

CITATION: Berendsen v. Ontario, 2009 ONCA 845  
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COURT OF APPEAL FOR ONTARIO

Laskin, Juriensz and Epstein JJ.A.

BETWEEN

Bernard Gerardus Maria Berendsen, Maria Berdina Helena Berendsen, Yvonne  
Berendsen, Mary Berendsen and Wilbert Berendsen

Plaintiffs (Respondents)

and

Her Majesty the Queen in Right of Ontario

Defendant (Appellant)

William J. Manuel and Erin Rizok, for the appellant

Richard D. Lindgren and Donald R. Good, for the respondents

Heard: April 6, 2009

On appeal from the judgment dated January 18, 2008 and the order dated July 11, 2008  
by Justice Silja S. Seppi of the Superior Court of Justice, with reasons reported at (2008),  
34 C.E.L.R. (3d) 223 and (2008) 38 C.E.L.R. (3d) 135.

**Laskin J.A.:**

## **A. INTRODUCTION**

[1] In the mid-1960s, the Ontario Ministry of Transportation deposited asphalt and concrete waste from a highway reconstruction project on a nearby dairy farm. It did so with the farm owner's consent.

[2] In 1981, the respondents, Bernard and Maria Berendsen, purchased the dairy farm. Soon after their purchase, the Berendsens' cows began to suffer serious health problems and to produce an unusually low quantity of milk. The immediate cause of these health and poor production problems was the cows' unwillingness to drink enough water. However, the Berendsens claimed that the root cause was Ontario's deposit of waste material on their farm. They alleged that harmful chemicals in the waste material migrated to the wells on their property, thereby contaminating the well water and making it unpalatable for the cows. Although testing showed that the chemicals in the well water did not exceed the limits under the Ontario Drinking Water Objectives for human consumption, the Berendsens maintained that the water was unfit for their cows.

[3] In 1994, nearly 30 years after the act they complain about occurred, the Berendsen family sued Ontario in negligence for depositing the waste and then failing to remove the contamination. In a lengthy judgment, after a five-week trial, Seppi J. found in favour of the Berendsens on both branches of their claim. She awarded damages of \$1,732,400 plus pre-judgment interest at six per cent annually and costs of \$655,000.

[4] On its appeal, Ontario accepts that it owed a duty of care to the Berendsens but submits that the trial judge erred in her finding of negligence. It puts forward two arguments in support of this submission. First, it contends that the trial judge's finding on causation – that the waste deposit materially contributed to the unpalatability of the well water – was tainted by palpable and overriding errors and was unreasonable. Second, Ontario contends that the trial judge 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 the risk a deposit of waste material 60 feet away would contaminate the well water and cause harm to animals.

[5] Finally, Ontario attacks the trial judge's finding that it had a duty in the 1980s and 1990s to eliminate the harmful effects of the buried waste material and that it breached this duty. Ontario contends that it had no statutory duty to remove the waste material or remedy the contaminated well water.

[6] Ontario also appeals the rate of pre-judgment interest awarded by the trial judge and seeks leave to appeal the costs award, claiming both are excessive.

## **B. FACTUAL OVERVIEW**

### **1. The dairy farm**

[7] The dairy farm in issue is a 190-acre farm in Teviotdale, a small Ontario community that lies on the border between Perth County and Wellington County.

Mathias Pentz owned the farm in the 1960s. In 1968, he sold the farm to Bruce Bawden. In 1981, Bawden sold the farm to the Berendsens.

[8] The Berendsens paid \$550,000 for the farm, the cattle (60 Holstein cows and three heifers), the milk quota and the equipment. At the date of trial the Berendsens still owned the farm in Teviotdale. However, by the end of 1994, they had given up farming there, and had moved to a farm in Chepstow, which is in Bruce County.

## **2. Asphalt and concrete waste is buried on the dairy farm**

[9] According to Pentz, in either 1966 or 1967, Ontario government employees took truckloads of asphalt and concrete waste from a provincial highway reconstruction project and deposited it as fill in a low lying area of the dairy farm. The area measured 100 feet by 100 feet; the waste material was buried to a depth of six to eight feet and covered over with gravel. At the time, the use of asphalt waste as fill on rural properties was common. In this case, the waste material was deposited on Mr. Pentz's farm with his consent.

[10] However, when the Berendsens bought the farm, they were not aware of the buried waste material. They first learned about it in 1989.

## **3. The wells on the dairy farm**

[11] When Mr. Pentz owned the farm, he had a 20 to 30 foot deep well on it. This well was about 50 to 60 feet away from the buried waste material.

[12] After Bawden bought the dairy farm, in 1969, he drilled a 100 foot deep well about 60 feet away from where the waste material had been buried. During the trial, this well became known as well #1. The Berendsens' herd drank water from this well. And this well became the subject of most of the testing done by the experts for the Berendsens.

