Rely on TDS

Recent Developments in Tort Liability for Contaminated Land Is Liability Growing?

By Sheryl Rosenberg

Member
Lex Mundi
World Ready
Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

It is often assumed that the common law concerning environmental contamination is an expanding field in which the only certainty is the risk of legal liability. As well, the relationship between traditional forms of tort liability and the liability incurred under the statutory regimes controlling the assessment and remediation of contaminated sites may not be well understood. This paper examines and compares two recent cases in the law of torts, one which appears, upon first consideration, to expand tort liability for contamination of land, and one which clearly limits it. Both cases involve the inter-relationship between regulatory standards and tort liability. On the basis of this analysis, it is argued that tort liability for contamination of land is not expanding and that some recent developments in tort law both limit and make more certain the type of liability that must be addressed.

The Stigma Cases

Recent cases involving the award of damages for ‘stigma’ appear to some to confirm the trend that liability for contamination is increasing and increasingly unpredictable. Most notable among these is the Tridan Developments Ltd. v. Shell Canada Products Ltd. case.2 Tridan Developments Ltd. was a company which operated a car sales business on commercial property adjacent to a Shell gas station. A leak developed in a Shell fuel line, releasing 9,000 litres of gasoline into the soil under the Shell property. Shell took the proper steps to notify the Ministry of Environment, repair the leak, assess the extent of the contamination and perform remediation up to the standards for clean-up being applied in Ontario at that time. Some time later, it was found that the contamination extended below ground into the Tridan property. The contamination did not affect Tridan’s building, interfere with the health or safety of its occupants or impair in any way the operation of its business. Nor did the contamination pose any threat to the physical environment. During the long period of time that it took for the matter to come to trial, Tridan did have trouble renewing its mortgage financing at favourable rates because of an assumed reduction in value of the mortgaged property, but Shell addressed the problem by giving an indemnity to Tridan s mortgagee in which it undertook to pay for any necessary cleanup. There was therefore no legal or pragmatic reason for Tridan to remediate the land as long as the property was not being re-developed or sold.

Tridan claimed in nuisance and in strict liability on the basis of the rule in Rylands v. Fletcher.3 The rule in Rylands v. Fletcher, known to all legal practitioners, provides that a person who keeps on land a substance which could do damage if it escapes ‘is prima facie answerable for all the damages which [are] the natural consequence of its escape’.4 Shell acknowledged the incursion of the spill from its land into the Tridan property and therefore admitted liability. The case concerned the proper measure of damages.

Shell relied on the statement of the law of damages formulated by Klar:5

Traditionally, the courts considered the only true measure of compensation for damage to property to be the diminution in value caused by the tortfeasor s wrong, that is, the difference between the property value before and after the occurrence of damage. The cost of restoring or repairing the property, if considered at all, was simply regarded as a means of determining the diminution of value. However, in many cases, the distinction is irrelevant. Where the cost of restoration is equal to or less than the diminution of capital value, the repair is always recoverable, even if the plaintiff does not actually incur the cost. Moreover, where the repairs fail to restore the property to its original value, the plaintiff is entitled to the cost of repair and to an additional sum to compensate for the residual deficiency. However, where the cost of restoring the property is greater than the diminution of value the cases are divided as to which measure of damages should be applied (emphasis added). Most cases follow the traditional approach so that the plaintiff is only entitled to damages sufficient to compensate for a diminution of property value. However, damages will be measured according to the cost of repair if restoration alone will make good the plaintiff s loss. For example, compensation for damage to the family home or a unique heirloom may be measured according to the cost of repair. The latter approach will only be adopted if the plaintiff actually intends to effect repairs and if the cost of such repairs are reasonable.

It may be seen from this formulation of the law, and the authorities cited by Klar in support of it, that the range of damages awarded for damage to real property may include either the cost of re-instatement of the property to the condition it was in ante the tort or the diminution in value of the property, or, in some circumstances, a combination of the two. The problem for the Court in such cases is to fairly balance the rights of the defendant and the plaintiff by crafting an award which fully compensates the plaintiff, but which limits the quantum to the actual loss suffered by the plaintiff.

