

When the Past Won't Stay Buried: Liability for Historic Contamination in a Post-*Berendsen* World

by Marc McAree and Joanna Vince

You likely did it, even if you don't remember. After all, it was the sixties: little was known about contaminants, the environment or adverse effects. There was no environmental movement, no Earth Day, and no environmental legislation. Rachael Carlson had just written her seminal environmental text, *Silent Spring*. In the sixties, it was common to dispose of waste items by burying them. An old oil tank to get rid of? Waste asphalt? Old drums containing unknown chemicals? Bury it!

What happens when this buried waste inevitably releases contaminants onto the property at which it was buried or contaminants migrate to a neighbouring property? Are governments, including municipalities, liable for an environmental harm that began over 40 years earlier? In *Berendsen v. Ontario*, [2010] O.J. No. 1181, 2010 ONCA 224, the Ontario Court of Appeal considered this issue. To the great relief of municipalities and governments across Ontario, the Court of Appeal found that there was no liability in negligence for these past actions or the current contamination.

The Berendsen story takes place in the small village of Teviotdale. In the 1960s, the Ministry of Transportation (MTO) was doing roadwork in the area, which resulted in a large amount of roadbed waste. So what did the MTO (or, more specifically, its independent contractor) do? They buried the waste on a nearby farm, close to a small watercourse and a drinking well. Almost 20 years later, in 1981, the Berendsens purchased the land, completely unaware of the waste materials beneath their feet and the havoc those materials would create. The Berendsens purchased the property for use as a dairy farm. (They had been successful dairy farmers in Europe, and hoped to continue with this success in Canada.)

Soon after the Berendsens began their farming operations, problem arose: cattle were dying at unexplainable rates, calves were deformed, and milk production was shockingly low. It was eight years before the Berendsens discovered the waste buried on their farm. Concerned about the health of their cattle and the viability of their livelihood, the Berendsens sought the advice of dairy specialists at the Ontario Ministry of Agriculture and Food (OMAF). OMAF shared the Berendsens' concerns about health of the cattle. Both OMAF and the Berendsens' veterinarian linked the cattle's poor health to the contamination of water by the buried waste. OMAF and the veterinarian found that the cows were so reluctant to drink the contaminated water that they became dehydrated and sick. OMAF and the Berendsens' veterinarian both contacted the Ministry of the Environment (MOE) and expressed their concerns.

The MOE began testing the water at the farm. While testing proceeded, the MOE constructed an underground water tank on the farm and paid to supply it with fresh water. The cows instantly responded to the new source of water: the animals were healthier, and milk production returned to normal levels. When the results of the MOE's tests came back, the MOE discovered that while there were contaminants in the water, the concentrations did not exceed the Ontario Drinking Water Objectives. Accordingly, the MOE stopped the supply of fresh water to the farm. The health and productivity of the cattle declined to former levels. The Berendsens were left on their own to deal with the contamination and the deteriorating health of their cattle.

The Berendsens hired consultants to test the water. They found a number of substances, including dioxins, furans, PCBs, PAHs and chlorinated hydrocarbons. The environmental and agricultural consultants concluded that the source of the contaminants was the waste concrete and asphalt buried years earlier by the MTO.

Without help from the MTO or MOE, the Berendsens had no choice but to abandon their farm. The Berendsens brought a claim against the Province of Ontario based in negligence. To be awarded damages in a claim for negligence, the Berendsens were required to establish four facts: (1) Ontario owed the Berendsens a duty of care, (2) Ontario's actions breached the standard of care, (3) the Berendsens sustained damage, and (4) these damages were caused, in fact and in law, by Ontario's breach of the standard of care.

The trial judge found that all parts of the test had been met, and that the Province was liable in negligence to the tune of $1.7 million. On appeal, however, the Court of Appeal took a very different view of the case. It held that, in the 1960s, the risk of harm was not reasonably foreseeable—the MTO was not, and could not, have been aware of the harmful contaminants in that roadbed waste; further, the standard of practice for disposing of waste in the 1960s was to bury it. The court also held that the MOE, after finding contaminants in the water at the Berendsen farm in the 1980s and 1990s, was under no statutory duty to eliminate that waste material and remediate the water. Lastly, the Court of Appeal decided that the Berendsens had not established a causal link between the harm they had suffered and the contamination of the water by the MTO.

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The judgment was appealed to the Supreme Court of Canada. Four days before the January 28, 2011 date that the case was to be heard by the Supreme Court of Canada, the Berendsens discontinued their appeal.

