NOVA SCOTIA COURT OF APPEAL
Citation: *Holland Carriers Ltd. v. MacDonald*, 2012 NSCA 47

Date: 20120508
Docket: CA 360839
Registry: Halifax

Between:

Holland Carriers Ltd. and Raymond Edward Murray

Appellants

v.

Frank MacDonald, Troy McCarthy, Jeffrey McPhee,
ING Insurance Company of Canada, First Communication Contractors Limited,
Nova Enterprises Limited and Valley Trailers

Respondents

Judges: MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A.

Appeal Heard: April 12, 2012, in Halifax, Nova Scotia

Held: Appeal dismissed with costs to the respondents, plus their reasonable disbursements to be taxed, per reasons for judgment of MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A. concurring.

Counsel: Charles J. Ford and Jane O'Neill, for the appellants;
David S. R. Parker, Robert B. Carter and Margaret George (articled clerk) for the respondent Frank MacDonald;
Tim Hill, Meghan Russell and Stephen Lawlor, for the respondents Troy McCarthy and Jeffrey McPhee;
Wayne J. Francis, for the respondent Nova Enterprises, watching brief only.

Reasons for judgment:

[1] A logging truck hauling an empty trailer was travelling along highway 103 when one of the trailer's vertical metal posts, designed to contain a load, came out of its mooring and flew into the windshield of an oncoming van. Not surprisingly, this caused serious injuries to the passengers in the van.

[2] Justice Arthur W.D. Pickup of the Supreme Court found the truck's owner and operator liable in negligence. They now appeal to this court. For the following reasons, I would dismiss the appeal.

BACKGROUND

Overview

[3] On March 23, 2004, the respondents MacDonald, McCarthy and McPhee, were traveling eastward on highway 103 in a van owned by their employer, the respondent First Communication. Mr. MacDonald was driving. Then from the opposite direction came the appellant Murray driving the logging truck owned by his employer, the appellant Holland. The truck's trailer contained 16 metal stakes designed to contain a load. They were inserted vertically into permanently mounted pockets, with eight on each side. To ensure that they remained in place, each stake was connected to its pocket by a safety chain. Holland described the trailer's acquisition and setup in its factum:

> ¶17 Holland purchased the trailer 22 months before the accident and it was used exclusively by Mr. Murray during that time period. This type of trailer is expected to be in service for approximately 10-12 years and hauled approximately 150,000 km per year.
>
> ¶18 There are eight vertical stakes on each side of the trailer to keep the load in place. The stakes are tapered, sit in a tapered pocket and are held by a chain and an additional tie put on by Holland to secure them in place. The stakes weigh approximately 150 to 200 pounds and cannot be easily removed from their pocket. The stakes are also sharp, do not have handles and cannot be removed by hand.

[4] By all accounts, Murray was driving in a careful and prudent manner at the time. However, that did not prevent the left rearmost stake from becoming

dislodged and crashing into the van's windshield. Upon impact, Mr. MacDonald lost control of the van. It rolled several times injuring all three passengers, thereby prompting the present action.

[5] The plaintiffs' claim led to a cluster of allegations involving not just Holland, but also the trailer's manufacturer, the respondent Valley Trailers and its retailer, the respondent Nova Enterprises. The judge summarized the various positions: (2011 NSSC 130)

> ¶5 The trailer was designed and manufactured by the defendant, Valley Trailers Inc., and sold to Holland's Carriers on or about May 22, 2002 by Nova Enterprises Limited, a retailer.
>
> ¶6 Holland's Carriers has admitted that it is vicariously liable for any liability of Raymond Edward Murray and I will refer to these defendants as Murray/Holland's in this decision.
>
> ¶7 This trial is concerned with the determination of who, if anyone, is liable for the damages resulting from this accident.
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> ¶8 The various plaintiffs' claim that different defendants are liable. Frank MacDonald, says that both Valley Trailers and Nova Enterprises are liable for defective design and failure to warn and that Murray/Holland's are liable in negligence. ING Insurance Company of Canada (ING) and First Communication say Murray/Holland's, are liable in negligence for the damages suffered by them as a result of the damage to the First Communication vehicle in that they allowed an unsafe vehicle to be driven on a public highway and failed to take reasonable preventative measures to avoid the accident. The other plaintiffs, Troy McCarthy and Jeffrey McPhee, say that Murray/Holland's are liable in negligence.
>
> ¶9 The defendants, Murray/Holland's, say that they were not negligent. They assert that they maintained the log trailer in a responsible manner, taking care to inspect it regularly for wear, tear and defects. They say that they were never made aware that having the stakes bottom out required the stakes to be fixed. They say that Valley Trailers is liable for the accident because the design was defective and it is this design/defect which led to the accident occurring.
>
> ¶10 Murray/Holland's also say Nova Enterprises is liable on three grounds. First, that they did not provide any instructions to Holland's, the ultimate purchaser of the trailer. Secondly, Nova was not only the distributer but also the assembler of the trailer as it was Nova who actually installed the stakes, including

