

Code Enforcement

Saggy Pants, or Where, Oh, Where Has My Belt-Buckle Gone?

by David Wesner

Since saggy pants have come into "fashion," they have stirred strong feelings. The wearers will tell you it's a fashion statement and a means of expression, while those that don't appreciate the look will tell you this expression goes too far. Saggy pants have led community elders to take notice, and some communities have, in fact, laid down the law by enacting ordinances prohibiting the wearing of saggy pants. Why do we feel compelled to address this issue? Is it the societal norm that underwear should only be worn under other clothes and not be visible? If exposed underwear is the problem, why do we limit the discussion to saggy pants that expose boxers or "tighty-whities"? (I note that it seems only males are causing this issue.) What about the exposure of a bra or bra strap? Are community elders a bunch of old guys who don't mind seeing a bra or bra strap, but do mind seeing another guy's posterior hanging out of his pants?

As a practical matter, one would think this trend wouldn't last long, after stories we've all heard. The best stories come from our police officers: No matter how fast you can run, if you have to try to keep your pants up at the same time, you're not going to get very far. And, if your pants are down, it's one less layer between you and the K-9. (Ouch!) One individual successfully robbed several stores, conspicuous because of his saggy pants. His luck finally ran out and he was apprehended. While trying to get away from the police, he was shot ... in the butt. Do you think the police were trying to send a message about the pants?

When drafting a new ordinance, one issue is whether the law will accomplish the intended result, yet avoid unintended consequences that create problems or result in legal challenges. Another difficult issue is identifying the possible legal challenges and whether the ordinance will withstand these. Given the strong feelings on the side of the wearers, I have a strong suspicion that ordinances prohibiting the wearing of saggy pants will get challenged regularly. Another consideration is whether the ordinance should be simple and general, or detailed and specific. With a simple, general ordinance, the first challenge will be for vagueness. The subjective nature of a simple, general ordinance would create issues for the citizens in understanding what constitutes a violation, and police officers may differ on what qualifies as a violation. If the ordinance is drafted with more specificity and detail, other issues may arise: a detailed ordinance may allow officers to be objective and avoid vagueness challenges; however, it may also catch situations that don't make sense as a violation, and easily miss others which should be included.

Typically, I like a simple and general ordinance because this provides the greatest flexibility: it's capable of addressing situations that would truly be violations, and one could deal internally with any particular circumstance that might be an unintended consequence or other issue that could give rise to a challenge or other problem. Even a general ordinance can be drafted to avoid a vagueness challenge.

Regardless of how a saggy-pants ordinance may be drafted, one challenge which creates the biggest hurdle is based upon a fundamental right or liberty interest in personal public attire. This challenge has already been successful in some courts. The argument is that people are free to dress as they please so long as they do not offend public order and decency. So, as long as I am covered, can the government dictate *how* I am covered? In defending against this challenge, a municipality has to articulate a legitimate governmental interest served by the ordinance, wherein the regulation will in fact alleviate the harm in a direct and meaningful way. An argument that saggy pants inhibit development is not likely to carry the day. What would be a sufficient governmental interest that could sustain the ordinance? Is regulating saggy pants similar to regulating other aesthetic concerns (tall grass on property)? Is it similar to regulating adult businesses, based on their secondary effects? If so, what secondary effects do saggy pants result in for the community?

In the end, I think we all know how difficult it is to legislate reasonableness or common sense. The issue becomes whether municipalities should enact dress-code legislation because we don't think improper attire belongs in polite society (or because we just don't like it), or whether communities should look at addressing this in other ways. Perhaps community pressure could resolve this issue. Schools impose dress codes on students; businesses impose dress codes on employees. How about expanding the concept of "no shirt, no shoes, no service," to include "no saggy pants"? Hosts of community events could require that pants be worn appropriately. If wearers have to deal with being told to pull their pants up everywhere they go, perhaps they will tire of wearing baggy, droopy pants. Kids could be educated about the impression they give by wearing saggy pants.

As we all know, fashion can be cyclical. How about this solution: our old friend, the belt-buckle? I don't see people wearing these much, anymore, though these used to be something that was worn with pride. We have recently seen the advent of specialized rims on a vehicle as a "fashion" or status symbol, but the problem with rims is that you

continued on page 39

Inside Canada

cont'd. from page 28

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.

Marc McAree is a partner with Willms & Shier Environmental Lawyers LLP in Toronto, Canada, and is certified as a Specialist in Environmental Law by the Law Society of Upper Canada. Joanna Vince is a Student-at-Law with the firm. She has a degree in biology and environmental science, and a certificate in environmental studies. **ML**

Cases

cont'd. from page 35

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**

Code Enforcement

cont'd. from page 31

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**