# *Siemens Automotive Ltd. v. Van Dorn Demag Corp., [2005] O.J. No. 2841*

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

D.H. Doherty, J.C. MacPherson and E.A. Cronk JJ.A.

Heard: July 7, 2005.

Judgment: July 7, 2005. Released: July 8, 2005.

Docket: C41208

**[2005] O.J. No. 2841** | 141 A.C.W.S. (3d) 334

Between Siemens Automotive Limited, (plaintiff/respondent), and Van Dorn Demag Corporation, (defendant/appellant), and Imperial Eastman, (defendant) (respondent/appellant by cross-appeal), and Caterpillar Industrial Products, (third party), and Koehler Rubber & Supply Co., (fourth party)

(8 paras.)

## Case Summary

**Civil procedure — Appeals — Appeal from decision reported at *[2003] O.J. No. 5235* dismissed.**

**Appeal From:**

On appeal from the judgment of Justice Colin Campbell of the Superior Court of Justice dated December 19, 2003.

## Counsel

Jeffrey Goldberg for the appellant Van Dorn Demag

James Regan for the respondent Siemens

J. Paul Dillon for the respondent Imperial Eastman

APPEAL BOOK ENDORSEMENT

The following judgment was delivered by

## THE COURT (endorsement)

**1** Counsel for Van Dorn acknowledges, properly in our view, that Van Dorn had a duty to warn the plaintiff Siemens of the risks associated with the use of the hoses.

**2** He argues, however, that the trial judge's findings against Siemens, made in the context of assessing Siemens' negligence, effectively amounted to a finding that Siemens had sufficient knowledge of the risks to negate Van Dorn's duty to warn. We disagree. The trial judge specifically found that Van Dorn knew of the dangers associated with the reuse of repaired hoses and Siemens did not. He also found that Van Dorn knew that Siemens was reusing repaired hoses. The trial judge's finding that Siemens' maintenance programme was inadequate given the obvious risks associated with the hoses, does not speak to Siemens' knowledge of the dangers inherent in reusing repaired hoses and do not, therefore, negate the duty to warn.

**3** Counsel also argued that the strong factual findings made against Siemens are not adequately reflected in the apportionment of only 15 percent of the liability. He submits that Siemens should have been found 50 percent liable. Strong deference is due to the trial judge's apportionment of liability. While others may have divided liability differently, we cannot say that the trial judge's apportionment is so clearly wrong as to require appellate intervention.

**4** We would also reject the appeal advanced by Imperial Eastman. First, although the description of Eastman as "akin to the manufacturer" of the hose was perhaps a misnomer, the trial judge accurately described the role played by Imperial Eastman in relation to the manufacturing of the coupling and fitting of the hose. That role was sufficient to fix Imperial Eastman with a duty to warn Siemens of the risk associated with the use of the product.

**5** Imperial Eastman also argues that if it had a duty to warn, the warning in its catalogue met that duty. The trial judge carefully considered the language and held that it did not address the specific risk in issue and, therefore, did not fulfill the obligation to warn. We see no reason to interfere with that interpretation.

**6** We also reject the learned intermediary argument advanced on appeal by Eastman. On the facts as found by the trial judge, Imperial Eastman could not bring itself within the narrow ambit of that doctrine as described in Bow Valley at para. 36.

**7** The appeal and cross-appeal are dismissed.

**8** Costs to Siemens against Van Dorn in the amount of $17,500.00, inclusive of disbursements and GST. Costs to Siemens against Imperial Eastman in the amount of $3,000.00.

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