**SUPREME COURT OF NOVA SCOTIA**
**Citation:** MacDonald v. Holland's Carriers Ltd,, 2011 NSSC 130

**Date:** 20110331
**Docket:** Hfx 263296
**Registry:** Halifax

**Between:**

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

Plaintiffs

v.

Holland's Carriers Limited, Raymond Edward Murray, Nova Enterprises Limited and Valley Trailers Inc.

Defendants

v.

Nova Enterprises Limited and Valley Trailers Inc.

Third Parties

| | |
|---|---|
| **Judge:** | The Honourable Justice Arthur W.D. Pickup |
| **Heard:** | January 17, 18, 19, 2011, in Halifax, Nova Scotia |
| **Written Decision:** | March 31, 2011 |
| **Counsel:** | Robert Carter and David Parker, for Frank MacDonald<br>Tim Hill, Meghan Roberts and Stephen Lawlor, for Jeffrey McPhee and Troy McCarthy<br>Dennise Mack and Scott Barnett, for Holland's Carriers Ltd.<br>Wayne J. Francis, for Nova Enterprises Ltd. |

**By the Court**:

[1] This matter arises out of an unusual accident involving two motor vehicles that occurred on March 23, 2004.

[2] The plaintiff, Frank MacDonald, was the driver of a van owned by First Communication Contractors Limited (First Communication) travelling eastward on highway 103 toward Halifax on the day of the accident. There were two passengers with Mr. MacDonald, Troy McCarthy and Jeffrey McPhee. All three were employees of First Communication.

[3] The defendant, Raymond Edward Murray, an employee of Holland's Carriers Limited (Holland's Carriers) was driving a logging truck and log trailer unit, which was owned by the company, westbound on highway #103. The Holland vehicle was hauling a trailer designed to transport logs consisting of a flatbed with a series of metal posts or stakes that rested in sockets along each side of the flatbed and stood upright. These stakes held logs in place during transport.

[4] At the time of the accident the Holland's vehicle was empty and was returning to New Germany after delivering a load. As the vehicles met, the rearmost stake on the left side of the log trailer came lose and crashed into the windshield of the First Communication van. The van lost control, rolled a number of times and the plaintiffs were injured as a result of the accident.

[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.

[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.

***Background***:

***The Accident:***

[12] On March 23, 2004 Frank MacDonald, Troy McCarthy and Jeffrey McPhee, all employees of First Communication were travelling eastbound on highway 103 towards Halifax. Frank MacDonald was the construction foreman. He was driving a Chevy one ton extended van which was pulling a trailer used for hauling communications cable.

[13] Jeffrey McPhee worked as a groundman/labourer. At the time of the accident, he had worked for the company for six months. He recalls March 23, 2004 as a sunny but cold day. They had left Timberlea and were on their way back to Halifax. Mr. MacDonald was driving and Troy McCarthy was in the front passenger seat. Mr. McPhee was sitting in the middle of a bench seat in the back, immediately behind the front two seats. Mr. MacDonald's dog was next to him. He testified that they were travelling on a single lane highway and described traffic as being average weekday traffic.

[14] Mr. McPhee was looking out the front window. He saw a tractor trailer coming from the opposite direction and noticed one of the stakes on the log trailer swaying back and forth. He then saw it flying off the log trailer and into the van's windshield. As the stake hit the windshield, the van swerved into the ditch and ended up on its side. He testified that Mr. MacDonald could not do anything to avoid being hit by the stake.

[15] On cross-examination he testified that there was nothing of concern in the manner in which Mr. Murray was driving. He agreed that Mr. Murray did not appear to be speeding nor driving on the wrong side of the road.

[16] The driver, Frank MacDonald, testified the collision happened between 3:00 and 3:30 pm. He confirmed it was a sunny day and that the sun was not in his eyes. He said that on that day they were getting paid on a piece work basis which meant that the more cable they laid the more they would be paid. He said the discussion in the van on the way back to Halifax centred around what a good day it had been and, Troy McCarthy in the passenger seat, had been calculating how much they made that day. He said during this discussion "all hell broke loose". He was travelling at 100 km/h. He said he had no idea what object hit him or where it came from. He did not notice the type of vehicles that were coming toward him. Something hit the windshield causing him to go off the road.

[17] Raymond Edward Murray was employed by Holland's Carriers . He was driving a Holland's tractor trailer with an attached logging trailer on the day of the accident. He said he was coming back from taking a load of wood to the MacTara Mill in Musquodoboit and was heading towards New Germany on Highway 103. He said he was proceeding on Highway 103 for about 10 minutes when he received

a radio call from another Holland's driver who was behind him reporting that something came off his trailer.