> the stake that flew off. Thirdly, that Nova is liable for defective products under the *Sale of Goods Act*, R.S.N.S., 1989, c. 408. Nova denies its liability.
>
> ¶11 Neither Valley Trailers nor its principle, Mark Babin, took part in the trial. Prior to the trial, counsel for ING and First Communication advised all parties that they would not be taking part in the trial. The trial proceeded with the remaining parties.

The Judge's Decision

[6] At trial, the evidence revealed that the stake was allowed to escape its mooring because its chain snapped due to wear and tear. The judge concluded that a reasonable inspection would have prevented this. As I will now explain, this finding formed the cornerstone of the judge's decision.

[7] With Holland acknowledging that it owed a duty of care to the plaintiffs, the judge's first task was to identify the appropriate standard of that care. Here he formulated a duty to "reasonably maintain the trailer", which would include a reasonable inspection regime:

> ¶110 The defendants Murray/Holland's have acknowledged they owe a duty of care to the plaintiffs. The question is, what is the standard of care on Murray/Holland's?
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> ¶111 The general standard of care owed by drivers to others on the road was described in *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, [1997] A.J. No. 30, 1997 CanLII 14730 (Alta. Q.B.) [at Tab 5]:
>
> > 21 Drivers of all vehicles must use that degree of care and caution which an ordinarily careful and prudent person would exercise under similar circumstances.
>
> ¶112 The plaintiffs say the onus on the owner and operator of a motor vehicle designed to carry or transport items, such as logs, is a heavy one, requiring the owner/operator to ensure that the equipment is safe and that nothing will fall off the vehicle and injure innocent persons using the highway. The standard of care is reflected in provisions of s. 199(1) of the *Motor Vehicle Act*, which provides as follows:

> 199(1) No vehicle shall be driven or moved on any highway unless the vehicle is so constructed or loaded as to prevent its contents from dropping, shifting, leaking or otherwise escaping therefrom.

¶113 Mr. Murray was charged under this provision.

¶114 The duty of the operator of a logging truck to inspect was explained in *Michel (Litigation guardian of) v. John Doe*, [2009] B.C.J. No. 1021, 2009 BCCA 225, as follows:

> 24 The trial judge held that log haulers owed a duty of care to people such as the appellant, the standard of which was "that they must diligently perform a complete inspection of their vehicle and their load to identify and remove debris or any foreign matter that might foreseeably dislodge and pose a hazard to the person or property of any member of the public who might foreseeably be harmed by such debris falling from the vehicle or load." ...

¶115 *I am also satisfied that Murray/Holland's owed the plaintiffs a duty to reasonably maintain the trailer.* As noted in *Morrison v. Leyenhorst*, 1968 CarswellOnt 206, [1968] 2 O.R. 741, 70 D.L.R. (2d) 469 (Co. Ct.):

> 11 The owner and driver of a motor vehicle cannot be expected to be an insurer of its mechanical perfection at all times. It is sufficient if he uses reasonable care and skill to ensure that it operates safely on the highway: *Morton et al. v. Sykes*, [1951] O.J. No. 250, [1951] O.W.N. 687; affirmed [1951] O.W.N. 860. The duty is not to have the vehicle reasonably fit for the road, but to take reasonable care it is fit for the road: *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539. However, those cases dealt with hidden defects unknown to the operator, or which by reasonable checking could be ascertained.
>
> 12 Driving with defective apparatus is a negligent act if the defect might reasonably have been discovered and it will be a question of fact in each case whether adequate care was taken in inspection and maintenance: *Rintoul v. X-Ray & Radium Industries Ltd.*, [1956] S.C.R. 674; *Grise v. Rankin*, [1951] O.W.N. 21.

[Emphasis added.]