[13] In late 1989, the Berendsens drilled a new 65 foot deep well – well #2 – about 400 feet from the buried waste material. The herd then began to drink from well #2 and no longer used well #1. Well #2 remained in use until December 1990.

#### **4. The Berendsens herd's health and milk production problems**

[14] Both Pentz and Bawden were dairy farmers. Neither experienced any problem with his herd while he owned the dairy farm.

[15] However, soon after the Berendsens purchased the farm, their herd started suffering from serious health problems and producing a low quantity of milk. The cattle were not drinking enough water; their cull rate was double what it should have been and their milk production was half what it should have been. These problems continued even after the cattle began drinking from well #2.

#### **5. The Ontario government's involvement**

[16] The Berendsens complained about their herd's health problems to the Ontario government. Ontario responded to the complaint. In late 1990, Ontario authorized and

paid for an underground water storage tank at the farm. It also paid for the delivery to the farm of potable water, which was brought in by truck from nearby towns.

[17] After the installation of the tank and the deliveries of potable water, the herd's water intake increased, its milk production increased and its overall health improved.

[18] Meanwhile, Ontario's Ministry of the Environment did some testing of the quality of the water in well #1, well #2, the barn troughs and the ditch. Its testing showed that the water contained no organic chemicals in excess of the limits under the Ontario Drinking Water Objectives for human consumption.<sup>1</sup> Ontario, therefore, concluded that it bore no responsibility for the plight of the Berendsens' herd. It so advised the Berendsens in April 1993, and stopped paying for water deliveries to the farm in June 1993.

[19] Shortly after, the Berendsens ceased dairy farming at Teviotdale, moved to Chepstow, and started this litigation.

## **6. The litigation**

[20] The Berendsens issued their statement of claim in 1994 and amended it in 1995. They sought damages against Ontario for negligence and for failure to remove the wasteful material or remediate the contamination.

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<sup>1</sup> These Objectives were first published in 1964, and were revised in 1983. These non-legally binding Objectives were replaced in 2000 by legally enforceable Ontario Drinking Water Standards: see O. Reg. 459/00.

[21] Ontario brought a motion for summary judgment to dismiss the claim on the ground that it was barred by the six-month limitation period in s. 7 of the *Public Authorities Protection Act*, R.S.O. 1990 c. P.38. The motion judge granted Ontario's motion. This court dismissed an appeal from the motion judge's decision.

[22] However, the Supreme Court of Canada reversed this court's decision: see *Berendsen v. Ontario*, [2001] 2 S.C.R. 849. The Supreme Court held that the *Public Authorities Protection Act* did not apply because the disposal of waste asphalt was a private or operational activity, not a public one. Thus, the six-year limitation period in the former s. 45(1)(g) of the *Limitations Act*, R.S.O. 1990 c. L.15 governed. As the Berendsens did not discover the existence of the asphalt waste until 1989, their action was started within the six-year period.

[23] Iacobucci J., who wrote the judgment of the court, commented at para. 24 on the duty owed by Ontario's Ministry of Transportation to the Berendsens:

In the first place, while the MTO may owe a duty to every member of the public to repair highways, the disposal of waste asphalt on private land gives rise to a duty of care owed only to the landowner involved and possibly a few other individuals who could be impacted by the disposal. In other words, the courts must examine who could bring an action against the government for the negligent disposal of waste asphalt. When asphalt has been disposed of on private land, and is only causing harm to a restricted number of individuals, it is only those individuals affected, not any member of the public, who could bring such a claim.

## C. ANALYSIS

### 1. Did the trial judge err in finding that Ontario was negligent?

[24] To succeed in their negligence action, the Berendsens had to show that:

- Ontario owed the Berendsens a duty of care;
- Ontario's actions breached the standard of care;
- The Berendsens sustained damage; and
- These damages were caused, in fact and in law, by Ontario's breach of the standard of care.

See *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 at para. 3. The contentious issues on this appeal are elements two and four: whether Ontario breached the standard of care and whether its breach caused the Berendsens' damages.

[25] Ontario acknowledges, as it must, that it owed the Berendsens a duty of care. On Ontario's unsuccessful motion to dismiss the claim on the ground that it was barred by the limitation period under the *Public Authorities Protection Act*, the Supreme Court of Canada held at para. 24 that "the disposal of waste asphalt on private land gives rise to a duty of care owed only to the landowner involved and possibly a few other individuals who could be impacted by the disposal." The Supreme Court accepted that this duty, initially owed to Pentz, was also owed to later owners of the dairy farm, Bawden and the Berendsens.

[26] The trial judge found that the Berendsens sustained damages, and quantified those damages at approximately \$1.7 million. Ontario does not challenge her finding of damage or her award.

[27] I turn then to the two contentious issues: standard of care and causation. Because of the view I take of these aspects of the appeal, I will address them in reverse order.

