

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Maxrelco (Immeubles) Inc.)
)
) Plaintiff) Brian Elkin and Stéphanie Drisdelle for the
) Plaintiff)
)
- and -)
)
Lumipro Inc. carrying on business as)
Lumipro Signs and Lighting Services) Martin Smith and Alexandre Robineau for
) the Defendant
)
Defendant)
)
)
)
) **HEARD:** February 12-16 and February 20-
) 22, 2018

JUSTICE SALLY GOMERY

[1] On August 17, 2008, a fire broke out at a highway service centre or “Restauparc” owned by Maxrelco (Immeubles) Inc. The fire originated in a neon Dunkin’ Donuts sign attached to the outside wall of the centre’s fast food building. It destroyed the roof of the centre. The building later had to be demolished.

[2] The central issue in this case is whether Lumipro Inc., a company that serviced the signs and lights at the Restauparc prior to the fire, should have warned Maxrelco about the possibility of a fire originating in a neon sign.

Overview

[3] The Restauparc is located in Casselman, Ontario, right off Highway 417. In August 2008, it consisted of a building with fast-food restaurants, a convenience store, and a small attached motel. There was also a gas station and a parking lot.

[4] The Restauparc was visible from the highway due to many signs and lights on the property. There were tall lamp posts in the parking lot and incandescent lighting over doors. There were signs illuminated with fluorescent lighting, such as the menu boards for the fast food restaurants inside the main building and on the exterior wall alongside the drive-through service lane.

[5] Prior to the August 2008 fire, there were also two types of neon signs at the Restauparc. First, a thin red neon border was installed on various structures. Most notably, a red neon border ran the outside perimeter of the fast food building, between the top of the plate glass windows and the roof. Second, there were neon signs inside and outside the building spelling out the words “Dunkin’ Donuts”, “Burger King”, “Pizza Hut” and “Motel” in various colours.

[6] The second type of neon sign is known as a channel letter sign. These signs were attached to the interior and exterior walls of the fast food building. Each channel letter was made of a metal casing with an acrylic cover. There was a glass tube containing neon gas fitted within each letter casing. A high voltage cable ran from a transformer into the neon lighting assembly housed in each letter.

[7] Maxrelco bought the neon signage in 1997 from Imperial Signs. Imperial also installed the signs. An inspection certificate issued in May of that year shows that Imperial installed a total of 118 feet of neon border, 4 sets of exterior channel letters, and 6 sets of interior channel letters.

[8] From sometime after 1997 until early 2008, Maxrelco called Lumipro Inc. to repair neon signs that were not working. Maxrelco also hired Lumipro to fix outside fluorescent panel signs and to replace fluorescent and incandescent lights and flags in the parking lot. It hired another contractor, Bercier Electric, for general electrical work inside the fast food building.

[9] The August 2008 fire originated in the letter “i” in the exterior neon Dunkin’ Donuts sign. Two experts on the origin and cause of fires testified at the trial. Hugo Messing was called by Maxrelco and Joel Turcotte appeared on behalf of Lumipro. Based on their examination of some of the channel letters in the Dunkin’ Donuts sign, they agreed that the assembly in these letters were improperly installed. Caulking had been applied around and underneath the metal

bonding plate screwed to the back of the metal casing. This metal plate was also painted. The excessive caulking and paint prevented metal on metal contact as required for proper bonding and grounding of the electric assembly. There was also not enough space between the high voltage cable running inside the casing and the interior wall of the casing. Turcotte was also of the view that the hole in the back of the metal casing on the letter “i”, through which the high voltage cable ran, was too big.

[10] Photos of other letters in the Dunkin’ Donuts sign furthermore show that some of the components inside the metal casings had deteriorated. The rubber boots (that is, the electrode enclosures on the connection between the high voltage wire and the neon light) and cables inside the casings were worn.

[11] Based on this evidence, Messier and Turcotte agreed that the fire was caused by a high voltage failure, coupled with the installation deficiencies and deteriorated components in the letter “i” of the Dunkin’ Donuts sign.