[8] Here, the judge acknowledged Holland’s comprehensive inspection regime and its proud safety record:

> ¶120 The evidence demonstrates that Holland's were safety conscious as evidenced by the many maintenance checks that they carried out on their equipment. These maintenance checks were done approximately every two weeks in addition to other periodic checks. The driver, Mr. Murray, also did a pre-trip check of the stakes every day. However, despite these safety checks, David Holland admitted that the stakes were never taken out of the trailer during the approximately 22 months it was owned by Holland's. I am satisfied that this would be particularly important to do regarding the back stakes, which the evidence has revealed, could not be viewed by a walk around visual inspection.

[9] However, as this passage reveals, the judge found one serious drawback when it came to inspecting the 2 rear stakes. Unlike the 14 other stakes, they were housed in such a way that their chains could not be inspected by the naked eye. Instead, the stakes would have to have been removed in order for the chains to be properly inspected. Yet at no time did Holland ever do this. This concerned the judge who found it incumbent upon Holland, as a reasonable operator, to inspect all 16 chains despite the extra effort required for 2 of them:

> ¶125 I am satisfied it should have been obvious to a reasonable person that the stake and safety chain could not be properly inspected by simply looking at or shaking the stake as the relevant part of the chain could not be observed. Moreover, it should have been obvious that a visual inspection would not reveal any defects in the rear two pockets or the stakes that were inserted in them.
>
> ¶126 I am satisfied Holland's were conscientious as the company's safety record reflects and to which the Holland brothers testified. The front 14 stakes were inspected on a regular basis where all portions of the connection between the chain and the stake could be visible. It would be reasonable that the two stakes that could not be visually inspected would be taken out and properly inspected. The fact that the stakes were not taken out for inspection is evidence of a breach of the appropriate standard of care.

[10] In fact, in articulating his concern, the judge relied on Holland’s own experts:

> ¶118 Marcel P. Haquebard and Grant Rhyno, the experts retained by the defendants Murray/Holland's, agreed on cross-examination, that Holland's could have taken the following preventative actions to avoid the accident:
>
> a) Move the stake by doing a wiggle test to see if it was loose.

b) Look at the left and right rear stakes and how they are seated in the pockets with a flashlight.

c) Take the stake out.

¶119 On cross-examination, Mr. Rhyno, when asked to comment on these three preventative procedures summarized as follows, "sounds like a good approach".

[11] Thus, upon this foundation, the judge found Holland to be negligent:

¶137 I am satisfied that a proper, thorough inspection of the trailer by Holland's and its employees ought to have revealed the deficiencies and the fact that the safety chain was not attached. Holland's was aware that the safety chains were used to secure the removable stakes in place on the trailer, and common sense would dictate that Holland's would have its maintenance inspectors closely inspect the rear stakes as they did the front 14. The only way to properly inspect the rear stakes would be to either look with a flashlight to determine that the chain was connected or to remove the stakes. I am not satisfied that Holland's used proper care inspecting and maintaining the trailer by doing a visual inspection on the stakes, including wiggling them in a forward and backward motion.

¶138 Having so determined, I am satisfied that Holland's was negligent in not carrying out a proper inspection and, therefore, that it breached the standard of care.

ISSUES AND STANDARD OF REVIEW

[12] Before us, Holland raises two issues:

Issue 1 - The Learned Trial Judge erred in law by imposing a standard of care in the absence of any evidence regarding the appropriate standard of care in the circumstances;

Issue 2 - The Learned Trial Judge erred in law by finding that the actions of the Appellants caused the Respondents' loss in the absence of any evidence offered at trial as to causation.

[13] The first issue challenges the judge’s formulation of the standard of care. Specifically, it asserts that without evidence of an industry standard, the judge had no basis to conclude that a reasonable carrier would be expected to remove those

heavy stakes as part of its inspection regime. The judge's definition of the appropriate standard of care involves a legal question which the judge must answer correctly. However, his application of this standard to the facts commands deference with us interfering only in the face of palpable and overriding error. See, for example, **Creager v. Provincial Dental Board of Nova Scotia**, 2005 NSCA 9 at para. 20.

[14] With its second issue, Holland says that even if it breached its standard of care by failing to properly inspect the trailer, there was no evidence to support a conclusion that this failure resulted in the accident. Here, I would apply essentially the same standards of review. Specifically, the judge's task in defining the correct test to determine causation draws a correctness standard. However, his application of that test to the facts would be reviewed on a palpable and overriding error standard. See **MacIntyre v. Cape Breton District Health Authority**, 2011 NSCA 3 at para. 63.