[18] Mr. Murray said that, while he noticed the First Communication van meeting his vehicle, he did not see it go off the road. He was driving about 90 to 95 km/h. Until he was alerted by the following driver, he said he was not aware of any problem. He then pulled over, backed up and picked up a riser which he saw had come off the truck, presumably because the stake was no longer in the left rear position to hold it in place.

[19] After the accident Mr. Murray spoke with the police. He was charged with a "leaking load" . He testified that someone put the stake that had come off his truck back onto the log trailer and he secured it in place prior to heading back to the Holland's garage in New Germany.

***Holland's Carriers:***

[20] Holland's Carriers is a limited liability company co-owned by three brothers, David Pearlie Holland, Brenton Bruce Holland and Glenwood Holland. These brothers became involved in the business around 1988. Their father, Pearlie Holland, had previously been the principal owner of the business.

[21] Holland's is a logging company that is involved in harvesting forest products on its own property and properties owned by its clients. It transports wood cut on these properties to various pulp mills and saw mills.

[22] David Holland is the secretary/treasurer and part owner of Holland's. Since 1988 he has been responsible for the day-to-day administration of the company. His additional responsibility is for safety. It was his responsibility to ensure that drivers have training and that their licenses are up-to-date.

[23] Holland's belongs to the Nova Scotia Truckers' Association. David Holland said the company receives annual audits from the association and from various government departments. He said it had never received a non-compliance rating and, in fact, on every occasion had been designated as being in compliance. He entered into evidence awards that had been received from previous employers and a safety excellence award from the Nova Scotia Trucking Safety Association which

was awarded on February 27, 2008. He testified that Holland's took all necessary steps to ensure compliance and safety.

[24] David Holland agreed on cross-examination that he is responsible for coordinating the various safety audits. He agreed that these audits are on-sight audits of paperwork that do not involve direct inspections of vehicles or trailers. For example, there would be a check to confirm that there is insurance in place, that the vehicle registration is up-to-date and that the employee files are in order.

[25] Holland's has a maintenance facility and does its maintenance in-house. He said the maintenance facility employed a mechanic and a welder. David Holland said they do regular maintenance on all of their vehicles and trailers with inspections often completed every two to three weeks.

[26] In respect of the standards governing the maintenance of the stakes on the logging trailer, David Holland admitted that the only standard listed in the forms they use as a checklist is to have the stakes and pockets checked for cracks. These checks are done by visual inspections. There is no standard for the amount of play in the stakes in the pockets. He said this would be up to the driver. There are no standards for checking wear in the pockets and no standards to determine how far into the pockets the stakes can go.

[27] Mr. Holland admitted that the log trailer involved in the accident was owned for approximately two years and the stakes were never taken out for inspection during that period.

[28] David Holland testified that pre-trip inspections are required to be completed by all drivers before they leave for their workday. He testified that they would normally follow a checklist, but he did not have copies of the completed forms showing the pre-accident inspections of the trailer involved in the accident. He said these were destroyed six to eight months after the accident. He stated they did additional inspections every three months on Holland's vehicles and equipment which was required by Kimberly Clarke on all vehicles which carried wood to their facility. He said these inspection result forms had been submitted to Kimberly Clarke but no copies were available.

[29] Brenton Holland is another co-owner of Holland's. He is responsible for daily logging operations and mechanical operations. His duties include

maintenance of logging equipment and on road equipment and hiring drivers. He was one of the persons who hired Mr. Murray.

[30] Brenton Holland testified that a pre-trip inspection is done on a daily basis by each driver. The resulting paperwork is normally kept at the back of the driver's log book. He referred to a portion of the pre-trip checklist headed "frame and cargo body" and said the frame of the logging trailer would include the bunks, plus the stakes. He said the driver is required to look at the bunks, stakes and pockets as part of the pre-trip inspection. The driver must fill out the form every morning. The inspection should take 20 to 30 minutes.

[31] Brenton Holland testified that the maintenance check on the stakes consisted of checking each stake and pocket for cracks by looking at each stake and pocket with a flashlight. He said it would take about 45 minutes to do the maintenance inspection. It was done by the mechanic and welder on staff.

[32] Glenwood Holland, another brother and co-owner of Holland's also testified. He was responsible for the forest work, including equipment and operations in the woods. He testified that during 2002 to 2004 they worked for Kimberly Clarke. He was involved in hiring Raymond Murray and would have reviewed with him the standards expected of drivers.