[12] In this lawsuit, Maxrelco says that Lumipro is responsible for the damages caused by the fire. It alleges that Lumipro saw how the assemblies in the exterior neon letter signs at the Restauparc were installed through its work on them over the years prior to the fire. It contends that Lumipro was also aware of incidents involving neon borders at the Casselman Restauparc and at a similar centre in St. Isidore. In these circumstances, Maxrelco says that Lumipro should have warned it about the risk of an electrical fire originating in the neon letter signs. Had it done so, Maxrelco would have taken steps to have the signs inspected and repaired, and the fire would not have occurred.

[13] Lumipro denies any liability for the August 2008 fire. It concedes that it owed a duty of care to Maxrelco to take reasonable care in doing repairs, and to warn its customers if and when it observed any risk of fire. But Lumipro denies that it was ever hired to repair any channel letters in the outside Dunkin’ Donuts sign. As a result, its technicians never had the opportunity to see any of the installation deficiencies or deteriorated components that prevented proper bonding and grounding of the neon assembly. In these circumstances, Lumipro denies that it had any general duty to warn Maxrelco of the increased risk of an electrical fire as a result of the ageing signs.

[14] The only question I have to deal with at this point is liability. The question of damages will be addressed, if necessary, at a future hearing.

[15] To determine whether Lumipro is liable for the August 17, 2008 electrical fire, I must address the following questions:

- (1) What work did Lumipro do for Maxrelco? Did any of this work involve opening up the exterior channel letter signs?
- (2) Were there any other circumstances that should have alerted Lumipro to a heightened risk of fire in connection with the signs?
- (3) Did Lumipro have a duty to warn Maxrelco about the risk of a fire in connection with the exterior neon channel letter signs?
- (4) If so, so, did it breach that duty?

(1) What work did Lumipro do for Maxrelco?

The general relationship between Lumipro and Maxrelco

[16] When neon lights and outside signs or lights at the Restauparc needed repairs, the manager at the centre would typically send a fax to Lumipro setting out the work to be done. Several witnesses testified that Maxrelco would wait until it needed several lights or signs or flags serviced before calling Lumipro. It did this to avoid paying for multiple service calls. When Lumipro received a fax request from the Restauparc, it would generate a service report listing the requested services. This report, which was effectively a work order, would be given to the Lumipro technician who attended at the site.

[17] On arrival, a Lumipro technician would check in with Restauparc's manager Denis Lajoie or the assistant manager to confirm what services were being requested and what time Lumipro had arrived. When Lumipro finished the work, the technician would add handwritten notes detailing the services actually provided and get the manager or assistant manager to sign the report before leaving the centre. Lumipro would use this completed service report to generate an invoice listing the labour and parts used for the job. All work done was billed on a time and materials basis.

[18] Based on the evidence of both parties at trial, I find that Lumipro did not provide any services to Maxrelco unless specifically asked to do so. No extra work could be performed without additional authorization. I further find that Lumipro was never asked to do any general inspection of the neon signs at the Restauparc or any general maintenance work or troubleshooting. It had no contract requiring it to do this type of work.

[19] Any problems within the neon channel letter signs were only visible if someone unscrewed the acrylic lid and looking into the metal casing. The experts at trial agreed, and I find, that neon tubes in channel letter signs typically have a lifespan of 10 to 15 years.

[20] Maxrelco's president Jacques Goupil testified. He denied having any particular expertise in neon signage but spoke knowledgeably about the different types of signs at the Restauparc. He chose the lighting for the centre and arranged to purchase it from Imperial. He explained how neon channel letter signs worked and noted the difference between these signs and hybrid neon signs.

[21] According to Goupil, Lumipro was hired to replace another contractor, Sylvania. Goupil testified that Lumipro's usual services included changing lightbulbs, fixing fluorescent signs and replacing flags in the parking lot. In his view, Lumipro had no particular expertise in neon signage.

Did Lumipro ever work on the external neon channel letter signs at the Restauparc?

[22] Maxrelco alleges that Lumipro worked on the exterior neon Dunkin' Donuts sign or on other exterior neon letter signs prior to the August 2008 fire. According to Maxrelco, the electrical assembly in all or most of these letters was improperly connected, and the flaws in the assembly – and the resulting risk of an electrical fire - would have been obvious to any competent technician who removed the acrylic cover on any of these letters.