**(a) Causation?**

*(i) Overview*

[28] Assuming Ontario breached the standard of care required of it, did the trial judge err in concluding that this breach caused the Berendsens' damages in fact and in law?

[29] Much of the trial judge's judgment deals with factual causation. She ultimately concluded that the waste material Ontario deposited on the dairy farm in the 1960s caused the harm to the Berendsens' herd and the herd's inadequate production of milk. Ontario submits that her conclusion is unreasonable and that it is tainted by palpable and overriding errors.

[30] In my view, Ontario's submission that the trial judge's finding was unreasonable has merit. The principal difficulty with her finding arises from her failure to address the lack of evidence connecting the buried waste to well #2. However, it is not necessary to decide whether to set aside her causation finding, because, as will become apparent, I have concluded that Ontario did not breach the standard of care. Therefore, in this

section of my reasons, I will simply point out my difficulties with the trial judge's finding on factual causation.

[31] The trial judge's determination of factual causation turned on her evaluation of the competing expert evidence called by the Berendsens and by Ontario. In all, ten expert witnesses testified on factual causation – four for the Berendsens and six for Ontario. These witnesses were experts in a variety of disciplines: dairy herd health and production, veterinary pathology and toxicology, organic chemistry and environmental toxicology, and hydrogeology.

[32] In general, the trial judge accepted and relied on the evidence of the four experts called by the Berendsens: Dr. Douglas Hallett, the head of ELI Eco Logic Inc., the firm the Berendsens retained in 1992 to investigate the source of their herd's health problems and to test the well water for contaminants; Dr. Jack Cote, a veterinarian and dairy herd health consultant to the Ontario Ministry of Agriculture and Food; Dr. Robert Thurston, another veterinarian with expertise in dairy herd health; and Dr. Herman Boermans, a veterinary toxicologist.

[33] After accepting the expert evidence called by the Berendsens as credible and reliable, the trial judge either rejected or in one case did not refer to the expert evidence called by Ontario, except for the few instances in which it was consistent with the Berendsens' expert evidence. Ontario's experts seemed to be distinguished in their respective fields, each with an impressive résumé. Yet the trial judge denounced their

evidence in unusually strong terms: one expert's evidence was "of little value"; another "did not present as an objective witness" and gave evidence "lacking scientific objectivity"; yet another was "evasive" and "subtly attempted to mislead"; another had a "dismissive attitude", was "not credible", and gave evidence that was "purely adversarial rather than scientific"; another's investigation was "glaringly deficient"; and another was "evasive and defensive", "deliberately omitted ... information", and gave evidence that "was seriously lacking in reliability and credibility" and was "misleading".

[34] Ontario submits that the trial judge's treatment of the expert evidence was unreasonable. I agree that the wholesale rejection of one side's experts in these derogatory terms, after the wholesale acceptance of the other side's experts, raises concern about the objectivity of the trial judge's assessment and evaluation of the expert evidence. Still, the trial judge was in the best position to evaluate the expert evidence. Her treatment of that evidence, standing by itself, does not undermine her finding on causation.

(ii) *Causation in fact*

[35] Some basic facts were not in dispute. The Berendsens' herd was in poor health. The cattle had an unusually high cull rate, twice the norm. When they became ill, they did not respond to treatment.

[36] The herd was also producing an inadequate amount of milk, 50 per cent less than produced on a typical dairy farm. In arithmetic terms, the Berendsens' herd went dry

after 200 days in milk, instead of the average of 365 days in milk. The immediate cause of the cows' poor health and inadequate production of milk was their failure to drink enough water.<sup>2</sup> According to the veterinary evidence at trial, water is the most significant nutrient in the diet of a dairy cow. Dr. Cote testified that cows should drink an average of 25 to 40 gallons of water per day for full milk production and good health. The Berendsens' cows were drinking on average only 12 to 14 gallons of water per day. They became unusually thin and dehydrated. They could not produce enough milk. They became especially vulnerable to disease.

[37] The Berendsens' cattle were not drinking enough water because they were rejecting the water on the farm. In the words of one expert, they drank only enough to stay alive. The question is why? The trial judge concluded that the buried waste material contaminated the well water, making it unpalatable to the cows. She set out her conclusion on causation at para. 287 of her reasons:

The plaintiff has thus proven the probable connection and cause from the buried roadbed materials to the contaminates found in the farm water. There remains the further requirement of the contaminated water being the probable cause of the Berendsens' serious losses on the farm, occasioned on account of the persistent herd health and production problems. The evidence in this trial strongly supports the conclusion that these problems were due to the weakened immune systems of the cattle which were compromised on account of the cattle refusing to drink what they needed when offered water containing these harmful

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<sup>2</sup> At trial, Ontario tried to blame the herd's problems on what it alleged was the Berendsens' poor farm management. The trial judge rejected this explanation. Ontario has not appealed her finding.

chemicals. The expert veterinary and toxicological evidence reviewed in significant detail in this judgment strongly supports this conclusion. Moreover, as Dr. Boermans testified, his extensive review of the entire investigation clearly showed the experts has eliminated all of the common causes of poor health in a dairy herd. This testimony is fully supported by the evidence of other potential causes being eliminated, particularly through Dr. Cote's investigation which was comprehensive and thorough.