[33] Glenwood Holland explained that company's like MacTarra require quarterly audits on employees. He said Holland's did these from the checklists. Item 18 in the checklist related to the risers/stakes and whether they were secured. He said they checked the chain which was attached to the bottom of the stake and to a keyhole lock. He never observed any concern with chains or stakes. The check was done by a walk around. The rear stakes were never removed.

***Nova Enterprises***:

[34] The defendant, Nova Enterprises, is a retailer based in Truro, Nova Scotia. It sells trucks and truck trailers, including logging trailers. William Gordon Masters is the general and sales manager for this company. He has worked for Nova since 1973. He is responsible for all sales except parts and service sales. As general manager he is responsible for the day-to-day operation of the business. Nova was incorporated in 1967 and became a truck dealer in 1973. They have been selling truck trailers for 30 years, including logging trailers similar to the

trailer involved in this accident. He said the company sells approximately 400 truck trailers in a good year and 125 in a slow year.

[35] Mr. Masters said Nova was familiar with Valley Trailers Inc. which was based out of Fort Kent, Maine. He said Nova was the sole dealer in Nova Scotia for Valley Trailers from about 2000 until Valley went out of business several years later. He said they sold in excess of 200 trailers manufactured by Valley during that time and averaged 30 to 40 sales of logging trailers per year.

[36] Mr. Masters described Valley manufactured logging trailers as light and strong and said they had a good reputation in Nova Scotia. He described Holland's as a good customer and, in particular, regarded the Holland brothers as friends. They often hunted and fished together. He described a continuing relationship between Holland's and Nova. Nova sold Holland's two trucks as recently as November 2010 worth more than $400,000.

[37] Bill Yorke testified on behalf of Nova Enterprises. He was employed by Nova from April 1993 until August 2009 when he left to set up his own business. He started with Nova in the parts department, moved to part-time trailer sales in 1997 and later sold trailers full-time. He was sent by Nova to various trailer manufacturers throughout North America to obtain product knowledge. He did not go to the Valley Trailers facility in Fort Kent, Maine. He described Holland's as a knowledgeable client. He was at the Holland's facility several times.

[38] Mr. Yorke said Nova kept approximately two or three new trailers on the lot for sale at any given time, as well as one or two on order. When the Holland brothers attended at their site on May 2002 Nova had two Valley trailers for sale.

***Valley Trailers:***

[39] The defendant, Valley Trailers, is a manufacturer of logging trailers based out of Fort Kent, Maine. It went out of business two to three years prior to trial. Valley is unrepresented. The company's principal owner, Mark Babin, did not attend nor take part in this trial but his discovery testimony was entered into evidence.

***Liability:***

***Valley Trailers:***

[40] Murray/Holland's says liability primarily lies with Valley, whose design was allegedly defective and this defect allegedly caused the accident. They say that Valley's literature, if any, was provided and contained no warning to the ultimate consumer as to how to prevent an accident such as occurred in this case. Valley denies that there was any design defect.

[41] A manufacturer owes a duty of care to individuals who could reasonably be affected by its negligent conduct, *Donoghue v. Stevenson*, [1932] All E.R. Rep 1(H.L.), at 20:

> ... a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

[42] Murray/Holland's rely on an expert report by Contrast Engineering prepared by Marcel P. Haquebard and co-signed by Grant L. Rhyno dated May 8, 2007. Mr. Hacquebard, a consultant with Contrast, visited the Holland's site on April 21, 2004. He examined and photographed the trailer in question. The Contrast report concludes that this accident occurred because the left stake on the Holland's vehicle was designed and manufactured with the following defects:

a) the geometry of the left stakes taper was too long to match its socket;

b) the safety chain was attached at an inappropriate location for the stake, resulting in it supporting the weight of the stake, putting unnecessary loading on the link; and

c) the location of the rear light assembly directly below the rearmost pocket was installed in such a way that the stakes rested on it.

[43] Mr. Hacquebard was qualified as an expert mechanical engineer capable of giving expert evidence regarding the design and manufacture of the trailer. His report, co-signed with Mr. Rhyno, was admitted in evidence.

[44] On cross-examination, Mr. Hacquebard testified that he was not aware that the bottom of the rear stakes had been cut off prior to his visit to the site. He said he doubted this was the case, but admitted that he could not state unequivocally that the stakes were not cut. He said he was never shown the original portion that had purportedly been cut off.

[45] Glenwood Holland testified that shortly after the accident Holland's intended to put the trailer back to work, so they modified the trailer and particularly the manner in which the stakes were secured. He testified that they made the stakes shorter, changed the position of the chain on the stake from the inner to the outer side, cut a half moon in the pockets so they could see the attachment to the chain and put rigid pins on all the stakes. Mr. Hacquebard was not aware that the stakes had been shortened when he inspected the trailer.