Lumipro's evidence

[23] Three Lumipro technicians testified at trial: Louis Lavallée, Christian Breton and Daniel Corbeil. They described Lumipro's service calls at the Restauparc between 2003 and 2008. No records of earlier service calls were available. Lumipro's president Guy Vallée also testified.

[24] All three technicians were credible witnesses. Lavallée was the most senior technician at Lumipro and the employee who did most of the service calls at the Restauparc. He spoke knowledgeably about the work he had performed and was thoughtful in responding to questions. Breton was a technician with only slightly less experience. He likewise provided straightforward and convincing explanations of the service records. Corbeil drove the crane or boom truck. He was involved in only a few service calls to the Restauparc.

[25] All three technicians relied heavily on service reports they prepared at the time and related invoices for parts and labour. Their explanation of the information on these records was consistent and reasonable.

[26] The technicians testified that they repaired neon signage at the Restauparc on various occasions. With one possible exception, the neon lights repaired during these calls were either red neon borders or interior channel letter signs. The possible exception is a repair to a neon “Hotel” sign in November 2005. It is not clear whether this was an interior or exterior sign. In any event, the work involved replacing a transformer. This did not require Lavallée, the technician who did the work, to look inside the metal casing of any letters.

[27] Lavallée, Corbeil and Breton said they could tell which neon signs he worked on based on the parts listed on the service records. Some parts used in the repairs were only used in neon borders. For example, a “30 MA” part could only be used in repairing the neon border, because the neon tubes in channel letters required a higher current (60 MA).¹

[28] Lavallée and Breton also testified that, if they were working on a channel letter sign, they would always record the letter being repaired on the service report. This avoided any confusion or lost time when a Lumipro technician returned to the Restauparc to install the new part. If the first technician did not record which letter was involved, the technician would not know which casing to open.

[29] All three Lumipro technicians denied ever working on the exterior neon Dunkin’ Donuts, Pizza Hut or Burger King signs. They had all repaired parts of the exterior neon border. They

¹ “MA” means milliamperes, a measurement of current.

testified that the borders were not covered and the neon tubes inside were prone to damage from weather or vandalism. This is consistent with the evidence of Maxrelco's president Goupil.

[30] Lavallée and Breton were particularly certain that they did not work on the exterior neon Dunkin' Donuts sign because it was inaccessible using the booms on the trucks they drove. These booms had a maximum reach of about 35 feet. The Dunkin' Donuts sign is several metres above the ground and there is a terrace in front of the building, making it impossible to park a truck directly beneath the sign. As a result, the only Lumipro vehicle that could be used to reach the sign is a crane that extends 87 feet.

[31] Maxrelco's counsel suggested that Lumipro technicians might have had access to the Dunkin' Donuts sign by parking a van with at the side of the building. Corbeil was not sure that his boom would have been able to reach the sign from this spot. Lavallée said that he would not try to access the sign from the drive-through lane because this would block customers' access to it. Breton admitted that he had parked in the drive-through lane to replace fluorescent lights in signs above the service window. This would have taken about 30 minutes. I do not find the evidence irreconcilable with Lavallée's testimony. If the only way to reach a sign was by blocking the lane for half an hour, a technician would have no choice but to do this. If on the other hand the customer did not have to be inconvenienced this way, it makes sense that Lumipro would use a vehicle with a greater reach. This of course assumes that they were ever called upon to do so.

[32] Most of the service reports indicate which vehicles were used on any given job. According to these reports, only the November and December 2003, July 2005 and May 2007 calls at the service calls at the Casselman Restauparc involved the crane. The service reports for these calls indicate that the crane was either needed to install flags, to obtain access the neon border around the main entrance tower or to service lamp posts in the parking lot. There is nothing on these reports suggesting that the crane was used to provide access to the Dunkin' Donuts sign or any other exterior neon channel sign.