[38] This causation finding has several links:

- The buried waste material contained harmful chemicals;
- The well water also contained harmful chemicals;
- The buried waste material was the source of the chemicals in the well water; and
- These chemicals made the well water unpalatable to the cows.

I will review each of these links.

### **The buried waste material contained harmful chemicals**

[39] Asphalt mainly consists of tar residue left after crude oil is refined. It contains polyaromatic hydrocarbons (PAHs) and other chemical compounds. This asphalt waste, which came from the roadbed, may also contain contaminants from automotive fluids, such as polychlorobiphenyls (PCBs).

[40] Sampling from the buried waste material showed elevated levels of some harmful chemicals, including PCBs, PAHs and dioxins.

### **The well water also contained harmful chemicals**

[41] Ontario maintained that the well water on the Berendsens' farm was not contaminated. Ontario's testing showed that any chemicals both in well #1 and well #2 were below the concentrations allowed by the Ontario Drinking Water Objectives for human consumption. PCBs, PAHs and dioxins, though present, were at such low levels that they should not be considered contaminants.

[42] The trial judge criticized Ontario's testing, which she considered neither thorough nor extensive. Indeed, the Ministry of the Environment itself admitted that its testing was flawed. Thus, the trial judge rejected the opinions of Ontario's experts on the acceptability of the Berendsens' well water. As she had on the other issues, she accepted Drs. Hallett's and Boermans' opinions. In his September 1992 report, Dr. Hallett stated that the Berendsens' water in well #1 contained a number of toxic industrial chemicals at ultra trace levels that were not found in rural groundwater near the farm. These included PAHs, PCBs, dioxins, furans, chlorinated hydrocarbons and phenolic compounds.

[43] Drs. Hallett and Boermans acknowledged that the levels of these chemicals, individually, were extremely low. However, Dr. Boermans emphasized that their additive or synergistic effects had to be taken into account.<sup>3</sup> And both experts said that the toxicity may be present at levels lower than the maximum allowable for human

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<sup>3</sup> One of Ontario's experts, Dr. Birmingham, testified that typically in setting standards – for example, under the Ontario Drinking Water Objectives – a standard is set for a single substance, not for a mixture of substances. Dr. Birmingham also said that he did not know of any agency in North America that regulates synergistic effects.

consumption. Dr. Boermans added that the biological differences between species made it inappropriate to use human drinking water standards to assess the toxicity of water supplied to cattle.

[44] Relying on Dr. Hallett's investigation and findings on the water in well #1 is problematic because he tested the water in well #2 only once, in 2003, long after the Berendsens had moved, and expressed no opinion on it. Indeed, he acknowledged that he was "not an expert" on well #2.

[45] The critical facts about well #2 are these: The well was built in 1989; it was used for a year; it was located 400 feet from the buried waste material; there was no evidence that the water in it contained the harmful chemicals identified by Dr. Hallett in well #1; and yet according to the evidence of both Mr. Berendsen and Dr. Cote, the cattle would not drink the water from well #2 either. Therefore, the trial judge's finding – based on the evidence of Drs. Hallett and Boermans – that the water in well #1 contained chemicals harmful to the cattle, suffers from her failure to address why the cattle were also not drinking the water from well #2.

**The buried waste material was the source of the chemicals in the well water**

[46] Whether and how contaminants in the waste material reached the well water was one of the most contentious issues in the trial. Ontario argued that no causal link could be demonstrated between the substances found in the buried waste material and those found in the well water. It called two experts, each of whom testified that there was no

realistic transport mechanism by which contaminants from the waste material could reach well #1, 60 feet away, much less well #2, 400 feet away. These experts maintained that the soil on the Berendsens' farm was indistinguishable from rural soil elsewhere in the province. And there was no evidence anywhere in Ontario that contaminants from buried waste material could move into the surrounding soil and then into ground water. At best, any movement would be exceedingly slow, taking anywhere from hundreds to thousands of years.

[47] The trial judge rejected the evidence of one of Ontario's experts and did not refer to the evidence of the other. Instead, she accepted Dr. Hallett's evidence, first given at the trial itself, that the contaminants in the buried waste material likely moved to the well water through a process of partitioning and diffusion, which he likened to a sugar cube dissolving in a glass of water. Dr. Hallett elaborated on what he meant by partitioning and diffusion in these terms:

Partition is a term that refers to organic chemicals and it's their ability to – they have different abilities depending on different solvents including water, to partition or move ...