What does this mean for municipalities and other governmental authorities? Well, it means that today's harm from contamination from the 1960s was not foreseeable at that time. Without foreseeability, there is no liability in negligence. It also means that plaintiffs in environmental litigation must show a causal link between the actions of a polluter and the harm suffered.

So, can you sleep soundly at night knowing that even if the past won't stay buried, its ability to haunt you is limited? Not quite. The Berendsens based their claim only in negligence. Generally, plaintiffs can advance environmental claims in several other causes of action in addition to negligence, including nuisance, trespass, strict liability and statutory breaches. These other causes of action do not require the plaintiff to prove foreseeability. They don't even require intention: they only require that the polluter released a contaminant on a plaintiff's land, and that harm resulted.

The moral? When past contamination is brought to the surface, you will need to sit up and take notice.

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night guest at one triplex unit does not have a reasonable expectation of privacy in a shared garbage storage area adjacent to the triplex.

Local police officers working with the Federal Bureau of Investigation arranged to make an undercover drug buy from Moses Earnest Maestas at a triplex residential unit in Albuquerque. The residence was actually rented by a man known as "Road Dog," but Maestas had spent a lot of time there in the preceding three months. On the day in question, Maestas arrived at the home and was seen taking out a gun and a ziplock bag of methamphetamine crystals. When he received a call from the law enforcement officers that they had the house surrounded, he stepped out into the fenced-in garbage storage area adjacent to the residence (but common to all three units), and disappeared from view momentarily. On reemerging, Maestas was arrested. The officers subsequently searched the garbage area and discovered a handgun placed near a fence and behind a garbage can, plus a ziplock bag of crystalline-type methamphetamine inside one of the garbage cans.

Maestas moved to suppress the methamphetamine and firearm recovered at the home on the basis that he had a reasonable expectation of privacy in the enclosed garbage storage area, as he was a guest in the home and, consequently, should be afforded the protections of the Fourth Amendment; second, the Fourth Amendment protections applicable to the unit extended to the enclosed garbage storage area within the curtilage. A defendant invoking the protection of the Fourth Amendment was required to show that he personally had an expectation of privacy in the place searched, and that his expectation was reasonable. This burden had a subjective and an objective component: the defendant had to show that he had a subjective expectation of privacy in the premises searched, and that society was prepared to recognize that expectation as reasonable. The privacy expectation in the home generally extended to the curtilage of the property. The district court denied the motion, finding that Maestas failed to show he had a legitimate, reasonable expectation of privacy in that area. His "connection to the home had been [too] tenuous and he was [not] the type of overnight guest to which Fourth Amendment privacy expectation has been assigned."

On appeal, the Tenth Circuit affirmed. Although Maestas was not the owner or renter of the unit, courts had recognized that a social guest had a reasonable expectation of privacy in the host's property unless the guest was present solely for commercial or business reasons and otherwise had no meaningful connection with the home. The court assumed, without deciding the question, that Maestas was a social or overnight guest and that, for Fourth Amendment purposes, his expectation of privacy was "coterminous with the expectation of privacy of the tenant." The court further assumed, for the sake of argument, that the garbage storage area outside the unit was within the curtilage.

Nonetheless, Maestas failed to demonstrate that he had a reasonable expectation of privacy in the area. The expectation of privacy in the home was distinguishable from one regarding the shared garbage storage area. That area was not used exclusively by the tenant and his guests, and it was accessible by the other units' occupants, as well as the landlord and his agents. The Second, Third, Eighth, Ninth, and Eleventh Circuits had previously held that shared or common areas (such as hallways, entryways, and basements) in apartment complexes or multi-unit dwellings were not areas over which an individual tenant could have a reasonable expectation of privacy. The court here declined to "establish any bright-line rules that would generally define the Fourth Amendment's reach over common or shared areas of multi-unit residential dwellings" but held that, on the particular facts here, Maestas failed to demonstrate that he had a subjective expectation of privacy in the garbage storage area which society was willing to accept as being objectively reasonable. *U.S. v. Maestas*, No. 10–2226, 2011 WL 1534573 (10th Cir. April 25, 2011). **ML**

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can't take them with you. Once you're away from your vehicle, no one can associate you with your tricked-out rims. Perhaps we could elevate the belt-buckle to a status symbol, like rims. Wearing one's pants cinched below the butt might vanish because people wouldn't be able to see the fancy buckle. If this doesn't catch on, I've got another solution which may be a surefire cure: Once Grandma and Grandpa start wearing saggy pants, I think the trend will come to a screeching halt. **ML**