Tridan alleged that Shell was liable both for the cost of remediation of the property to pristine standards and an award of damages for the ‘stigma’ associated with owning a property which had once been contaminated. Shell, on the other hand, argued strenuously that the pristine standard was both unnecessary and in practical terms, impossible to achieve. Shell expected that the loss would be measured on the basis of the cost to remediate the property according to the requirements that would be applied if Tridan decided to re-develop or sell the property. These were set by the Ontario Ministry of the Environment in its Guidelines for dealing with such sites. The Ministry Guidelines in Ontario, as in Manitoba and elsewhere at that time, set the level of contamination which could remain in the land on the basis of a number of variables, including the use of land (agricultural, residential, commercial or industrial), the type of soil which was affected, the proximity of the contamination to groundwater and the use being made of the groundwater. These were all criteria which bear a relationship to the effect of the contamination on human health and safety or on the environment.

The court found that, once strict liability had been established, Shell was liable to ‘make good the damage which has ensued from the spill’. Relying on Klar and other authorities that emphasized the right of the tort victim to be fully compensated for its loss,6 the Court found that the measure of damages included having the property restored to the ‘same state that existed before the spill’. On that basis the court found that Shell was obliged to pay the costs to remediate the site to pristine conditions. The trial court also assessed damages for stigma associated with having land which had once been contaminated.7

The Court of Appeal was clearly uncomfortable with the award of damages based on the cost to remediate to pristine standards, hinting that it would prefer to see the award in such a case based on remediation to Ministry Guidelines. This type of remediation would represent a reasonable standard for assessing actual damage to commercial land on a busy thoroughfare which was unlikely ever to be re-developed for residential purposes. The land was contaminated but its use was unaffected by the contamination. However, the Court of Appeal allowed this portion of the award to stand, on the basis that it violated no legal principle: the law of strict liability requires that a person who releases a substance onto neighbouring land be responsible 'for all the damage which is the natural consequence of its escape'. The Court of Appeal agreed that the evidence demonstrated that clean-up to Ministry standards would not fully compensate for the loss, as a residual loss of value or stigma would remain.

However, the Court of Appeal was not prepared to permit an award for both clean-up to pristine conditions and stigma.8 The trial judge who found that residual loss of value would continue after remediation to pristine standards had misconstrued the evidence on this point. The award for stigma was set aside. Therefore, the rule, as determined by the Ontario Court of Appeal, is that the plaintiff is to be fully compensated for loss of value, but that no duplication is to be allowed. The cases decided in the last few years in which stigma has been discussed bear out the view that this principle is consistently applied in other jurisdictions. Provided that there is proper expert evidence to support it, an award for 'stigma' or residual loss of value has been allowed when the type of remediation performed leaves some contamination in place.9 When there has been complete restoration of the property to conditions ante, no award has been made for 'stigma'.10 In cases in which there was no accepted evidence of a residual loss of value, the award has not been made.11 The challenge for counsel, therefore, is to ensure that the best possible evidence is before the Court.

The decision in Tridan v. Shell, therefore, while it was shocking to some who have relied upon regulatory requirements to advise on limitations of liability, is far from being an expansion of such liability. The decision, as corrected by the Court of Appeal, is in accordance with long-standing principles of the law of strict liability. The fact that the standard of remediation used to assess the loss on the basis of tort liability may not be in accordance with the standard of remediation applied under environmental regulation or in the enforcement of contract terms does not make it new law. The award made in Tridan v. Shell, though perhaps at the extreme end of the spectrum, nevertheless is on the spectrum contemplated by longstanding principles in the law of damages.

Why then does it appear that the award in Tridan v. Shell is a new development? The award seems to us to be a new development because after some ten to fifteen years of experience with the administration of regulatory regimes controlling the remediation of contaminated land, we have all become accustomed to assessing liability for remediation in terms of the standards of the Department of Environment or the Ministry in the province in which we live. Those familiar with recent trends in regulatory requirements are aware that most jurisdictions have enacted provisions that allow them to follow standards developed by the Canadian Council of Ministers of the Environment. These standards generally entail a risk management approach.12 This means that regulatory requirements rarely involve clean up of contaminated land, or the assessment of costs for the clean up of contaminated land, to pristine standards. The standards that are applied take into account the value to society in requiring the remediation, by assessing the need to remediate against the risk to human health or the environment and in consideration of the normal use of that land.