Diffusion is different ... you're dropping the sugar in the water and it first partitions into the water and then by a process of diffusion it moves from, the molecules are moving from a very high concentration of molecules right around the sugar cube or, in this case, right around these areas where the PCBs have dissolved in water you have a very high concentration of PCBs in water on a relative scale for PCBs in water, and this is going to move out through a process of diffusion from an area of high concentration to lower concentration, and that is called "diffusion" ...

[48] Dr. Hallett further testified that the contaminants most likely entered the well water where there was a hole or gap in the sections of the decades old steel casing around well #1. Therefore, in Dr. Hallett's opinion, it was more probable than not that the PCBs, PAHs and dioxins in well #1 came from the buried waste material.

[49] The trial judge accepted Dr. Hallett's opinion. She was entitled to do so. But his opinion suffers from his failure to address well #2. He did not explain how the contaminants from the buried waste material could migrate to and then enter the water in well #2. This well was newly built; it was very far away from the buried waste, at a distance permissible even by today's standards;<sup>4</sup> and presumably its casings were sound and impenetrable throughout their depth. The trial judge's failure to consider how the chemicals from the waste could reach and then enter well #2 raises a further difficulty with her finding on factual causation.

### **These chemicals made the well water unpalatable to the cows**

[50] The last link in the chain of factual causation was whether the unpalatability of the well water to the cattle could be tied to the chemicals in it. Showing that the cows would not drink the water was not enough to establish causation. Their unwillingness to drink the water had to be linked to the chemicals in it. The trial judge found that the

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<sup>4</sup> Ontario Ministry of Transportation Guidelines developed in the late 1980s and early 1990s specified that buried waste sites be at least 100 metres away from a private well. Well #2 was over 100 metres away from the waste buried on the Berendsens' farm.

unpalatability of the water was linked to the contaminants in it. The only evidence reasonably capable of supporting that finding was the following testimony of Dr. Cote:

Q. Define the essential problem, the crux of the herd and health problems at the farm?

A. To me and to all of our tests and efforts at correction, it was to me obvious that the drinking water from the well was the root cause – the unpalatability of the water was the root cause of the situation at the Berendsen farm.

...

Q. Based on your observations, Dr. Cote, what would you say was the cause of the unpalatability problem that you detected at the farm?

A. Well, because we tried four methods of correction or improvement for the water palatability that were unsuccessful, we were left with the toxins that might be present in the buried asphalt leaching into the ground water. The aquifer for the well.

Q. And leaving aside that explanation, just part the issue of the buried asphalt and what might be coming out of it, are there any other on-site sources or causes of the water unpalatability to your knowledge?

A. Not to my knowledge.

And, as Dr. Cote added, cows “don’t lie” about their water preferences.

[51] It is unclear to me whether Dr. Cote’s opinion is restricted to explaining why the cattle did not drink the water in well #1 or whether his opinion covers the water in both

wells. Even accepting that his opinion covers the water in both well #1 and well #2, I see two difficulties with an unqualified acceptance of it.

[52] First, the Berendsens' own expert, Dr. Boermans, conceded on cross-examination that he could see no link between the chemicals in the water in well #1 and the unpalatability of that water to the cows.

Q. Do I interpret that correctly that in your opinion, the chemicals identified in the Berendsen well water at the levels they were found there, are unlikely to affect the palatability of the water for cattle?

A. I think I was trying to more indicate I was sure it did not affect the palatability in terms of irritation properties within the gastrointestinal tract. In terms of palatability of odour etcetera, is another possible area but, again, I think it was less likely in terms of odour. Now animals are very hard to predict on odour, but in terms of sensitivity or irritation of chemical I feel comfortable in saying probably didn't irritate the gastrointestinal tract enough to produce and go off their food and water.

Q. You add the point that it was unlikely that those cattle based on those chemicals would be sensitive to the odours?

A. That was a personal opinion, that's correct. I didn't – I thought at that level your chances are that the cattle wouldn't be overly sensitive to the odour but, again, that is totally personal and it may have been sensitive.

The trial judge did not refer to this evidence.

[53] Second, to repeat what I have said earlier, the trial judge does not consider how the chemicals from the buried waste could end up in the water in well #2, or why the cattle would not drink the water from that well. 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.

[54] The Berendsens seek to support the link between the chemicals in the well water and the water's unpalatability to the herd by pointing to the evidence of what occurred when Ontario delivered town water to the farm for the cows to drink. The cows' daily water consumption rose from 10 to 15 gallons to 26 to 31 gallons, and their daily milk production increased from 12 to 13 litres to 20 to 21 litres. It seems to me, however, that this evidence is neutral. It merely shows that the cows preferred the delivered water. It does not account for why they did not like the well water.

[55] In this section of my reasons, I have tried to highlight my concerns with the trial judge's finding on factual causation. I have not determined whether these concerns warrant setting aside that finding. That determination is unnecessary because of my conclusion that Ontario did not breach the standard of care.