[46] Mr. Hacquebard stated that he inquired about recalls with Transport Canada and with US authorities who did not report any recall of the type of trailer in question. He testified on cross-examination that this is the only incident that he is aware of with these Valley trailers.

[47] Mr. Hacquebard admitted prior to going to Holland's to view the trailer he was provided with information from ING, including a letter from Wade Barry, an insurance agent who insured Holland's, suggesting a cause of the accident similar to the conclusion subsequently reached by Mr. Hacquebard as to the defect and cause of the accident.

[48] Mr. Hacquebard's on site notes that were prepared April 21, 2004 consist of three pages of handwritten notes and diagrams. The first page notes a conclusion as to the cause of the accident which appears to have been made before he completed the calculations and investigations as later detailed in the notes. The second page gives measurements of the stakes (also found in Exhibit 2), and the third page includes the following observations:

> Both rear stakes put in place on trailer.
>
> Left one bottoms out before getting snug in taper. Movement both front/back and side to side.

> - Right one snugs up side to side but still has movement front/back - right one was does not bottom out.

[49] The report then describes measurement of the left and right sockets. These notes appear to follow in chronological order and it is logical to conclude that Mr. Hacquebard reached his conclusion as to the cause of the accident before he did the further calculations and investigations. He admitted that he did not contact Valley Trailers for blueprints or to confirm that Valley designed the trailer.

[50] Grant Rhyno is a professional engineer and is the owner of Contrast Engineering. He co-signed Mr. Hacquebard's report, for the purpose of peer review, as is done with all consultant's reports for his company. This was done after Mr. Hacquebard did his fieldwork. He said after review of the data and photos he came to the same conclusion as Mr. Hacquebard. Mr. Rhyno agreed on cross-examination that he did not attend the scene of the accident, nor did he view the log trailer or any of its parts. He testified that when he reviewed the report he was not aware that a part of the stake had been cut off. He checked the "technical depth and breadth" of Mr. Hacquebard's report, spending one and one half hours on the file. He was not aware of the number of kilometres on the log trailer at the time of the accident.

[51] Mr. Rhyno made a follow-up call to a Mr. Faulkner of the Federal Transport department on January 5, 2011 shortly before trial to determine whether the department had taken any action on the Valley Trailer file. He was advised that the matter had been closed in June 2004 and that it was likely an isolated incident. Mr. Rhyno did not testify to this call until he was questioned about it on cross-examination.

[52] Murray/Holland's rely on the Contrast Engineering report to establish that the log trailer was defective at the time of manufacture. I am not satisfied that this report is reliable. I have reached this conclusion for several reasons.

[53] Firstly, the report makes several conclusions as to the condition of the stakes in the pocket at the time of manufacture, yet the examination of the trailer took place some 22 months after manufacture and after the trailer had logged 250,000 kms. Several witnesses testified as to the excessive wear and tear on log trailers and the resulting need for regular maintenance. For example, Mark Babin said such trailers operate in one of the most severe environments there is and that is

why there is a need for maintenance. Bill Yorke also talked about excessive wear and tear and the need for regular maintenance.

[54] Surprisingly Mr. Hacquebard, who attended at the site, was unaware that modifications had been made to the stakes, including a portion of the stake having been cut, as testified to by Glenwood Holland. In addition to shortening the stakes, Holland's changed the position of the chain on the stake from the inner to the outer side and cut a half moon in the pockets so they could see the attachment to the chain and put rigid pins on all stakes.

[55] Contrast Engineering did not recreate the post-accident situation by reattaching the chain to its original position and then doing an inspection as to how it sat in the trailer. There was no testing of the safety chain.

[56] No evidence was provided by Mr. Hacquebard that he had viewed any other log trailers, nor did he try to obtain any design specifications for this trailer. He did not visit the accident scene.

[57] While I do not impute any bias (as suggested by the closing submissions of counsel for Nova), Mr. Hacquebard's conclusion was surprisingly similar to the conclusion reached by Holland's and its insurers as to the cause of the accident, all of which was communicated to Mr. Hacquebard in correspondence he received.

[58] Murray/Holland's argue that it is significant that Mr. Hacquebard found the left taper was longer than the right taper.

[59] Several witnesses (including those called by Holland's) discussed wear and tear on log trailers. Mr. Hacquebard obtained no information from the manufacturer on this issue. In his discovery evidence, Mr. Babin testified as to these tapers being cut on a CNC plasma machine, which ensures repeatability of its cuts. It must be remembered that Mr. Hacquebard was viewing and measuring these tapers some 22 months after purchase.