Hence, the shock of the defendant and others in the industry upon learning that the damage award would include the cost of clean up to pristine standards. While this does not mean that the traditional law of tort has expanded, it may mean that it is time for those interested in environmental policy to take a look at the interaction between tort and regulatory provisions with a view to curtailing liability when it is out of synchrony with modern environmental standards and requirements. Examination of the policy behind such a step was just what the Court of Queen s Bench of Manitoba was asked to do in the recent decision in Curtis Carpets.13

The Curtis Carpets decision: New Liability for Pure Economic Loss

The Curtis Carpets case involved a property, near the corner of a busy intersection, which had been owned by Imperial Oil Limited from 1951 until 1983. Until 1977, the site was used for the operation of a gas station, which utilized a number of underground gasoline storage tanks. As was common industry practice (at the time and even today), Imperial Oil removed the underground storage tanks, leaving some petroleum contamination in the soil. In 1983 the property was placed on the market and sold to Wail Investments, who had no sooner renovated the property to its liking, when it was approached by Curtis Carpet with an unsolicited offer to purchase. Curtis bought it from Wail in February of 1984, built and then expanded its building, continuing to use the property to operate its carpet business through the date of the hearing.

In August, 1999, Curtis again sought bank financing, and for the first time in all the years of its successful operation, was requested by the bank to provide an environmental report on the property. The environmental site investigation disclosed the existence of residual contamination. The contamination was not at a level which would affect the use of the site for its commercial purpose or require remediation for environmental protection reasons. Not surprisingly, Curtis performed no remediation of the property, and not surprisingly, the Court found that there was no expectation that it would do so.

After receiving the environmental report, Curtis filed an application under Part II of The Limitation of Actions Act seeking leave to commence a claim out of time against both Imperial Oil and Wail. One of the two tests that the applicant must meet on a Part II application is to prove that it has a reasonable chance of succeeding in the claim that it seeks leave to file. Therefore the substance of the issues addressed before the Court concerned the elements of the torts alleged by Curtis and the extent to which there was evidence sufficient to make out a prima facie case.

The claim was for loss of value of the land ('stigma') together with compensation for various costs incurred in the investigation. Imperial Oil submitted and counsel for Curtis (though of the view that the damage was damage to real property) conceded that all of the items of compensation for which there was evidence fell into the category of pure economic loss – that is, it was for costs incurred or to be incurred on account of the pre-existing condition of the site. The Court agreed with this argument, noting that there was no claim for damage to person or property.

The claim against Wail was based on an allegation that Wail, as vendor of the land, failed to learn and disclose to the purchaser the use of the site as a gas station. (Tort liability for fraudulent or negligent misrepresentation which is incurred in the context of an agreement between vendor and purchaser is discussed below.) The claim against Imperial Oil was that when Imperial Oil removed the tanks, it ought to have removed all the contaminated soil and that its failure to do so had negligently caused Curtis financial loss.

Imperial Oil made arguments with respect to each of the elements of negligence, including the difference in standard of care between 1977 and 1999. Vigorous arguments on this point were based on the extensive discussion of the historical development of the standard of care in management of gas station operation and de-commissioning found in the Westfair Foods v. Domo case14 and also the detailed discussion found in the 1991 Ontario decision in McGeek Enterprises Ltd. v. Shell Canada Ltd.

The McGeek Enterprises case presented a fact situation which was substantially similar to the one in the Curtis Carpets case. In both cases, land which had been used as a gas station was sold to one person who sold it to another. The subsequent owner (with no privity of contract) sued the original owner in negligence. The negligence arguments in the Westfair Foods v. Domo Gas and the McGeek Enterprises cases were both decided primarily on the element of standard of care. It is not known to the author whether counsel in the McGeek Enterprises case made an argument that there was no duty of care to prevent pure economic loss in the circumstances of that case. Such an argument was made by Imperial Oil in the Curtis Carpets case, emphasizing that no actual change to land occurred at any time during Curtis ownership and occupation. The Court decided the Curtis Carpets case against Imperial Oil on the duty question, finding that there was no duty recognized in Canadian law to prevent a plaintiff from suffering pure economic loss of the type alleged.