*(iii) Causation in law*

[56] To succeed in their negligence action, the Berendsens also had to show that Ontario's breach caused their damages in law, in the sense that their damages were not too remote to be recoverable. Causation in law focuses on the question whether the

damages are too unrelated to the wrongful conduct to hold the defendant fairly liable: see *Mustapha* at para. 12.

[57] The trial judge held that the damages sought were sufficiently related to the deposit of the waste material to be recoverable. She relied on the principle enunciated by Dickson J. that “it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred”: *R. v. Côté et al.*, [1976] 1 S.C.R. 595 at 604. If Ontario has breached the standard of care, I would not interfere with the trial judge’s affirmative finding of causation in law.

**(b) Breach of the standard of care?**

[58] A defendant’s conduct breaches the standard of care, or in ordinary parlance, is negligent, if it creates an unreasonable risk of harm. In the words of McLachlin C.J. in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 at para. 6: “Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act of omission of another”.

[59] From this quote, it is evident that foreseeability of harm is a crucial component of a breach of the standard of care. To succeed in showing a breach of the standard of care in this case, the Berendsens had to show that, back in the 1960s when Ontario deposited asphalt and concrete waste on the dairy farm, harm to the cattle from this buried waste material was a reasonably foreseeable risk. It is not necessary that the precise way the

harm occurred be foreseen; but the risk of harm in a general way from drinking or not drinking the water had to be reasonably foreseeable to impose liability.

[60] In concluding that Ontario breached the standard of care it owed to the Berendsens, the trial judge held at para. 269 of her reasons that the harm was reasonably foreseeable:

As reasonably prudent repairers and maintainers of public highways in Ontario, the MTO knew or ought to have known the quantity of the fill and the location to which it decided to dump the roadbed waste, could potentially result in toxicity to the natural water supply on the farm. By dumping such a large quantity of old roadbed materials over such a large area in that location the MTO was in breach of its duty to ensure it caused no harm to the occupiers of the farm by how and where the waste was deposited.

Ontario submits that the trial judge erred in law because there was no evidence to support her conclusion. I agree with that submission.

[61] For virtually every other finding that the trial judge made in her lengthy and detailed reasons, she cited the supporting evidence that she relied on. In contrast, her finding on foreseeability of harm is stated baldly without any supporting evidence. Instead, the trial judge wrote at para. 262: “There is also no evidence to suggest potential harmful effects of waste roadbed materials buried on the dairy farm next to a water course and close to the barn, residence and well would not be known to a reasonably prudent servant or agent of the Crown in mid 1960s.”

[62] Of course, the Berendsens had the onus of showing that harm to their cattle from the deposit of waste material on the dairy farm was a reasonably foreseeable risk. And foreseeability of harm had to be assessed when the conduct in issue occurred, in the 1960s, not today when we know so much more about the risks of toxicity from waste material.

[63] Moreover, the Berendsens could not simply rely on common sense when the experts themselves disagreed, even today, on whether buried waste material could move through soil to well water at least 60 feet away and whether trace levels of chemicals could cause harm to animals. Nor could the Berendsens simply rely on the statutory prohibition against depositing material in any place that may impair the quality of water, contained in s. 27(1) of the prevailing *Ontario Water Resources Commission Act*, R.S.O. 1960, c. 281, which stated:

27(1) Every municipality or person that discharges or deposits any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or water-course or on any shore or bank thereof or into or in any place that may impair the quality of the water of such well, lake, river, pond, spring, stream, reservoir or other water or water-course is guilty of an offence and on summary conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or to both.

This statutory prohibition does not answer the question whether it was reasonably foreseeable in the 1960s that the deposited waste material would impair the quality of the Berendsens' well water.

[64] What was needed was evidence of foreseeability of harm. Yet 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. The Berendsens conceded as much because, both in their factum and in oral argument, the only evidence on foreseeability of harm that they could point to was the evidence of Ontario's expert, Dave McLaughlin, of the Ministry of the Environment.

[65] The trial judge did not refer in her reasons to Mr. McLaughlin's evidence. However, Mr. McLaughlin did testify in cross-examination that although he did not recall talking to Mr. Berendsen, he tells all owners of property he investigates that he does not think it would be "appropriate" to put asphalt and concrete debris on their property. He went on to say he gives that answer because "it is a principle of knowledge and ownership and perception". Property owners do not know what they are getting; under the *Environmental Protection Act*, R.S.O. 1990, c. E.19, they own and are responsible for what is put on their properties, and regardless whether what they received has the potential to harm human or animal health, it is perceived as a contaminant.

[66] Mr. McLaughlin was hired by the Ministry in 1977, so his investigations date from that time. He was not giving advice to property owners in the 1960s, the relevant time to assess foreseeability of harm. Moreover, in my view, his evidence, although making common sense, falls short of providing any basis for the trial judge's finding of reasonable foreseeability of harm.