[33] Maxrelco theorized that Lumipro must have worked on neon channel letter signs during any calls where the "Enseigne" box was ticked on a service report. A review of the reports does not bear out this theory. The technicians testified that they had differing practices in filling out

the forms. I conclude that a check in this box did not mean anything in particular. What is critical is the list of parts and service attached to any given report, the identification of any equipment used, and the technicians' explanation of how this information shows what work was done.

[34] Maxrelco attacked the technicians' testimony on the basis that they did not actually recall the work they had performed. I agree with Maxrelco that they likely had little independent memory of particular service calls and testified about the work done primarily based on Lumipro's records. This does not mean that their evidence is inherently unreliable. For example, on the record of a service call on May 23, 2007, Lavallée noted that there were 5 outside "neons" to be repaired or replaced. Lavallée said that he must have been working on the border because the parts required for the repair included thruwall housing and fifty feet of high voltage cable. As well, he did not indicate any particular letter or channel sign on the service report. This explanation is credible and consistent with other evidence about the practice of Lumipro technicians.

[35] Maxrelco argued that the technicians' testimony should be discounted for two other reasons. First, they were all long-time Lumipro employees and their loyalty to their employer inclined them to support its version of events. Second, in a draft statement written by an insurance adjuster based on an interview with Lavallée in October 2010, Lavallée was reported to have made statements that are arguably inconsistent with his testimony at trial. Maxrelco contends that these statements are more reliable, because Lavallée had a clearer memory of events in 2010 than in 2018.

[36] I do not accept these arguments. There is nothing in the testimony by Lavallée or the other technicians that suggests they tailored their evidence to serve their employer's interests. The 2010 statement, which Lavallée did not review or sign, may not accurately capture what he told the adjuster. In any event, when he spoke with the adjuster, he had not reviewed the service records carefully. Having done so, he became certain that he had never replaced the interior assembly in any of the exterior neon letter signs. This explains any inconsistency.

[37] Maxrelco also argued that Lumipro's president, Guy Vallée, made critical admissions during his examination for discovery.

[38] During his examination for discovery, Vallée was asked whether a sign repaired during service calls in January and February 2009 was the same sign involved in the August 2008 fire. Vallée said he could not say but it was “probably” the same sign.² After the examination, Lumipro’s counsel corrected the answer to indicate that, during these calls, Lumipro technicians had worked not on the exterior Dunkin’ Donuts sign but rather on the interior red neon border and the “t” in the interior neon channel letter Pizza Hut sign.³

[39] Mr. Elkin argues that Vallée’s original answer on discovery proves that Lumipro likely worked on the exterior neon Dunkin’ Donuts sign. At discovery, however, Vallée did not state with any certainty that the sign worked on in early 2008 was the sign at issue. His corrected answer is consistent with the contemporaneous records and the evidence from Lavallée, the technician involved in the service calls. For this reason, I give no weight to Vallée’s original answer at discovery.

[40] At the same examination, Vallée undertook to ask the technician involved in the January and February 2008 service calls, Lavallée, to advise what work he had done. The answer to undertaking provided by Lumipro after the discovery stated that Lavallée did not remember. Vallée expressed the view that this answer was not inconsistent with Lavallée later being able to figure out what work was done based on a detailed review of his service reports. I agree. I further note that the undertaking as written asked Lavallée to recall work done on August 17, 2008. This was clearly a mistake, since the service report at issue related to calls in January and February 2008. In effect, the undertaking asked Lavallée to recall service calls he did not do.

[41] Finally, Vallée testified at discovery that neon tubes can last 8 to 9 years. At trial, he said that the lifespan of the tubes could be longer. In my view, nothing turns on either answer since Vallée admittedly has no expertise in this area.

² Q 214: « Est-ce que ce sont les néons qui sont impliqués dans le sinistre en cause? »

Réponse : « Je ne peux pas vous dire. C’est probablement dans la même enseigne, mais le néon impliqué, je ne peux pas vous dire que c’est de sa faute. »

³ Corrected answer : « Non. Ce sont les néons sur la bordure intérieur et le ‘t’ de ‘Hut’ intérieur. »

[42] Maxrelco argued that Vallée's evidence at discovery generally differed from what Lumipro technicians said at trial. But Vallée testified that he has a purely administrative role at Lumipro. He is not a service technician and has never done a service call. I find that he has a limited understanding of the actual work done. This is not surprising given his administrative role in the company. To the extent that his testimony or his witness statement contradicts the evidence of Lumipro technicians on services provided to Maxrelco, I prefer the technicians' evidence.