[15] I will now address each issue in order.

The Standard of Care

[16] I will first briefly address how the judge defined the applicable standard of care. Here, he asserted that Holland had a "duty to reasonably maintain the trailer", which included a reasonable inspection regime. In other words, the standard imposed was essentially that of a reasonable carrier in the logging industry. Holland does not (nor could it) take issue with this articulation.

[17] Instead, as noted, Holland challenges the judge's conclusion that a reasonable inspection regime would include removing 2 of these stakes. It insists that it would be impossible to make such a determination without evidence that this reflected an industry standard. In short, it says that it would be no small feat to remove those 2 heavy rear stakes and the judge was not at liberty to impose such a burden without an evidentiary foundation. It asserts in its factum:

> ¶37 There was no expert evidence called by any party at trial to demonstrate the standard of care to which Holland should be held. In addition, there was no expert evidence presented by any party to demonstrate <u>when</u> the link in the chain on the stake failed.

> ¶38 The trailer involved in the accident is one that is commonly used in the logging industry, however, there was no opinion evidence before the Trial Judge on which he could determine what constitutes reasonable inspection and maintenance practices in that industry or of these types of trailers. Instead of considering whether Holland's decision not to remove the stakes was reasonable in light of industry practices, the Trial Judge simply concluded that if Holland had removed the stakes, it would have found the problem.
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> ¶39 The question the Trial Judge should have asked was whether Holland's decision not to remove the stakes was reasonable. Had he asked that question, Holland submits that the answer would have been "yes". The evidence before the Trial Judge was that Holland bought this style of trailer specifically so it would not have to remove the stakes as part of its maintenance program. This was not the type of trailer where you had to remove the stakes and to do so, would be very difficult. In fact, Mr. Murray testified that he was not even sure how it could be done.
>
> ¶40 Holland submits that the type of inspections that are or should be performed on these types of stakes is not a matter of common knowledge. Further, the metallurgy of the failed chain and the timing of that failure are not matters upon which a lay person can draw common sense inferences.

[18] Respectfully, there is no merit to this submission. First of all, one does not always need expert evidence in order to determine the appropriate standard of care. Often, it simply takes common sense. For example, this court in **G & S Haulage Ltd. v. Park Place Centre Ltd.**, 2011 NSCA 29, explained:

> ¶105 The presence of expert evidence in an action against a professional such as a physician is the norm. Conduct that accords with well recognized and acceptable professional practice will usually, but not necessarily, defeat an allegation of negligence (see *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674). I see no basis to elevate an operator of a hotel and commercial complex to the level of a professional exercising his or her skill in a specialized or technical area. There was nothing technical or specialized about the conduct in this case.
>
> ¶106 The interplay between specific evidence about the appropriate standard of care and a finding of negligence was carefully reviewed in *Burbank v. Bolton* [*Burbank v. R.T.B.*], 2007 BCCA 215, (leave denied [2007] S.C.C.A. No. 316). (See also the companion case of *Radke v. M.S. (Litigation guardian of)*, 2007 BCCA 216.) In *Burbank*, an accident occurred during a high speed pursuit by a police officer. The trial judge, [2005] B.C.J. No. 2271, found the officer partially at fault by creating an unreasonable risk of harm. The complaint on appeal was

> that there was no evidence adduced at trial as to the appropriate standard of care by a reasonably competent police officer. The majority, Lowry and Chaisson JJ.A, gave separate concurring judgments. Lowry J.A wrote:
>
> > [57] It is first important to recognize that in a negligence action it is not usually necessary to adduce evidence, much less expert evidence, to prove the standard of care. It is generally a matter to be determined by the trier of fact based on common experience having due regard for what may be taken from any applicable legislation or policies governing the activity in question; in some instances, evidence of custom associated with any particular conduct may also be germane. It is only where the subject matter of the inquiry is beyond the common understanding of judge and jury that expert evidence may be adduced to assist the court in determining the appropriate standard of care.
>
> ¶107 Although the court in *Burbank* split in result, and Chaisson J.A gave separate concurring reasons, on this point, I can discern no difference in opinion in any of the three reasons for judgment.
>
> ¶108 From the evidence at trial, Coughlan J. determined it was reasonably foreseeable, by an ordinary, reasonable and prudent operator of a hotel and office complex, if there was an oil leak in the tank room, and if the room was not liquid-tight, that oil could escape and cause damage. *The conclusion was reached by the trial judge simply applying common knowledge and experience to the facts as he found them.* There was ample evidence to support this conclusion and I would therefore dismiss the cross-appeal.
>
> [Emphasis added.]