Justice Schulman conducted a careful and detailed review of the five categories of cases in which the courts have recognized exceptions to the exclusionary rule (the rule against finding a duty to prevent pure economic loss). The review included consideration of the elements of each of the five categories and most of the Supreme Court of Canada decisions on the issue of recovery for pure economic loss. Initially, Imperial Oil grounded its argument on the Supreme Court of Canada s decision in Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.15 The argument was that, of the five categories of exceptions, the sale of land is most similar to the sale of a building. Imperial Oil relied on the rationale stated by Justice LaForest that the tort should be recognized because it was based on compensation for the steps taken to repair a dangerous defect – the traditional concern of tort law being harm, the prevention of harm and compensation for harm done. The Court was urged not to expand the category to include compensation for loss suffered by a commercial party on account of a non-dangerous defect in real property.

Upon review of the Canadian cases, academic commentary and a decision of the High Court of Australia16 on this issue, Justice Schulman found that the case of contaminated land did not fit in this category of exception and proceeded to consider whether a sixth category of exception should be recognized. In the process he reviewed in detail each of the three recent decisions of the Supreme Court in which opening a new category was considered (and rejected in all).17 In applying the two-part test for the recognition of a cause of action in negligence for pure economic loss,18 the Court was required first to determine if Curtis Carpets and Imperial Oil were in the required degree of proximity, that is, if harm to a future owner caused by leaving contaminants in one's land is foreseeable (it was) and, next, to assess whether there were policy reasons militating against allowing a claim of this nature to proceed (there were).

The Court found that, in the circumstances presented by the Curtis Carpets case, there is no duty of care in the law of negligence which requires an owner of land to prevent pure economic loss suffered by a remote future owner of the land. In doing so, the Court analyzed, and in part, relied upon the policy rationale behind the Supreme Court s decision in the Martel Building case. In that case the Court found that, apart from the duty not to misrepresent, there was no duty in pre-contract negotiations in a commercial setting to be mindful of another party's commercial interests – the essence of the commercial contractual relationship being that each party is attempting to maximize its own benefit.

Mr. Justice Schulman stated six policy reasons for refusing to recognize a right of action by Curtis Carpets against Imperial Oil. The first was the spectre of indeterminate liability: since Curtis did not evidence any intention of removing the contamination, each subsequent purchaser could bring a similar claim. The Court found that this was inconsistent with the objective of tort law, which is to deter wrongdoing. Secondly, the Court found that in commercial dealings, there is a need for stability and finality – investors 'need to have a measure of certainty of their position in acquisition and on sale of properties'. Thirdly, allowing this type of claim would provide a purchaser with after-the-fact insurance for its own failure in pre-purchase due diligence.

Fourthly, Justice Schulman relied on the distinction between regulatory requirements and the statutory powers of officials of the administration, on the one hand, and tort requirements and rights established on the neighbour principle, on the other. Curtis Carpets' claim was based partly on an allegation that Imperial Oil failed to comply with a literal reading of the relevant regulation19 (the 'Regulation') that was in place at the time that the underground storage tanks were removed. The Regulation required the removal of 'contaminated soil and gasoline if the soil around and under the tank is contaminated with gasoline '.20 The Court recognized that the Regulation and the statute under which it was made contemplated administrative action or prosecution in the event of a breach. The policy behind such legislation is not to create private rights or duties, but rather to protect the public welfare. The Court found nothing to support a finding that either the statute or the Regulation was intended to create a private law duty on the owner to restore the land to pristine condition.

Fifthly, and perhaps most significantly for the purpose of the discussion in this paper, is the Court's finding that once the legislature has addressed the problem of contaminated sites (as Manitoba has done in passing The Contaminated Sites Remediation Act, S.M. 1996, c. 40), 'there are policy reasons why a right of action, particularly one which would require of persons affected a higher standard of care than that provided for in the statute, should not be allowed'.21 Mr. Justice Schulman relied on the authority of the House of Lords in the Cambridge Waters case.22 In that case, the Court dismissed a damage claim against a tannery that had leaked solvents into the ground water aquifer which was used for a public drinking water supply, finding that 'well-informed and carefully structured legislation is now being put in place' to deal with the complex problem of addressing the public environmental welfare and the obligations that ought to flow from the historic contamination of land. Justice Schulman agreed, finding that Courts should be loath to contemplate imposing liability for conduct that happened long in the past when a common law principle would have to be developed or extended to provide for such liability and the legislature has already put in place the 'well informed and carefully structured legislation' that the House of Lords had anticipated.