[60] Mr. Babin did not testify at trial but portions of his discovery were read into evidence. He stated as follows, at pp. 80 and 81 of the discovery transcript:

> By Mr. Francis:

Q. Have you ever - - sorry let me back up – you've been in the family business now since the late '70's right, when you were in high school, you were working helping out?

A. Yes

Q. Have you ever heard of a stake coming out of one of these trailers while it was in transit?

A. No

Q. Never coming out on a woods road?

A. No

Q. Never coming out on a highway?

A. No

Q. So this incident in 2004 was the first time you're ever heard of that?

A. Yes

Q. And that – I'm not just talking about Valley Trailers. I'm talking about trailers made by other companies in other states. Have you ever heard of any of their stakes coming out?

A. No

Q. So in all your 30 years in the business this is the only time you've heard of a stake like this coming out on the highway?

A. That's correct.

[61] This evidence is consistent with that of several witnesses at trial, including Bill Yorke and the Federal Government officials contacted by Mr. Hacquebard.

[62] Mr. Babin said as follows at pp. 37 - 38 of the transcript:

Q. Okay. To your knowledge has there been any recalls to this particular type of trailer?

A. No

Q. And when I say I'm referring too the stakes, the pockets, the safety chains or the brake assembly.

A. No

[63] Further at pp. 39 - 40 Mr. Babin testified:

Q. I'm just going to read you from page 69, the second paragraph after that chart. It says:

> "In addition with the safety chain attached in its original position the right and left rear most stakes would sit higher in their sockets and have looser fit than was observed during the examination by Mr. Hacquebard. That since the time it was manufactured the left stake would have had its entire weight resting on the first link of the safety chain every time it was in the socket."

Q. Is that an accurate statement what he's saying there?

A. The - - -

Q. Starting with:

> "The - - - since the last time - - since the time it was manufactured the left stake would have its entire weight resting on the first link of the safety chain."

Every time it was in its socket?

A. No

Q. You disagree with that?

A. Yeah

Q. So your evidence was there would be a space, a one inch space between?

A. Well like I said there's wear. But if it sat there from day 1 there would be whole worn right through the light box.

Q. Okay. How do you know that?

A. From experience.

Q. You've seen this happen before?

A. Common sense.

Q. But that's common sense but I'm saying —

A. No, it's common sense.

[64] I am satisfied that at the time of manufacture there was space between the bottom of the stake, the chain assembly and the light assembly.

[65] The following exchange with Mr. Babin appears at pp. 57 - 58 of the transcript:

Q. Sure. You told My Friend that there's an inch clearance between - - or there was at least between the bottom of the pocket in the rear most stakes from the top of the rear light assembly. Is that correct?

A. No. From the bottom of the stake to the bottom of the pocket, one inch.

Q. Oh, okay. All right. And what is the distance between the bottom of the stake from the top of the rear light assembly?

A. On this trailer here?

Q. Yeah

A. It looks like about a half an inch.

[66] Mr. Babin went on to state there had been a further change in the trailer design since 2004 in the trailers, giving a little more room between the rear light assembly and the bottom of the pocket. He said the reason for that was the light

assembly is now done in two pieces rather than one, and because it is done in two pieces it necessitates an extra half inch of clearance to weld it.

[67] Mr. Yorke, an experienced log trailer salesman, described the need for maintenance to prevent the stakes from protruding below the pocket. He states at pp. 72 - 73 of his discovery transcript:

> A. No, ma'am, I do not know.
>
> Q. Okay. And to your knowledge industry practice is that everything needs to be specifically the same length?
>
> A. Yes
>
> Q. So, even a one centimeter difference in a taper length?
>
> A. Well, no, in the log trailer end of it you've got a steel stake against steel pocket which is designed to taper as those two pieces of steel rub together eventually over time things wear. I mean, that stake is going to - - it's shaking back and forth and it's moving - - I know it's locked in there, but still, it wears from being that pocket. That's when maintenance comes into affect. When you see your stake - - and this does happen on log trailers with tapered stakes - - when you see your stake getting down below your pocket normally what they'll do is they'll rebuild up their pocket, rebuild up their stake or shim it, put a shim on the inside of the pocket to get that stake back up to where its level.
>
> Q. Okay
>
> A. And that's the whole idea, the design of a tapered stake, is that it gets in there and the taper goes down so far so you can see that out of the bottom of the pocket and normal routine maintenance. If you seen that stake sticking down whether it's a centimeter or an inch and a half below that pocket you know it's time to do something with that pocket to get that stake riding back up in where it's supposed to be.
>
> Q. I see. So, your understanding is that the stake should not be sitting below the bottom of the pocket at all?
>
> A. No, it should not.
>
> Q. It should be flush with the bottom of the pocket?