[19] Yet here, Holland insists that common sense would not suffice. Again, I refer to its factum:

> ¶50 In contrast, in the present case, it is not a matter of common sense that if the stakes were not removed from their pockets to be inspected as part as Holland's regular maintenance program, a stake would dislodge when the trailer was on the highway. To make that determination, a court needs to have evidence regarding the timing and extent of inspections in this industry. Without such evidence, the court cannot articulate the appropriate standard of care against which it can compare the actions of a defendant to assess its reasonableness.

[20] Again, I disagree. This is not a complicated analysis. For example, Holland felt it important to inspect the chains for 14 of the 16 stakes. It takes no great leap

in logic to conclude that if it is prudent to regularly inspect 14 chains, it would be equally prudent to inspect all 16, even if it meant the inconvenience of removing 2 of the stakes. In fact, as the judge noted, Holland's own expert conceded that this "sounds like a good approach". In other words, as in **Haulage**, *supra*, the judge simply applied "common knowledge and experience to the facts as he found them" when he concluded:

> ¶126 I am satisfied Holland's were conscientious as the company's safety record reflects and to which the Holland brothers testified. The front 14 stakes were inspected on a regular basis where all portions of the connection between the chain and the stake could be visible. It would be reasonable that the two stakes that could not be visually inspected would be taken out and properly inspected. The fact that the stakes were not taken out for inspection is evidence of a breach of the appropriate standard of care.

[21] In short, this conclusion reflects neither legal error nor palpable and overriding factual error.

[22] In reaching this conclusion, I acknowledge Holland's challenge to the following passage in the judge's decision:

> ¶124 Obviously the system established for the inspection of the logging trailers was not adequate as demonstrated by the very fact that the safety chain failure occurred.

[23] In essence, Holland highlights this passage to suggest that the judge presumed negligence simply by the fact that the accident occurred. I again refer to its factum:

> ¶8 Despite the lack of an evidentiary foundation, the Trial Judge concluded that the Respondents had established that Holland was negligent in inspecting and maintaining the trailer. In essence, the Trial Judge concluded that because the stake fell off the trailer, Holland must have been negligent. This is evident from the following statement at paragraph 124 of the Decision:
>
> > Obviously the system established for the inspection of the logging trailers was not adequate as demonstrated by the very fact that the safety chain failure occurred.
>
> . . .

> ¶13 Not every accident is caused by someone's negligence. Holland requests that this appeal be allowed, that the trial judgment be reversed and that the plaintiffs' claims against it be dismissed. This is not the type of case that can be sent back for a new trial. The evidence to establish the elements of a negligence claim were not led and we must presume that the trial would proceed on the same evidence.
>
> . . .
>
> ¶64 The Plaintiff Respondents were injured in a very unfortunate accident in March, 2004 and understandably, there is an urge to find fault on the part of some person who can compensate them for their injuries. Negligence law, however, requires that certain elements be proven before a defendant is found to be at fault. It is not enough to say, as the Trial Judge did - "the accident happened, therefore there must be something that the defendant could have done to prevent it."
>
> ¶65 This reasoning led the Trial Judge to adopt an incorrect approach to the question of negligence. Instead of determining what would have been reasonable for the owner and operator of a logging trailer in the circumstances and then judging Holland's conduct against that standard, the Trial Judge simply concluded that Holland was negligent in not having removed the stakes for inspection as this would have revealed a problem with the link in the chain that failed. The Supreme Court of Canada explained in *St-Jean v. Mercier, supra* at paragraph 53 that to approach the standard of care in this manner is to collapse the inquiry.

[24] In my view, this excerpt is taken completely out of context. The judge did not presume negligence simply because there was an accident. Quite the opposite. For example, at the outset of his negligence analysis, the judge correctly identified the need to find a duty, an appropriate standard of care and a corresponding breach:

> ¶108 .... the question becomes whether Murray/Holland's were negligent.
>
> ¶109 To determine liability in negligence, it is necessary to answer the following questions:
>
> a) Is there a duty of care?
>
> b) If so, what is the standard of care?

c) Was the standard of care breached?