Maxrelco's evidence

[43] Lumipro's technicians and president testified that the company did not do any work that required them to open the acrylic lid of an exterior neon letter. Did Maxrelco present any persuasive evidence to the contrary?

[44] Maxrelco relies primarily on testimony from Denis Lajoie, the manager at the Casselman Restauparc between 2001 and 2010, and Gaetan Bercier, an electrician. Lajoie testified that he remembers seeing Lumipro technicians working on the outside neon signs using a boom truck. Bercier said he remembered seeing neon signs flickering or out entirely.

[45] I cannot place any weight on this testimony.

[46] Lajoie could not recall when he saw this work being done or what sign was involved. On a photo of the various vehicles used by Lumipro technicians, he misidentified the truck that could have been used to reach the exterior neon Dunkin' Donuts sign. Both he and the assistant manager Nadia Côté testified that the interior neon letter signs were never illuminated. This is contradicted by Lumipro service records showing repairs to the interior neon Motel sign in October 2004 and to the interior neon Pizza Hut sign in January 2008. If these signs were never on, there would be no reason for Maxrelco to hire Lumipro to fix them. In his faxes to Lumipro seeking service calls, Lajoie often confused neon and fluorescent signage. Based on all of these problems with his evidence, it is impossible to rely on it to establish that Lumipro worked on the external neon channel letter signs.

[47] Bercier's testimony is also unpersuasive. Like Lajoie, Bercier could not recall when he saw non-functioning lights or what signs were involved. He almost always did any work at the

Restauparc during the day. It is therefore hard to understand how he could have noticed whether the neon signage, which was only turned on at night, was working. But even if I accepted Bercier's evidence on this point, it does not prove that Lumipro had to open an exterior channel letter at any point prior to 2008. When the first two letters in the exterior neon Motel sign went out in November 2005, Lavallée repaired it by replacing the transformer connected to it. This work was performed in the ceiling of the building and did not require him to open the front of the letters outside the building.

[48] Maxrelco also relied on expert evidence from Hugo Messier. Messier was qualified as an expert in the investigation of the origin and cause of fires. He provided an opinion on how the August 2008 started and where. He was not qualified as an expert in neon lighting and could not provide an opinion on whether maintenance had been performed on exterior neon letter signs. Messier also had no direct knowledge of any events that occurred at the Restauparc before the fire. His evidence therefore did not help Maxrelco establish that Lumipro technicians ever had an opportunity to observe the problems with the mounting of the neon channel light assembly.

[49] I would add, finally, that I cannot take into account portions of their respective expert reports that Messier and Turcotte did not address at the trial. Under the Ontario *Rules of Civil Procedure*, expert reports constitute notice of expert's proposed evidence. The reports are not themselves evidence, as indicated by their introduction into the record as lettered exhibits.⁴

Conclusions on Lumipro's work (or lack thereof) on the exterior neon channel letter signs

[50] In the absence of any service records between 1998 and 2003, Maxrelco argued that Lumipro cannot prove that it never worked on the exterior neon signs. But the burden of proof is not on Lumipro. It is up to Maxrelco to establish that work was done. I cannot infer that work was done simply because there is no evidence to the contrary.

[51] I find that Lumipro technicians never worked on the "i" in the exterior neon Dunkin' Donuts sign at the Restauparc. I further find that Maxrelco has not proved that Lumipro technicians ever opened the acrylic lids and looked inside any of the exterior neon channel letters

⁴ See *1162740 Ontario Ltd. v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792 at para. 19.

prior to August 2008. To establish that Lumipro knew that there were installation flaws with the exterior Dunkin' Donuts sign, Maxrelco had to show that Lumipro had the opportunity to observe the faulty assembly in at least one of the other exterior neon channel letters. It did not.