A. Yeah

[68] I am not satisfied that there is sufficient evidence to conclude that the Valley log trailer was defective. There are deficiencies in the expert's report as I have outlined. The trailer was in operation for 22 months covering some 250,000 kms of service in what seems to be universally agreed to be a rough environment, which resulted in numerous maintenance operations being conducted by Holland's during that time. In total there were approximately 50 inspections carried out by Holland's, not to mention daily inspections by its drivers.

[69] For all of these reasons, I am not satisfied that the defendants and others have shown that the Valley log trailer design was defective at the time of manufacture. As such, it cannot be said that a design defect caused the accident.

***Is Nova Enterprises Limited Liable?***

[70] The defendants Murray/Holland's say Nova is liable on three grounds:

a) Failure to warn.

b) Negligence in failing to notice the defect in the stakes when they were installed.

c) The *Sale of Goods Act*, R.S.N.S., 1989, c. 408.

***Failure to warn:***

[71] Murray/Holland's claim that Nova provided no warnings to Holland's about the maintenance of the stakes. Nova did not provide an owner's manual to Holland's for the trailer. They say that Nova cannot suggest that a purchaser ought to do something to maintain equipment which it sells, if it does not specifically advise a purchaser that such maintenance is necessary.

[72] Nova says that it has been selling the Valley logging trailers for several years without receiving any complaints about the trailer, stakes or pockets, the location of the safety chain or the location of the rear light assembly. Nova was not aware of any incidents where the trailer stakes had failed or caused damage to

anyone or anything. Similar comments appear in Mr. Babin's discovery evidence and in Mr. Hacquebard's report.

[73] Murray/Holland's say that Nova failed in its duty to warn that the stakes cannot be allowed to bottom out. They say the distributor owed a duty of care to the ultimate consumer similar to that of a manufacturer to ensure that a product does not contain defects. They say liability may be imposed upon distributors on account of such a failure to warn. I am not satisfied that there is sufficient evidence in this case to find liability on Nova. Nova had no prior knowledge of a potential problem as testified to by Mr. Yorke and Mr. Masters. In fact, Mr. Masters testified that of all the trailers they had sold for Valley, there had been no reported problems or defects with the stakes and pockets on those trailers prior to this accident.

[74] I am satisfied on the evidence that Holland's would be aware of the possibility of wear and tear on their vehicles based on the company's extensive experience in the forestry business. The evidence to support this conclusion is the fact that there was such an extensive maintenance program for the trucks and logging trailers involved in their business. These inspections and maintenance included bi-weekly maintenance and inspections, as well as daily driver inspections and other quarterly inspections required by the companies Holland's dealt with.

[75] I am not satisfied that Nova had a duty to warn that the stakes cannot be allowed to bottom out. Even if there were, it would be generally known to Holland's that this was the case. The main reason for the numerous maintenance inspections on the vehicles was the wear and tear. Part of the inspection was the stakes and pockets in which they sat.

[76] As a result, I cannot find liability in Nova for failure to warn.

***Was Nova negligent in failing to notice the defect in the stakes when they were installed?***

[77] The defendants' Murray/Holland's say that Nova is liable as the installer of the stakes because a person who installs or erects a product must exercise reasonable care. Murray/Holland's suggests that because Nova installed the stakes prior to their purchase, the defect ought to have been visible during installation. I

have found that there is insufficient evidence of a manufacturing defect and, therefore, it would not be obvious to Nova that there was defect. Further, there is no evidence that the stakes were improperly inserted on the trailer and, in fact, the evidence of Nova was that they had trained technicians who install the stakes. There is no evidence whatsoever of any defect at the time of installation. It must be remembered that Holland's did a cursory inspection upon purchase and then did an inspection in their shop. I find no negligence on Nova because there was no defect to be identified by Nova. As well, as I have indicated, there is no evidence that the stakes were improperly inserted on the trailer.

***Is Nova liable under s. 17(a) or 17(b) of the Sale of Goods Act***?

[78] Murray/Holland's have pleaded the *Sale of Goods Act*, R.S.N.S., 1989, c. 408, s. 17, which provides:

> 17. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed ...

[79] Murray/Holland's say that Nova is liable under s. 17(a), for failing to supply a product that was fit for its purpose, and under s. 17(b), for failing to supply a product that is of merchantable quality.

***S. 17(a) - not fit for its purpose:***

[80] In order to succeed under s. 17(a), Murray/Holland's say they must show:

a) Holland's made known to Nova the particular purpose for which the trailer was required;

b) Holland's relied on Nova's skill and judgment;

c) the trailer was of the description that it is in the course of Nova's business to supply; and

d) the trailer was not reasonably fit for Holland's purpose.