[25] Then, as I will elaborate upon in my analysis of the next issue, the judge later found causation; thereby making the case against Holland complete.

[26] I would therefore dismiss this ground of appeal.

Causation

[27] This ground of appeal is related to the first. Essentially, Holland asserts that even had its duty to inspect included the need to remove the last 2 stakes, the judge made no finding as to the frequency of such cumbersome inspections. Without that, says Holland, there is no proof that the inspections would have prevented the accident. It explains in its factum:

> ¶58 The Trial Judge's error relating to the standard of care also affected, or in other words, spilled over into the causation analysis. The question that remains unanswered is <u>when</u> Holland should have removed the stake to look underneath. Should it have done so daily, weekly, monthly, yearly? What is the standard Holland was supposed to meet? Did its failure to meet that standard (whatever it may be) cause the accident?
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> ¶59 The Trial Judge did not make any finding (as he had no evidence upon which to do so) regarding when the stake came into contact with the chain causing it to break. Without that evidence, it is impossible to determine whether Holland's failure to remove the stakes from time to time actually caused the accident.
>
> ¶60 To illustrate, if there was evidence that to meet the standard of care, Holland was required to remove the stakes on the trailer once every two years, its failure to do so did not cause the accident. If there was evidence that to meet the standard of care, Holland was required to remove the stakes once every six months, the Respondents would still have to establish that the problem would have been detected at the 6, 12 or 18 month inspection.
>
> ¶61 The Decision demonstrates that the Trial Judge did not turn his mind to the burden on the Respondents to prove causation. At paras. 109-110, the Trial Judge set out the legal test he applied to the facts before him:
>
> To determine liability in negligence, it is necessary to answer the following questions:

a) Is there a duty of care?

b) If so, what is the standard of care?

c) Was the standard of care breached?

> The defendants Murray/Holland's have acknowledged they owe a duty of care to the plaintiffs. The question is, what is the standard of care on Murray/Holland's?
>
> ¶62 The trial judge went on to conclude at para. 138 that "I am satisfied that Holland's was negligent in not carrying out a proper inspection and, therefore, that it breached the standard of care." The Trial Judge did not address the timing of a "proper inspection" as it related to the accident and accordingly did not have a proper foundation to determine that Holland's breach of the standard of care caused the Respondents' loss.

[28] Respectfully, this submission might have some merit had there been at least one inspection of these 2 chains. But there was not one in the entire 22 months, despite the rough ride these trailers are given and the many kilometres travelled as the judge observed:

> ¶136 Given the frequency of maintenance on inspections carried out by Holland's, it would be foreseeable that if any portion of the inspection could not be completed, they would take the necessary steps to do so, given their evidence of the numerous inspections that were carried out of the stakes, all of which were visible except the back left and right stakes. It must be remembered that the reason for all of these maintenance inspections by Holland's is because of the severe nature of the environment in which these log trailers operate. They are in continuous use, in this case, for some 250,000 kms. They travel on back woods roads, including logging roads, to obtain their load of wood. They are loaded by mechanical equipment and the evidence is sometimes the stakes could be hit during this loading process.

[29] In fact, by this passage, it becomes clear that Holland itself set the standard as to when these chains ought to have been inspected. It did so every two weeks at least for 14 of the 16 chains. It was completely logical for the judge to assume that had it done this for all stakes, the accident would have been avoided. In short, there was ample basis for the judge to conclude:

> ¶130 I am satisfied that it would have been prudent for Holland's to have its maintenance inspectors closely inspect the stakes and safety chain on a regular basis by removing these back stakes and ensuring the chains would properly perform their required purpose. The failure to do so constitutes negligence. A proper inspection was not carried out and the direct and foreseeable result was the failure of the safety chain which ultimately caused the unsecured stake to come of its socket and cause injury to the plaintiff.

[30] I would therefore also dismiss this ground of appeal.

DISPOSITION

[31] I would dismiss the appeal with costs to the participating respondents as follows: $5,300.00 to the respondent MacDonald plus his reasonable disbursements to be taxed, and $5,300.00 payable in one bill to the respondents McCarthy and McPhee plus their reasonable disbursements to be taxed.

MacDonald, C.J.N.S.

Concurred in:

Fichaud, J.A.

Farrar, J.A.