


# The Drinking Habits of Cows

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Cows are hard drinkers: a dairy cow needs an average of 25 to 40 gallons of water per day for full milk production, and a cow's standards of palatable water don't necessarily conform to those of the government.

This was a central issue in *Berendsen v. Ontario*, 2009 ONCA 845 (Ont. C.A. Dec. 01, 2009). In the 1960s, the Ontario Ministry of Transportation (MTO) deposited asphalt and concrete waste from a highway reconstruction project on a dairy farm nearby, with the landowner's consent. At the time, the use of asphalt waste as fill on rural properties was common, and no industry or governmental standards existed. The area where the waste was left measured 100 feet by 100 feet, and the material was buried six to eight feet deep and covered over with gravel. A subsequent owner drilled a well, located some 60 feet away. In 1981, the plaintiffs, the Berendsens, purchased the farm, the livestock, and the milk quota, intending to continue the dairy farm use. Their cows, however, did not thrive, and yielded less milk than could be expected. Neither of the previous owners, both dairy farmers, experienced these problems. The Berendsens said that their cows avoided drinking the well water, if possible, and drank rain water or river water instead, so they drilled a second well 400 feet away from the waste dump site. They also complained about their herd's health problems to the Ontario government. The province authorized and paid for an underground water storage tank at the farm, as well as for the delivery of potable water, and the health of the cows improved. However, the Ministry of the Environment (MOE) tested the water in the two wells between 1990 and 1993, and the results indicated that the water contained no organic chemicals in excess of the limits in the Ontario Drinking Water Objectives for human consumption. Given these results, the province concluded that it had no responsibility for the water quality and stopped paying for the water delivery. Private testing of the Berendsen water revealed the presence of a number of toxic industrial chemicals in the well water. Thirteen years after they purchased the farm, the Berendsens sued the Province of Ontario in negligence, claiming that toxic waste had contaminated the well water on their property, and that the government failed to remove the contaminating materials. After a five-week trial, and in a lengthy decision, the trial court ruled in favour of the plaintiffs, awarding damages of $1,732,400, plus pre-judgment interest at six per cent annually, and costs of $655,000. "[I]t would have been obvious, even in the 1960s, that old, used, waste roadbed material likely contained various automotive fluids within the asphalt and concrete," said the judge, and it "was reasonably foreseeable that harm could result to occupiers of the farm as a result of the MTO's carelessness in depositing potentially contaminated material, in that quantity and in that sensitive location." Further, in addition to the "duty to take reasonable care in its operational decision of where and how to deposit waste material from its road construction, the circumstances also concern[ed] the liability of a provincial ministry for its alleged failure to properly exercise its statutory powers of investigation and remediation of resultant environmental contaminates."

Ontario appealed the judge's finding on causation, claiming she erred in law in finding that it breached the standard of care because there was no evidence a reasonable person in the 1960s would have foreseen that a deposit of waste material could harm well water 60 feet away. It argued that it had no statutory duty to remove the waste material or remedy the contaminated well water. (Ontario acknowledged that it owed the Berendsens a duty of care, and had previously brought, and lost, a motion for summary judgment to dismiss the claim on the ground that it was barred by the six-month limitation period in the *Public Authorities Protection Act*.)

The Ontario Court of Appeal, in a ruling welcomed by government lawyers, allowed the appeal and dismissed the action. In a unanimous decision, the court held that "Ontario was not negligent when it deposited waste material on the farm in the 1960s. Because the risk of harm was not then reasonably foreseeable, Ontario did not breach the standard of care. Nor did Ontario have a duty in the 1980s or 1990s to eliminate the waste material and remediate the Berendsens' well water. No duty existed under the Ontario legislative regime protecting our environment. And Ontario was justified in not taking further action when both its investigation and the investigation conducted for the Berendsens showed that no chemicals in the Berendsens' well water exceeded the allowable provincial drinking standards." The court also addressed the causation issue at length, noting that the expert failed to address how the contaminants from the waste could migrate to and then enter the water in the second well (one that the cows also would not drink from), located "very far away from the buried waste, at a distance permissible even by today's standards." Moreover, the Berendsens' own expert conceded that he could see no link between the chemicals in the water in the first well and the unpalatability

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sells nothing at retail is not required to have such a license. *See* Littleton City Code, sec. 3-9-2-1.
5. 21 U.S.C.A. § 801 *et seq.* (West 2009).
6. Crime in Colorado 2008, Colorado Bureau of Investigation, at http://cbi.state.co.us/dr/cic2k8/incident%20based%20reports/Property%20Crimes/burglary.html.
7. *See* http://www.cml.org/new.aspx. ML

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of that water to the cows. "These two difficulties suggest an unexplained reason, unrelated to the chemicals in the buried waste, for the cows' unwillingness to drink the Berendsens' well water." Secondly, on foreseeability, "despite the voluminous amount of expert evidence called by the Berendsens, not one of their many experts testified about the known or likely harmful effects of buried waste material in the 1960s…No evidence was led that in the 1960s soil geologists understood chemicals in buried waste material could migrate to well water 60 feet away." Absent such evidence, the finding that Ontario breached the standard of care was an error of law. Lastly, and flowing from the previous finding, there was no duty to remediate. Ontario made a "deliberate decision" not to exercise its power to remove the contaminants, and it "did so for a legitimate reason: the water met existing standards." ML

## Cases

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and agreed to call her drug dealer, Smith. As she arranged for a purchase at her residence, police recorded the call. When Smith arrived, he was arrested and his cell phone was seized. The arresting officer put the cell phone (one with phone, text messaging, and camera capabilities) in his pocket and placed Smith in a cruiser, then searched the scene for evidence. Police later confirmed that Smith's phone had been the one used to arrange for the drug purchase, but the officers did not have either a warrant or Smith's consent to search the phone data. Smith filed a pretrial motion to suppress evidence, objecting in part to the warrantless search of his cell phone. The trial court ruled that it would permit testimony regarding the cell phone's call records and phone numbers, but not the use of photographs that had been discovered in the phone. Smith appealed.

Pointing out that neither the United States Supreme Court nor any state supreme court had ruled on the warrantless cell phone search, the Supreme Court of Ohio began by contrasting the two approaches to characterizing a cell phone for Fourth Amendment search purposes. A phone could be treated as akin to a closed container found on an arrestee's person, which may be searched; or, alternatively, as an object more like a laptop computer, in which arrestees had a significant privacy interest and which required consent or a warrant. The court adopted the second approach, finding that objects "falling under the banner of 'closed container' [had] traditionally been physical objects capable of holding other physical objects." A cell phone was "wholly unlike any physical object found within a closed container," and its ability to store large amounts of private data gave its user "a reasonable and justifiable expectation of a higher level of privacy in the information" it contained. Once the cell phone was in police custody, the police were required to obtain a warrant before intruding into the phone's contents. In this case, a search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. "We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant." *State v. Smith*, No. 2008-1781, 2009 WL 4826991 (Ohio Dec. 15, 2009). ML

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