[52] I would add that, even if a Lumipro technician had looked inside one of the channel letters that were not part of the Dunkin' Donuts sign prior to August 2008, the evidence falls short of establishing that the assembly in the other exterior neon letter signs was obviously substandard. In photos of the interior of some casings, the problem with caulking was not immediately obvious. Two of the Lumipro technicians, Corbeil and Breton, testified that they did not see any obvious deficiency in the photo of the interior of the casing of the letter "B" in the exterior Burger King sign. The assembly in the interior of this sign is visibly different than the assembly in the "D" in Donuts.

(2) Were there any other circumstances that should have alerted Lumipro to a heightened risk of fire in connection with the signs?

[53] Even if it did not open up the external neon channel letter signs at the Casselman Restauparc, Maxrelco argues that Lumipro should have had a heightened awareness of the potential risks associated with them. It bases this argument on Lumipro's involvement in repairs to other neon signs at the Restauparc and another service centre owned by Maxrelco in St. Isidore.

[54] Corbeil testified he was called to the St. Isidore location at some point prior to 2008 because the red neon border on the tower at that centre were not working. He inspected the wiring and saw that the cables were not properly grounded. Corbeil told the St. Isidore manager that this was not safe and that the installation should be fixed. The manager said she would have to get authorization since the repair would cost about \$1000. Corbeil shut off the breaker to the tower before leaving. When he returned a couple of weeks later, the breaker had been turned back on despite his warning about the neon border was not safe.

[55] There are significant gaps in this evidence. Corbeil did not know who installed the neon borders at St. Isidore or when. As a result, we do not know if these signs were installed by Imperial, the company that installed the neon signs at the Casselman Restauparc. All we know is

that there was a problem with the wiring to the neon borders and that an employee at St. Isidore reconnected the breaker after it was disconnected by Corbeil.

[56] According to Maxrelco, a second significant event occurred in March 2008 at the Casselman Restauparc. There was a fire in the small tower above the main entrance to the fast food centre. The wiring to the neon border on the tower was apparently disconnected after the fire. There was again limited evidence about this event.

[57] What if anything do these situations involving the neon borders at the St. Isidore and Casselman locations imply about Lumipro's state of knowledge about the neon signs?

[58] The wiring fire in the tower in Casselman took place after Lumipro made its last service call there in February 2008. Lumipro was not involved in any repairs to the signage or lighting in Casselman after this date. Maxrelco cannot reasonably allege that, based on an incident in which it was not involved and about which it had no particular knowledge, Lumipro should have realized the other neon signs at Casselman presented a potential fire hazard.

[59] We do not know when the incident at St. Isidore took place. Goupil, the only other person aside from Corbeil who might have had direct knowledge about it, was not asked about it. We do not know if it took place before or after the tower fire at the Restauparc, or before or after Lumipro ceased to be called for any services at Casselman. All we really know is that, when Corbeil saw that there was a problem with the installation of the neon border at St. Isidore, he immediately drew the problem to the attention of local management and took steps to eliminate any risk of fire by disconnecting the power. Based on this response, I could infer that Corbeil and other Lumipro technicians would have taken similar steps if they had ever noticed any installation deficiencies at the Restauparc in Casselman.

[60] Finally, we do not know what the cause of the incidents with the neon borders on the towers in St. Isidore and Casselman. There is no basis to find that these incidents resulted from the same sort of problem that caused the August 2008 fire, or to conclude that Lumipro should have suspected a problem in the neon channel letters based on the problems with the borders.

(3) Did Lumipro owe a duty of care to Maxrelco?

[61] Lumipro had a very limited role at the Restauparc. It was never hired by Maxrelco to inspect its signs or to perform general maintenance on them. It was hired for specific repairs and paid strictly on a time and materials basis.

[62] Despite this, Maxrelco claims that Lumipro had a duty to warn the Restauparc's ownership of the potential risk of fire if its signs were not inspected and maintained as they aged. According to Maxrelco, this duty was based on Lumipro's special knowledge and expertise in the area of neon signage and its role in servicing the signs and lights at the Restauparc.