[67] Not only was evidence in support of the trial judge's finding of foreseeability of harm lacking, there was considerable evidence going the other way – suggesting that harm to the Berendsens' well water and to its herd from the deposit of waste materials was not foreseeable in the 1960s. This evidence included the following:

- In the 1960s, the deposit of waste material was not regulated. No industry or governmental standards existed. Indeed, the evidence suggests that what occurred on Pentz's farm was a fairly common practice at the time.
- Guidelines now exist on how close asphalt waste can be placed to wells: a minimum of 100 metres away. These guidelines, however, came into effect in the late 1980s. No guidelines existed in the 1960s.
- Dr. Hallett, on whose testimony the trial judge relied heavily, acknowledged that the field of toxicity did not even begin to develop until the 1970s.
- No evidence was led that in the 1960s soil geologists understood chemicals in buried waste material could migrate to well water 60 feet away.
- No evidence was led that in the 1960s veterinarians understood water fit for human consumption could nonetheless cause harm to cattle.
- Finally, neither Dr. Hallett nor Dr. Boermans could point to a single scientific study showing that people or animals had been harmed by the level of chemicals in the Berendsens' well water. Both considered this case to be "unique".

[68] This case differs from the case of *Bingley v. Morrison Fuels* (2009), 95 O.R. (3d) 191, recently decided by this court. There too the court had to reach back in time to judge foreseeability of harm.

[69] In that case, the Bingleys hired Stanzel Plumbing in 1979 to decommission their oil heating furnace because they were switching to natural gas. Stanzel removed the Bingleys' oil furnace but left in place the oil tank and oil fill pipe. However, Stanzel sealed the pipe and turned it downward to prevent it from being filled and to show it was no longer to be used. Twenty-two years later, an employee of Morrison Fuels mistakenly delivered oil to the Bingleys' home. The employee found the oil pipe, and wrongly thinking it was loose, raised it and unsealed the cap. He then poured over 900 litres of furnace oil into the wrong home. Unfortunately, the Bingleys' oil tank had rusted and it leaked. The oil spilled into the basement making the house uninhabitable.

[70] The Bingleys sued Morrison, which admitted its negligence and settled the claim. However, Morrison took third party proceedings against Stanzel for contributory negligence. The third party action became the subject of the appeal. A majority of our court overturned the trial judge and found Stanzel liable to Morrison because of their view that a mistaken delivery was a foreseeable risk at the time. Juriansz J.A., who wrote the majority decision, explained his reasoning at paras. 28-29:

In short, the possibility of a mistaken delivery was both subjectively foreseen by the respondents and, more importantly, was objectively foreseeable. The method used

by Stanzel Plumbing did not adequately safeguard against this reasonably foreseeable harm. Combining reasonable foreseeability with the enormous potential harm and the trifling cost of permanently plugging the fill pipe, I conclude that the respondents breached the standard of care owed to the Bingleys.

Two comments are worth making about the conclusion that the respondents breached the standard of care owed to the Bingleys. *First, though I agree it would be unfair to reach back into the past and measure the respondents' decommissioning work by contemporary safety standards, here the conclusion turned on the foreseeability factor. I stress what I noted above, that the view of all the witnesses was that a mistaken delivery was foreseeable at the time.* Second, it is worth mentioning that no limitations issue was raised in this case. [Emphasis added.]

[71] In *Bingley v. Morrison*, the majority concluded that there was evidence on which they could find foreseeability of harm when the conduct in question occurred. Simmons J.A. dissented because she agreed with the trial judge's conclusion that harm was not foreseeable in 1979 when the oil furnace and oil fill pipe were left in place.

[72] In the present case, I am not persuaded there is any evidence that the harm occurring to the Berendsens was reasonably foreseeable when Ontario deposited waste material on the dairy farm. Absent evidence, the trial judge's finding that Ontario breached the standard of care was an error of law. Since Ontario did not breach the duty it owed to the Berendsens, the Berendsens' negligence action must fail. Although this result may seem harsh in the light of what we now know about the environment, it is inappropriate to use our current knowledge to measure conduct occurring more than 30 years ago.

**2. Did the trial judge err in finding that Ontario was liable for failing to remove the waste material and remediate the contaminated well water?**

[73] In the 1980s, the Berendsens asked Ontario to investigate whether its well water was contaminated. Ontario agreed to do so. It decided to test the water on the Berendsens' farm to find out if it contained chemicals in excess of the Ontario Drinking Water Objectives. Having made this policy decision to investigate, I accept that Ontario owed a duty to the Berendsens to carry out the investigation properly: see *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

[74] The trial judge found that Ontario's investigation was negligent. She then made the further finding at para. 258 of her reasons that Ontario had a duty to "eliminate the continuing harmful effects of the buried waste material". She repeated this finding at paras. 270 and 288 of her reasons:

The MOE's failure to conduct a thorough investigation of the Berendsen groundwater complaint, its refusal to remedy the contaminated water source on the farm and its continuing failures in that regard are also breaches of its duty to the plaintiffs.