The final policy reason, which is in accord with the fifth reason, is that the alleged economic loss suffered by Curtis represents no net loss to society. The weight of the Curtis Carpets decision is that, while it might be a good idea to construct a new cause of action to make the 'polluter pay,' the authority to impose such liability is best left to the legislature. It is the legislature which has the ability to construct a complex administrative scheme employing the scientific and technical skills that are necessary to ensure that money that is paid on account of contaminated sites is in fact used to clean up those sites, that the health of the public and the environment are protected and that resources expended on account of contamination of the environment are allocated wisely.

In the result, when the Court was invited to create the tort in Manitoba of liability to a future owner for pure economic loss arising from contamination left in the land because 'it is good policy to hold companies involved in decommissioning of sites to be responsible for impacted land'23 the Court found an abundance of reasons why it is not good policy to do so.

Vendor's Liability in Tort for Fraudulent or Negligent Misrepresentation

Notwithstanding academic commentary to the contrary,24 neither does it appear to this author that vendor's liability for contamination of property has increased in the last several years. A claim for such liability usually arises when, after closing the sale, the purchaser discovers that the land is contaminated. The claim generally is for the vendor's failure to disclose environmental information. As decided by the Manitoba Court of Appeal in Stotts v. McArthur25 and applied by Justice Schulman in the decision in the Curtis Carpets case, 'the longstanding principle of caveat emptor is applicable to real estate transactions in Manitoba'.26 A vendor is not obliged to disclose all known facts affecting the value of land. It is certainly not liable to disclose facts of which it had no actual or constructive knowledge.27

The purchaser's duty in tort continues to be limited to a duty to disclose its knowledge concerning 'latent' defects which render a property uninhabitable or which pose a health hazard or other danger to its users.28 The determination of whether a defect is latent or patent may vary, depending on whether the purchase is for residential or commercial use. Generally, with respect to the purchase and sale of commercial land which is contaminated at some level, courts across the country have applied the principle stated in the leading case, Tony's Broadloom and Floor Covering Ltd. v. NMC Canada Inc.29 that there is no defect at all (latent or patent) when the purchaser could have discovered the contamination by undertaking its own reasonable environmental investigations.30 From a review of recent cases, there does not appear to be any increase in tort liability in connection with the sale of contaminated land, even in cases in which the commercial vendor is silent about contamination known to it.

Policy Issues in the Law Concerning Tort Liability for Contaminated of Land

Thus the cases which address private law duties with respect to contaminated land vary widely in their result, but they do not appear to expand liability in tort. On the contrary, as evidenced by the decision in the Curtis Carpets case, in some cases there has been a move to bring tort liability into synchrony with the public policy objectives expressed in legislation concerning liability for contaminated sites. This is not to say that there are no policy problems associated with allowing cases which address the same types of environmental contamination to apply very different standards of remediation. When one compares cases such as the Ontario Court of Appeal decision in Tridan v. Shell with the recent Manitoba Court of Appeal decision in Westfair Foods Ltd. v. Domo Gasoline Corp.,31 one realizes that the discrepancy is real: on the one hand, a strict liability case may result in an award of damages for clean-up to pristine standards even when no such clean-up – or no clean-up at all – is contemplated, while a Court interpreting lease provisions32 and applying the law of negligence may be content to apply the standards used by regulatory authorities in protecting human health and the environment.33

The willingness of Courts to control and limit tort liability, to some extent, may be a function of the period of time which has elapsed from the date of the contamination. Two strict liability cases that are often compared are the 1994 decision of the House of Lords in the Cambridge Waters case and the Ontario General Division decision in Smith Bros. Excavating Windsor Ltd. v. Camion Equipment & Leasing Inc. (Trustee of).34 In the Cambridge Waters case (discussed above), the House of Lords introduced the element of foreseeability of harm into the test for making out the tort of strict liability. However, in that case, the harm caused to the water supply had occurred over many years in the past, at a time when technical knowledge of the requirements for prevention of environmental harm was not well advanced. In the Smith Bros. case, the damage, though caused by an independent criminal act, had occurred in the immediate past, while the contaminant control equipment was under the management of a sophisticated commercial enterprise, well experienced in the management of petroleum products. Similarly, in Tridan v. Shell, the damage was not the inevitable result of the less technically sophisticated industrial operations that characterized earlier decades, but rather a sudden, unintended release which occurred under modern operating conditions.