[63] In the Supreme Court of Canada's recent decision in *Rankin (Rankin's Garage & Sales) v. J.J.*, it reviewed the test that a plaintiff must meet to establish a *prima facie* duty of care.⁵ If a specific duty of care or analogous duty of care has not already been recognized, the plaintiff must persuade the court, first, that the parties were in a relationship of proximity and, second, that the harm which occurred was a reasonably foreseeable consequence of the defendant's conduct in the context of that relationship.⁶ In the proximity analysis, the court must determine "whether the parties were sufficiently "close and direct" such that the defendant is under an obligation to be mindful of the plaintiff's interests".⁷ In the reasonable foreseeability analysis, the court must decide whether the plaintiff's evidence establishes "that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged".⁸

[64] The analytical framework used by the Court in *Rankin* is not new. As the emphasis on the passage above suggests, however, the majority focussed in particular on the evidence that must underpin a finding that a defendant owed a plaintiff a duty of care. It held that the plaintiff must present evidence that the defendant ought to have anticipated a particular harm that would probably occur if it did not take appropriate steps to guard against it.⁹ The majority rejected the

⁵ 2018 SCC 119.

⁶ *Rankin* at paras. 18 and 19.

⁷ *Rankin* at para. 23, citing *Cooper v. Hobart*, 2001 SCC 79, [2001] S.C.R. 537 at para. 32 and *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24.

⁸ *Rankin* at para. 24, citing A.M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015) at p. 322.

⁹ *Rankin* at para. 46.

argument that a commercial enterprise has a positive duty to guard against any risk posed by objects that are not inherently dangerous.¹⁰

[65] Using the *Rankin* template, I conclude that Maxrelco has not proved that Lumipro owed it a positive duty to warn of the danger of electrical fire caused by its neon signage. Maxrelco did not establish that Lumipro ought to have anticipated the specific risk of an electrical fire caused by a sign that was not properly bonded and grounded.

[66] Neon signs are not inherently dangerous. The Dunkin' Donuts sign at the Restauparc was at risk for an electrical fire only because it was poorly installed.

[67] Lumipro technicians had experience in repairing neon signage. But experience or expertise alone does not give rise to a duty of warn of specific risks caused by a third party. The third party, in this case, is the individual or individuals who installed the assemblies in the Dunkin' Donuts sign without adequate bonding and grounding.

[68] Maxrelco claims that Lumipro should have been aware a heightened risk of an electrical fire due to the obvious installation deficiencies in other signs, incidents involving the neon borders at the Cassleman and St. Isidore service centres, and the age of the neon signs.

[69] I have already concluded that Lumipro technicians never worked on the exterior neon Dunkin' Donuts sign, nor any other exterior channel letter sign that had the same obvious installation deficiencies as that sign. The incidents with the neon borders on the towers at Casselman and St. Isidore would not have prompted any concern about the neon letter channel signs. They involved different types of signs. There is no evidence that the neon borders had the same installation deficiencies as the Dunkin' Donuts sign. In any event, I have already found that Lumipro had limited involvement in the St. Isidore tower incident and no involvement at all in the Casselman tower fire.

[70] This leaves the argument that Lumipro should have warned Maxrelco about heightened risks based solely on the age of the neon signs, and the technicians' knowledge that parts of the installation, notably the boots and cables, might deteriorate over time.

¹⁰ *Rankin* at paras. 57 to 60.

[71] I do not accept this argument. I note first that there was no evidence on the lifespan of the boots and cables. But even assuming that the age of this equipment heightened the risk of a high voltage failure, a failure would not result in a risk of fire if the installation inside each sign was properly grounded. The expert evidence established that there are several safeguards against an electrical fire in a properly installed neon sign. Lumipro had no reason to think that the exterior neon channel letter signs were installed improperly, let alone that the installation was so sloppy that basic safeguards (metal on metal contact, distance between the cable and the metal casing) were not in place.