...

Had the defendant not been negligent in the conduct of its investigation and fulfilled its duty to remedy the environmental harm it knew to exist, particularly after receiving Dr. Cote's and Dr. Hallett's opinions, the plaintiffs' losses would have been significantly reduced.

[75] Ontario does not challenge the trial judge's finding that its investigation was negligent. However, it submits that nothing turns on that finding because it had no duty to remove the waste material or remedy the well water. I agree with that submission. In my view, the trial judge erred in imposing this duty on Ontario.

[76] The trial judge's starting point and my starting point differ. The trial judge starts from her conclusion that Ontario was negligent in the 1960s when it buried the waste material on the farm. I start from the conclusion that Ontario was not negligent because when it buried the waste material the risk of harm was not reasonably foreseeable.

[77] Even beyond our different starting points, I take issue with the trial judge's analysis supporting her finding of a duty to remediate.

[78] Ontario investigated the Berendsens' well water for a specific and limited purpose: to determine whether it met the applicable water standards for human consumption – the Ontario Drinking Water Objectives. No standards existed for water consumption for animals. Ontario's testing showed that none of the chemicals in the water exceeded these Objectives. Even accepting that Ontario's own investigation was negligent, Dr. Hallett's investigation on behalf of the Berendsens also showed that all the chemicals in the water in well #1 were below the limits in the Ontario Drinking Water Objectives. That is why I agree with Ontario that nothing turns on its negligent investigation.

[79] Once Ontario concluded that the Berendsens' well water did not contain contaminants in excess of the existing standards, it had no duty to remove those contaminants or even their source. It undoubtedly had the discretionary power to do so, but it made a deliberate decision not to exercise that power, and it did so for a legitimate reason: the water met existing standards. Ontario had already paid for water delivered to the Berendsens' farm for three years. It had paid for a water tank installed on their farm. After it concluded that the Berendsens' well water met the Objectives it was not required to spend more public money to go beyond the enforcement of its own standards. Therefore, Ontario cannot be held liable in damages for failing to remove the waste material or remedy the contaminated well water: see *Kamloops*.

[80] The trial judge believed that the duty resided in s. 30 of the *Ontario Water Resources Act*, R.S.O. 1990 c. O.40 and s. 14 of the *Environmental Protection Act*. And she found support for this duty in the decision of this court in *Heighington v. Ontario* (1989), 69 O.R. (2d) 484. Neither the statutes nor *Heighington* support the existence of a duty.

[81] Section 30 of the current *Ontario Water Resources Act* replicates s. 27 in force in the 1960s, to which I referred earlier. Under s. 30, a person who discharges material in any place that may impair the quality of the water is guilty of an offence under the Act. Neither s. 30 nor its predecessor applies to this case because neither provision imposes a duty of removal or remediation.

[82] Section 14 of the *Environmental Protection Act* similarly prohibits a person from discharging a contaminant into the natural environment if the discharge may cause an adverse effect. Section 17(a) is more germane: where a person causes a discharge of a contaminant into the natural environment, the director under the Act may order the person to repair the injury or damage. Ontario is a “person” subject to the Act, but the power of the director to order repair is discretionary, not mandatory. Although the waste material contained contaminants, the Berendsens’ well water did not contain a single contaminant that exceeded Ontario’s allowable limits. This was the reason Ontario chose not to take any further action on the Berendsens’ farm. I cannot see any legislative basis that would require it to do so or that would give rise to civil liability for failing to do so.

[83] The *Heighington* case is easily distinguishable. There, this court upheld a trial judge’s finding that Ontario was negligent for failing to remove radioactive material placed on a farm in 1940s. There are two important differences between the facts in *Heighington* and the facts in this case. First, in *Heighington*, at the time of trial, the level of radiation of the farm exceeded acceptable limits; the levels of chemicals in the Berendsens’ well water did not exceed acceptable limits. Second, the 1937 *Public Health Act* that governed the dispute in *Heighington* imposed a duty on the Department of Health to take necessary measures to abate conditions injurious or dangerous to health; neither the *Ontario Water Resources Act* nor the *Environmental Protection Act* imposed a duty to remove the waste material or improve the Berendsens’ well water.

[84] In my opinion, therefore, the trial judge erred in finding Ontario liable for failing to remove the waste material buried on the Berendsens' farm now over 40 years ago and for failing to remediate the contamination.

#### **D. CONCLUSION**

[85] I would allow Ontario's appeal, set aside the judgment at trial and dismiss the action. In my view, 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.

[86] 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.

[87] The parties may make written submissions on the costs of the trial and the appeal with two weeks of the release of these reasons.

RELEASED: December 1, 2009  
"JL"

"John Laskin J.A."  
"I agree R.G. Juriansz J.A."  
"I agree G.J. Epstein J.A."