If the goals of society are to maximize the likelihood that contamination which is dangerous is cleaned up and avoid incurring costs when there is no real impact arising from the contamination, then it may be poor policy to allow such a discrepancy in awards. The question of whether it is desirable to avoid the discrepancy and, if so, how to do so, may be considered in light of legislative decisions made in certain jurisdictions to establish a statutory tort.

Saskatchewan, British Columbia and Ontario all have enacted provisions which in some circumstances allow a person who has remediated land to make a claim in the Superior Court against certain responsible persons for the cost of the remediation. No proof of fault or negligence is required. In Saskatchewan, only the owner and person in control of the pollutant at the time of the release are liable and these persons may avoid liability by proving due diligence.35 In Ontario, Part X of The Environmental Protection Act36 imposes similar liability, while in British Columbia, there is some disagreement in the case law whether an injured person may have resort to the statutory tort action in the Court without first engaging in the regulatory administrative process set out in the Contaminated Sites Regulation made under the Waste Management Act.37 Manitoba has enacted no statutory tort, but has enacted a comprehensive administrative law regime for determining liability for contaminated sites.

Conclusion

In none of the above jurisdictions with statutory torts do rights under the statute displace the right to take a common law tort action. With the exception of the application of section 31 of The Contaminated Sites Remediation Act,38 neither does the statutory scheme do so in Manitoba.39 If some form of statutory tort were to displace all tort liability for contaminated land, the result could be that some persons who are currently free of liability would pay damages, while others would escape the extent of liability which the law would now impose. Contaminated land which poses a threat to human health or the environment would continue to be remediated according to regulatory standards, while claims for remediation of lesser levels of contamination would only be brought if and when the current owner performed the remediation, if at all. Alternatively, the legislature could enact legislation to rationalize liability by limiting the quantum of damages in tort cases to liability for remediation of the type which is in accordance with regulatory standards.

Practitioners have the privilege of litigating the meaning of the law as it is. Consideration of the law as it ought to be will have to be left to those whose role it is to make policy and consider legislative changes.

*This article is placed on this website with the permission of the Law Society of Manitoba.

**With the author's thanks to articling student-at-law, Sacha Paul, for research assistance, and co-presenters, John Stefaniuk and Bill Ryall, for their ideas on the development of tort law. Any errors are the author's alone.

1 With the author's thanks to articling student-at-law, Sacha Paul, for research assistance, and co-presenters, John Stefaniuk and Bill Ryall, for their ideas on the development of tort law. Any errors are the author's alone.

2 35 R.P.R. (3d) 141 (Ont. S.C.); 57 O.R. (3d) 503 (Ont. C.A.)

3 (1868), L.R. 3 H.L. 330, affirming Fletcher v. Rylands (1866), L.R. 1 Ex. 265

4 Rylands v. Fletcher as quoted in Tridan v. Shell at paragraph 20

5 Lewis N. Klar et al., Remedies in Tort, Volume 4 (Carswell, 1999) at p 27-162.76.4-5 – the footnote references have been eliminated from the quote.

6 Lodge Holes Colliery Co. v. Wednesbury Corporation, [1908] A.C. 323 (H.L.) at p. 325 and C.R.Taylor (Wholesale) Ltd. and Others v. Hepworths Ltd., [1977] 2 All. E.R. 784 (Q.B.) at p. 792 as cited in paragraphs 22 and 24 of Tridan v. Shell

7 citing S.M. Waddams, The Law of Damages, 3rd ed. (Toronto: Canada Law Book Inc., 1997) at p. 111; Porteous v. Chotem (1920), 51 D.L.R. 507 (Sask. C.A.); and Walter v. Seibel, [1927] 2 D.L.R. 1005 (Sask. C.A.)

8 An interesting footnote to the Tridan story is the difficulty that Shell was left in because of the indemnity that it had given to Tridan's lender. There was no legal requirement and no practical likelihood that Tridan would spend the award on remediation of its property. There was no provision in the indemnity agreement to let Shell out of its obligation should it pay Tridan for the cost of remediation. Thus it was left with a 'double jeopardy' for the spill. The Court of Appeal acknowledged the problem but remarked that Shell s difficulty was with a person who was not a party to the action. The Court could not 'abridge Tridan's right to deal with its damages as it sees fit'. Something to keep in mind in advising clients on voluntary measures to take in dealing with tort liability for contaminated land.