[81] Holland's say that when they attended Nova's premises to purchase the trailer, they specifically made it known to Nova that the trailer was to be used for logging. They say the trailer was within Nova's course of business to supply and they were, therefore, entitled to assume the trailer would be fit for the purpose of use as a logging trailer. They say that because of the manufacturing defect the trailer was not fit for its intended purpose as the rear stakes were not properly secured.

[82] In pre-trial submissions, counsel for Nova acknowledge (a) and (c). However, they say that the evidence demonstrates that Holland's did not rely on the skill or judgment of Nova in the purchase of the trailer. For the following reasons, I am not satisfied that Nova is liable under s. 17(a) of the *Sale of Goods Act.*

[83] This issue is a question of fact and it is necessary for the court to examine the transaction between the parties to determine whether Holland's actually relied on the skill or judgment of Nova in the purchase of the trailer.

[84] Holland's was an experienced logging company. The Holland brothers acquired the company in 1988. They have been primarily involved in the forest industry, trucking wood from tree lots to mills and cutting of forest products since that time. Nova says Holland's was aware of the type of trailer it needed. Nova provided the in-stock trailer model requested by Hollands.

[85] Brenton Holland testified that Holland's representatives told Mr. Yorke they were going to use the trailer to haul logs and pulp. They received information as to the weight and Brenton Holland measured the width of the trailer. When they purchased the trailer they did not carry out a full inspection but did a walk around. Mr. Holland stepped onto the trailer deck and checked the weight of the stakes and the pockets. He said when they got back to the shop they inspected the trailer. They put chafe lines on the airbrake system and added safety ties to the chain. On cross-examination he was asked why he was suing Nova and he said "I have no reason to sue Nova". He confirmed that they went to Nova intending to purchase a Valley trailer and that he inspected the trailer on site and found no problems.

[86] Glenwood Holland accompanied his brother to purchase the trailer from Nova. He also said they met with Bill Yorke and had called him before they met with him and told him specifically what they were there for and, in particular, told him it was for hauling logs lengthways. His account of the visit was similar to his brother's.

[87] Nova says that Holland's did not rely on its advice regarding the condition of the stakes, as they did an initial inspection of the trailer at Nova's lot and a complete inspection at its own facility. They say that if there was a defect in the stakes, it was within the scope of Holland's expertise to detect and avoid it. Therefore, it is submitted, Holland's did not rely on Nova's skill and judgment. Holland's ordered a specific trailer for a specific purpose in a field in which it was highly experienced. By inspecting the trailer after purchase, Nova says this indicates that it did not simply rely on Nova to supply a vehicle without defect. I am not satisfied that Holland's relied on Nova's skill and judgment.

[88] Holland's owned several trailers, including at least one Valley trailer. They were experienced and needed a log trailer to haul the wood lengthways. They were provided with information on the trailer, including the distance that the stakes were apart, as well as the dimensions. They received information about the number of axles. There were two Valley trailers for sale at the time at Nova and they chose the one that is the subject of this action. They were highly experienced. They did an initial inspection and a more thorough one at their garage. Brenton Holland asked why he was suing Nova and replied, "I have no reason to sue Nova".

[89] Holland's used the logging trailer in question for 22 months after its purchase and logged approximately 250,000 kms. During that period the trailer

would have been loaded and unloaded with logs on numerous occasions, travelling woods roads and highways to transport them. Several witnesses described the severe environment in which these trailers operate. Nova says that this extensive use demonstrates that the trailer was fit for the purpose intended. I agree that the extensive use of the trailer demonstrates the trailer was fit for the purpose intended.

[90] I am not satisfied that there was any latent defect, nor that the trailer was not fit for the purpose of a logging trailer. The defect which ultimately led to the accident appears to have come about because of use and was not existent at the time of the sale.

***S. 17(b) - not of merchantable quality:***

[91] Murray/Holland's say the logging trailer was not of merchantable quality. They say that in order to succeed they must show that:

a) the trailer was bought by description;

b) Nova was a seller who deals in trailers of that description;

c) the trailer was not of merchantable quality; and

d) if Holland's had examined the trailer there shall be no implied condition as regards defects which such examination ought to have revealed.

[92] Murray/Holland's say that the Holland brothers arrived at Nova wanting to purchase a "logging trailer". By their request to purchase a logging trailer, it is submitted, that the requirement that the sale be by description has been satisfied.

[93] It is not in dispute that Nova is a seller who deals in logging trailers and, therefore, I agree with Murray/Holland's that the second requirement under s. 17(b) is satisfied.