[72] On cross-examination, Lumipro's president Vallée agreed that new generation transformers might have reduced the risk of fire in the neon signs. Customers do not however want to replace their old equipment unless they have to do so, or it stops working. The transformers on old installations are grandfathered under the new standards and there is no law requiring owners of signs to upgrade their old equipment. For this reason, Vallée never suggested to Maxrelco that it replace the transformers. I accept his evidence on the practice of Lumipro's customers, and that Lumipro's failure to suggest an upgrade to Maxrelco was reasonable in the circumstances.

[73] In *Rankin*, the majority cautioned against assuming that a risk was foreseeable just because it has in fact manifested. It observed that "any harm that has occurred was by definition possible. ... [F]or harm to be reasonably foreseeable, a higher threshold than mere possibility must be met".¹¹ Ageing electrical equipment may result in a fire. This does not mean that it is likely to do so in the absence of some other risk factor.

[74] Maxrelco relies on the Ontario Court of Appeal's decision in *Walford [Litigation Guardian of] v. Jacuzzi Canada Ltd.* for the proposition that a defendant with particular expertise may have a duty to warn a plaintiff of non-obvious risks.¹² In cross-examination, Lumipro's expert Turcotte admitted that the risk of electrical fire created by ageing components in a neon assembly would not be obvious unless someone removed the acrylic top of a neon channel letter

¹¹ *Rankin* at para. 46.

¹² 2007 ONCA 729, 2007 CarswellOnt 6736 at paras. 56 to 60.

sign. He also said that this usually does not happen unless a sign's owner is prompted by a technician, since they are generally not aware of any risk.

[75] The situation in this case is however distinguishable from the situation in *Walford*. In that case, the plaintiff asked the employees of a store selling above-ground pools whether a certain type of slide would be safe to use with her pool. The Court of Appeal held that, because the danger of using the pool slide in relatively shallow water was not an obvious danger, the employees were obliged to respond to her questions by warning her of the risk of physical injury. In the case at bar, Maxrelco never relied on Lumipro for any advice or information about the risks of the neon signs. Their relationship was confined to the specific tasks that Maxrelco was hired to do from time to time, which did not include any general maintenance or inspection.

[76] In the words of the Supreme Court:

Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn.¹³

[77] On the evidence, I could infer that Lumipro knew or should have known about the increased risk of an electrical fire as components aged. But this knowledge alone would not give rise to a duty to warn, in the absence of evidence establishing a relationship of proximity and the reasonable foreseeability of an electric fire arising from a faulty installation.

(4) Did Lumipro breach its duty of care to Maxrelco?

[78] Given my conclusion that Lumipro had no duty to warn Maxrelco about the risk of an electrical fire in the exterior neon channel letter signs, it is not necessary for me to address this issue. I would however observe that Maxrelco did not submit evidence of an industry standard with respect to the maintenance of neon signage. It did not call an expert to testify, for example, that channel letter signs should be inspected every five or ten years, or that certain external indications of wear and tear would prompt a competent technician to warn the owner of an increased risk of fire. In the absence of such evidence, it would be impossible for me to

¹³ *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 22.

conclude that Lumipro's technicians breached the applicable standard of care by failing to take steps to alert Maxrelco of the risks associated with its neon signs.¹⁴

Conclusion

[79] The action is dismissed.

[80] If the parties cannot agree on costs, Lumipro may submit a cost outline and submissions on costs within two weeks of this decision. Maxrelco may respond with its own submissions within two weeks of receipt of Lumipro's materials. Each party's submissions must not exceed three pages in length.



Justice Sally Gomery

Released: 2018/06/11

¹⁴ *Garratt v. Orillia Power Distribution Corp.*, 2008 ONCA 422, 2008 CarswellOnt 3090, at paras. 53 to 55; *Toromont Industries Ltd. v. DJSS Transport*, 2014 ONSC 1124, 2014 CarswellOnt 1941, at para. 18.

CITATION: Maxrelco (Immeubles) Inc. v. Lumipro Inc., 2018 ONSC 3638
COURT FILE NO.: 10-49174
DATE: 2018/06/11

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Maxrelco (Immeubles) Inc.

Plaintiff

– and –

Lumipro Inc. carrying on business as Lumipro Signs
and Lighting Services

Defendant

REASONS FOR JUDGMENT

Madam Justice S. Gomery

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