9 for example, see O'Connor v. Fleck (2000), 79 B.C.L.R. (3d) 169, 35 C.E.L.R. (N.S.) 16, 2000 (B.C.S.C)

10 for example, see Webster v. Goff (2000), 184 Nfld. & P.E.I.R. 305, 559 A.P.R. 305, (Nfld. T.D.)

11 Westfair Foods Ltd. v. Domo Gasoline Corp. (1999), 29 C.E.L.R. (N.S.) 299 (Man. Q.B., Morse J.); Ceolaro v. York Humber Ltd. (1994), 37 R.P.R. (2d) 1, 53 C.P.R. (3d) 276 (Ont. Gen. Div.)

12 See the presentation of William Ryall for a discussion of the approach applied under Manitoba contaminated sites legislation.

13 66295 Manitoba Ltd., Wayne Curtis and Curtis Carpets Ltd. v. Imperial Oil Limited and Wail Investments Ltd., unreported decision of the Manitoba Queen's Bench (Winnipeg Centre), CI 00-01-20063, dated May 7, 2002 (Schulman J.)

14 This case was primarily about the obligation of the lessee to the owner of the land upon reversion, but also included, inter alia, a claim of negligence.

15 (1995), 121 DLR (4th) 193

16 Bryan v. Maloney (1995), 182 C.L.R. 609. This case permitted recovery by an owner against a builder when there was no privity of contract between the owner and the builder. The award was compensation for major repairs of non-dangerous defects in a new residential property. The decision to find a cause of action was based on the rationale that, since the builder was liable under a contractual warranty to the first owner and home buyers are unsophisticated and have little opportunity to protect themselves, there is some justification for imposing a judicially-created warranty of quality running to subsequent purchasers of new residential property. The Court in Curtis might simply have applied the rule in the Bird Construction category and found that the exception did not apply in the Curtis Carpets fact scenario because there was no danger and no consumer protection rationale. However, the Court decided that the facts before it did not meet the requirements of the category and proceeded to consider whether the case justified the creation of a sixth exception.

17 Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860; Cooper v. Hobart (2001), 206 D.L.R. (4th) 193; Edwards v. Law Society of Upper Canada (2001) 206 D.L.R. (4th) 211.

18 the two-part test is derived from the ratio in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.) – overruled by the House of Lords in Murphy v. Brentwood District Council, [1991], 1 A.C. 398, but adopted by the Supreme Court of Canada in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2 and affirmed in Hercules Managements Ltd. v. Ernst & Young (1997), 2 S.C.R. 165.

19 Regulation 147/76, a Regulation Respecting the Storage and Handling of Gasoline and Associated Products, made under The Clean Environment Act, S.M. 1972, c. 76, repealed by S.M. 1987-88, c. 26, s. 56 (the Regulation). A version of the Regulation was in force under The Environment Act, S.M. 1987-88,c. 39 until December 17, 2002, when it was replaced by the Storage and Handling of Petroleum Products and Allied Products Regulation, made under The Dangerous Goods Handling and Transportation Act, R.S.M. 1987, c. 40. A similar regulation was considered in the Ontario McGeek Enterprises case.

20 section 23 of the Regulation

21 paragraph 39

22 Cambridge Waters Co. v. Eastern Counties Leather PLC, [1994] 2 A.C. 265 (H.L.(E.).

23 paragraph 32 of the Curtis Carpets decision.

24 'Caveat Emptor and the Sale of Land: The Erosion of a Doctrine' (2001), 39 Alta. L. Rev. (No. 2) 441 – 452

25 (1991), 75 Man.R. (2d) 212 (C.A.)

26 Curtis Carpets at page 28-9

27 Heighington v. Ontario (1990), 4 C.E.L.R. (N.S.) 65 (Ont. C.A.) and Wirsing v. Clark (1990), 11R.P.R.(2d) (Ont. H.C.), aff d [1993] O.J. No. 1603 (Ont. C.A.)

28 Sevidal v. Chopra (1987-88), 2 C.E.L.R. (N.S.) 173 (Ont. H.C.) and Heighington v. Ontario, supra

29 (1996), 141 D.L.R. (4th) 394 (Ont. C.A.)

