alternative to monetary damages: *Weenen v Biadi*, 2015 ONSC 6832, at para 181.

[119] Mr. Warren has not provided a quote for remediating his property for soil contamination which I appreciate may also involve clean up of Mr. Gluppe's property. Trial judges may have some discretion to award nominal damages even in the absence of evidence of quantifiable losses: *WMS Lighting Limited v KJS Transport Inc.*, 2014 ONCA 1 at para 61. Nonetheless, I find that in the absence of some evidence on the cost of remediation, it would be highly speculative to award additional monetary damages for remediation in this case.

[120] Finally, Mr. Warren sought additional remedies such as the right of an appraisal of Mr. Gluppe's home and the right to elect to obtain a vesting order. I have considered counsel's submissions on these remedies, but find that I have insufficient evidence and information on the courts' jurisdiction to award such remedies in these circumstances. These remedies are accordingly declined.

IV. Conclusion

[121] I find Mr. Gluppe liable of nuisance, negligence, and the doctrine of *Rylands v. Fletcher* and responsible for paying Mr. Warren general and special damages in the total amount of \$505,354.53 together with pre- and post-judgment interest under ss. 128 and 129, respectively, of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I have calculated pre-judgment interest to be \$35,577.99. Mr. Gluppe shall pay the damages in 30 days.

V. Costs

[122] The Plaintiff seeks costs on a substantial indemnity basis in the amount of \$112,899.41 inclusive of disbursements.

[123] Mr. Warren is entitled to his costs as the successful party at trial. The only issue to be decided is a quantum that is fair and reasonable.

[124] Courts have broad discretion to determine to whom costs should be paid and the quantum: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1).

[125] In exercising their discretion, judges may consider the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure* and governing jurisprudence. These factors include the following: the experience of counsel and rates charged, the amount an unsuccessful party could reasonably expect to pay, amounts claimed, and amount recovered, apportionment of liability, importance of issues, complexity of the proceedings, and the conduct of the parties.

[126] In this case, the court must also consider the application of Rule 49 of the *Rules of Civil Procedure*. Rule 49 states that where a party makes an offer to settle at least seven days before the commencement of a hearing, which is not accepted by the defendant, and is not withdrawn and does not expire before the hearing, and the plaintiff obtains a judgment that is at least as favourable as the terms of the offer to settle, then the plaintiff is entitled to partial indemnity costs up to the date the offer was served on the defendant, and substantial indemnity costs from that date, unless the court orders otherwise.

[127] Mr. Warren made an offer to settle the matter on June 9, 2017, requesting Mr. Gluppe pay him monetary damages in the amount of \$175,000 on a without costs basis. The offer was maintained until just after the start of trial six years later. The offer letter stated that should Mr. Gluppe not accept the offer and the matter proceed to trial, Mr. Warren would be seeking substantial indemnity costs. The judgment obtained by Mr. Warren is far more favourable than the offer. The offer meets the requirements of Rule 49 warranting substantial indemnity costs.

[128] Upon review of the Bill of Costs, I find the amounts charged were commensurate with the work done. The rates charged by both senior and junior counsel were reasonable. The matter was complex given it involved three torts and expert evidence. The Bill of Costs sets out legal fees up to the time of offer, between the offer and close to the start of trial, and for the trial itself. I find Mr. Warren is entitled to partial indemnity costs of legal fees up to the time of offer of \$2,803.53, and thereafter, of legal costs on a substantial indemnity basis in the amount of \$84,716.74 for a total of \$87,520.29. In addition, Mr. Warren is entitled to the costs of

disbursements of \$20,967.36. including expert fees, for a total of \$108,487.65. I note that the actual costs of these proceedings were \$123,102.98.

[129] There is nothing in Mr. Warren's conduct that would disentitle him to a reduced costs award. On the contrary, I note that Mr. Gluppe failed to attend the trial management conference in the summer of 2023, failed to comply with timelines for the filing of documents, and attended the trial with documents that had not been seen by opposing counsel. Counsel Ms. Naughton who conducted the trial was not flummoxed by these procedural challenges and to her credit, went to considerable efforts to assist Mr. Gluppe who was self-represented in locating and identifying documents throughout the trial so that the matter could proceed efficiently.

[130] Mr. Gluppe did initially have counsel including at the time of discoveries. He would have had some knowledge that costs would result if he was unsuccessful at trial. Mr. Gluppe did not file a costs submission. I am, however, aware that he is of limited means as described above. While Mr. Gluppe's current financial situation does not preclude him from paying costs, I have given some weight to his present financial circumstances in determining quantum.

[131] In determining quantum, the overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances rather than the amount of actual costs incurred by the successful party: r. 57.01(1)(0.b); see also *Boucher v Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras 37-38; *Deonath v Iqubal*, 2017 ONSC 3672, at paras 20-21.

[132] Given Mr. Warren's success at trial, the application of Rule 49, the complexity of the matter, the reasonableness of the rates charged, the conduct of the parties, and Mr. Gluppe's ability to pay, I find that a fair and reasonable costs award in this case is \$100,000. The costs shall be payable in 30 days.

VI. Order

[133] There will be an Order that:

1. Mr. Gluppe is liable for liable of nuisance, negligence, and the doctrine of *Rylands v. Fletcher and* shall pay to Mr. Warren general and special damages in the amount of \$505,354.53 in 30 days.
2. Mr. Gluppe shall pay to Mr. Warren pre-judgment interest for damages in the fixed amount of \$35,577.99 in 30 days and post-judgment interest for damages in accordance with s. 129 of the *Courts of Justice Act*.
3. Mr. Gluppe shall pay to Mr. Warren, costs (inclusive of HST and disbursements) fixed in the amount of \$ \$100,000 in 30 days.

Somji J.

Released: November 8, 2023

CITATION: Warren v. Gluppe, 2023 ONSC 6301
COURT FILE NO.: CV-16-483
DATE: 2023/11/08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Samuel Warren

Plaintiff

– and –

Troy Gluppe

Defendant

REASONS FOR DECISION

Somji J.

Released: November 8, 2023