C.A. No. 116092

NOVA SCOTIA COURT OF APPEAL

Freeman, Jones and Bateman, JJ.A.

Cite as: Marson Canada Inc. v. LeBlanc, 1995 NSCA 206

BETWEEN:

MARSON CANADA INC., a body corporate	)	Scott C. Norton for the appellant
appellant	)	Harold A. MacIsaac for the respondents
- and -	)	Judgment Heard: November 28, 1995
LIONEL LEBLANC and JESSIE MARGARET LEBLANC	)	Judgment Delivered: November 28, 1995
respondents	)	

THE COURT: Appeal dismissed with costs inclusive of disbursments to the respondent in the amount of $3000 per oral reasons for judgment of Bateman, J.A.; Jones and Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

BATEMAN, J.A.:

This is an appeal from a decision of the trial judge awarding damages for injuries

sustained by the respondent, Lionel LeBlanc. The appellant appeals both the finding of liability and the quantum of damages awarded.

While using a fibreglass repair kit, packaged by the appellant, the respondent was injured when the tube containing chemical hardener burst, splashing the hardener onto his face causing eye and skin injuries. It was the appellant's position at trial that the respondent had caused the accident by applying excessive pressure to the tube and, that the respondent's ongoing medical problems were not attributable to the accident, nor of significant impact.

The learned trial judge found that the tube containing the chemical "failed during normal use by Mr. LeBlanc". This critical finding of fact is supported by the evidence. It cannot be said that, in so finding, the trial judge made some "palpable and overriding error which affected his assessment of the facts" (see **Stein v. Ship 'Kathy K'** [1976] 2 S.C.R. 802).

The tube having failed during normal use, the trial judge was entitled to infer that it was defective. The presence of such a defect spoke of negligence on the part of the appellant. (**Shandloff v. City Dairy et al**, [1936] 4 D.L.R. 712 (Ont. C.A.), **Grant v. Australian Knitting Mills Ltd.**, [1936] A.C. 85 (H.L.)) There was, as well, ample evidence to support the finding of the trial judge that the procedure employed by the appellant to test the adequacy of the seal on the tube containing the chemical was "haphazard, uncontrolled, totally unscientific and not intended or effective to guard against the

rupturing of these seals, a danger which is clearly foreseeable". In such circumstances it was not a requirement that the respondent call expert evidence as to the industry standard.

The learned trial judge further found, and in the alternative, that the appellant's warning on the package containing the hardener was inadequate, taking into account

the dangerous nature of the substance. This too is supported by the evidence and consistent with the law, as enunciated in **Lambert v. Lastoplex Chemical Company Limited**, [1972] 2 S.C.R. 569.

In view of the inadequate nature of the warning on the product, and the fact that the tube failed during normal use, there was no basis for a finding of contributory negligence on the part of the respondent.

As to the causal connection between the respondent's injuries and his subsequent medical problems, the only reasonable explanation for the ongoing symptoms suffered by the respondent was the injury from the chemical. While there was evidence of prior facial injuries, there was no evidence of a pre-existing condition.

As a result of the injury, the respondent suffered chronic skin and eye sensitivity aggravated by exposure to chemical fumes and the elements. This prevented him from working in a number of the fields for which he was trained, including silviculture, painting, woodworking and furniture repair and restoration.

As to the award of damages, this court said in **Newman v. LaMarche,** (1994), 134 N.S.R. (2d) 127, at p. 131:

> It is important to remember at the outset the limitations imposed upon this Court in reviewing a damage award. First, as to any of the trial judge's findings of fact, we must not interfere with them unless there is palpable or overriding error on the trial court's part in arriving at them. As to the amount of any award, we cannot interfere unless it has been reached by the application of wrong principles or is so inordinately low or high as to be a wholly erroneous estimate of the damage.

The general damages are within the range prescribed by this court in **Smith v. Stubbert**, (1992) 117 N.S.R. (2d) 118.

As to the award for lost earning capacity, this court said in **Newman**, **supra**, at p. 132:

> We must keep in mind this is not an award for loss of

> earnings but as distinct therefrom it is compensation for loss of earning capacity. It is awarded as part of the general damages and unlike an award for loss of earnings, it is not something that can be measured precisely. It could be compensation for a loss which may never in fact occur. All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss...
>
> In making an award for loss of future earning capacity the court must, of necessity, involve itself in considerable guesswork. Indeed, in many cases where there is less than total disability and the loss of earning capacity cannot be calculated on the basis of firm figures, the diminution of earning capacity is compensated for by including it as an element of nonpecuniary damages .. It is thus a difficult exercise to begin with and from the point of view of an appeal court it is very difficult to say that such an award is inordinately high or inordinately low except in the most obvious of cases.

The learned trial judge committed no reversible error in fixing the award of damages.

Accordingly, the appeal is dismissed. The respondent shall have costs of $3000.00 inclusive of disbursements.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

C.A. No. 116092

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MARSON CANADA INC.,	)	REASONS FOR
a body corporate	)	JUDGMENT BY:
	)	
appellant	)	BATEMAN, J.A.
	)	
- and -	)	
	)	
LIONEL LEBLANC and JESSIE MARGARET LEBLANC	)	
	)	
respondents		