30 see, for example Home Exchange (Alberta) Ltd. v. Goodyear Canada Inc. 291 A.R. 283, 15 C.P.C. (5th) 150 (Alta. Q.B.); 862590 Ontario Ltd. v. Petro Canada Inc. (2000), 33 C.E.L.R. (N.S.) 107, 2000 CarswellOnt 937 (Ont. S.C.J); Ceolaro v. York Humber Ltd. (1994), 37 R.P.R. (2d) 1, 53 C.P.R. (3d) 276 (Ont. Gen. Div.); and Holtby s Design Service Inc. v. Campbell Chevrolet Oldsmobile Inc., unreported decision of the Ontario S.C.J. (Court file NO. OT-273/01), June 28, 2002 (Meehan J.)

31 Westfair Foods Ltd. v. Domo Gasoline Corp.(1999), 28 R.P.R. (3d) 232, 142 Man.R. (2d) 70, [2000] 4 W.W.R. 553, 33 C.E.L.R. (N.S.) 93 (Q.B.), aff d 182 D.L.R. (4th) 682, 133 Man.R. (2d) 77, 29 C.E.L.R. (N.S.) 299 (Man. C.A.)

32 At least in Manitoba, Courts have refused to imply into a lease a term that requires the lessee to return the land free of contamination – in British Columbia, some Courts have been willing to apply the 'business efficacy' doctrine to imply a term into a lease of industrial premises that requires the lessee to return the premises in uncontaminated condition. See the interesting discussion in O'Connor v. Fleck commencing at paragraph 150 and the Darmac Credit Corp. v. Great Western Containers Inc. (1994), 163 A.R. 10 (Q.B.) and Progressive Enterprises Ltd. v. Cascade Lead Products Ltd., [1996] B.C.J. No. 2473 cases applied in O'Connor. The willingness to imply a 'no-contamination' term may be regarded as obiter as each of these cases involved leases with specific provisions which would have permitted the result. As well, the clean-up being sought was more in line with the clean-up that had already been performed in the Manitoba Westfair Foods v. Domo case. However, these B.C. cases do represent a more activist approach to finding environmental clean-up obligations in lease terms.

33 Westfair Foods v. Domo

34 (1994), 21 CCLT (2d) 113. See the detailed discussion of the two cases by Radha Curpen in The Ever Increasing Liability in Environmental Law, Law Society of Manitoba, the 1996 Isaac Pitblado Lectures.

35 see the Saskatchewan Court of Appeal decision in Busse Farms Ltd. v. Federal Business Development Bank and section 13 of The Environmental Management and Protection Act, S.S. 1983-84, c.E-10.2

36 as cited in Holtby's Design Service Inc. v. Campbell Chevrolet Oldsmobile Inc.

37 see the discussion of this issue in O'Connor v. Fleck (2000), 79 B.C.L.R. (3d) 169, 35 C.E.L.R. (N.S.) 16, (B.C.S.C), in which the Court steps into the role of the environmental regulator and applies the provisions of the Act and the Regulation; and see also the later decision by a judge of the same Court in Swamy v. Tham Demolition Ltd. (2000), 35 C.E.L.R. (N.S.) 105, in which the Court finds that the plaintiff must pursue administrative remedies before commencing civil proceedings.

38 S.M. 1996, c.40

39 The Contaminated Sites Act allows persons who are responsible for remediation of a contaminated site to enter into an agreement apportioning liability among them and to have the agreement approved by the director. Alternatively an apportionment order may be made by the Clean Environment Commission. Pursuant to section 31(b), an apportionment under the Act may limit liability and extinguish rights of action of the participants in the apportionment.

Please **click here** to sign up for @TDSLaw, our quarterly e-newsletter.

DISCLAIMER

This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Don Douglas, CEO & Managing Partner at dgd@tdslaw.com, or 204.934.2466. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.

ABOUT THE AUTHOR

Sheryl Rosenberg

Phone: 204.934.2312 | Email: sar@tdslaw.com | Web: www.tdslaw.com/sar

Sheryl Rosenberg is a partner in TDS practising primarily in the area of environmental law. She provides clients with advice concerning environmental approvals and licensing, mining and mine rehabilitation, natural resource development, regulatory compliance, contaminated sites and litigation of environmental matters.