[94] The third requirement is that the goods are not of merchantable quality. Murray/Holland's submits that the stake design was inherently dangerous and that no reasonable consumer would purchase a potentially dangerous piece of equipment.

[95] Nova says the evidence at trial does not establish that the trailer was not of merchantable quality. I am not satisfied that at the time of the sale the trailer was not of merchantable quality, given my previous finding, that there was no manufacturing defect in the stakes and pocket and/or rear light assembly at the time of manufacture. Therefore, the claim under s. 17(b) fails. I do not find that the stake design was inherently dangerous as alleged by Murray/Holland's.

[96] Having found no liability in either Valley or Nova, I will now determine whether Holland's is liable in negligence.

***Was Murray/Holland's Negligent?***

[97] The first issue is the applicability of s. 248(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, which was dealt with by pre-trial submissions by the parties.

[98] The plaintiffs say Murray/Holland's are liable in negligence in that they permitted an unsafe vehicle to be driven on a public highway and failed to take reasonable preventative measures to avoid the accident. The plaintiffs, ING and First Communication say Holland's and Murray have the onus of showing that they are not liable under s. 248(1) of the *Motor Vehicle Act*, which provides that in certain circumstances, the owner or operator of a vehicle bears the onus of demonstrating that the loss, injury or damage did not solely arise from the negligence of the owner or operator of the vehicle:

> 248(1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the onus of proof
>
> (a) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent of such owner acting in the course of his employment and within the scope of his authority as such servant or agent;
>
> (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle,

> shall be upon the owner or operator of the motor vehicle.
>
> (2) Subsection (1) shall not apply where the injury, loss or damage is incurred or sustained by
>
> (a) reason of a collision of a motor vehicle or motor vehicles with another motor vehicle or other motor vehicles, and the action is brought or the counterclaim is made by the person who was at the time of the collision the owner or operator of one of such motor vehicles;
>
> (b) a person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation and the action is brought or the counterclaim is made by such person against such owner or operator; or
>
> (c) reason of a collision of a motor vehicle or motor vehicles with another motor vehicle or other motor vehicles and the action is brought or the counterclaim is made by a passenger in one of the vehicles against the owner or operator of another vehicle.

[99] The plaintiffs say the reverse onus in s. 248(1) applies in this case. They cite the Nova Scotia Court of Appeal decision in *Jeffrey v. Naugler*, 2006 NSCA 117, where the court stated, at para. 29:

> 29 Section 248(1)(b) usually applies to pedestrian plaintiffs. But the provision may apply where two motor vehicles are involved, the exclusions of s. 248(2) are absent, and the plaintiff was injured by reason of the presence of the defendant's vehicle on the highway: *MacDonald v. McGrath*, [2004] N.S.J. No. 388, 2004 NSCA 125 at paras. 19-20.

[100] Murray/Holland's say s. 248(2) provides that the reverse onus under s. 248(1) does not apply to this case, that the exceptions in s. 248(2) apply and that, in any event, s. 248(1) is inapplicable where the accident is occasioned by the presence of more than one vehicle on the highway as here.

[101] The defendants, Murray/ Holland's, argues that the reverse onus in s. 248(1) does not apply where:

> (1) The loss was sustained by reason of a collision of a motor vehicle with another motor vehicle; and

> (2) The action is brought by the owner or operator of one such motor vehicle; or
>
> (3) The action is brought by a passenger in one vehicle against the owner or operator of another vehicle.

[102] They say that the actions are being advanced by the owners (First Communication), operator (MacDonald) and passengers (McCarthy and MacPhee) of one of the vehicles. They say the action is being advanced against the owners and operators of the other vehicle involved in this accident (Holland's and Murray). They say it is clear that the second part of s. 248(2) is satisfied. Further, they say the real issue is whether the loss was sustained by reason of a collision of a motor vehicle with another motor vehicle. They say that the striking of the stake or post from the Holland's vehicle onto the windshield of the plaintiffs' van amounted to a collision.

[103] Murray/ Holland's, say that *Jeffrey v. Naugler, supra,* simply stands for the proposition that the Chambers judge ought to have considered the applicability of s. 248(1) in light of amended pleadings, as there remained a material issue for trial whether s. 248(1) was triggered. They say the case does not conclude that s. 248(1) was triggered.

[104] Furthermore, they say by the presence of more than one motor vehicle on a highway, s. 248(1) cannot apply. They say the triggering event for the application of s. 248(1) is a loss which is occasioned by reason of the "presence of a motor vehicle upon a highway". It contemplates the existence of only one motor vehicle and not more than one. Therefore, where there is one motor vehicle, the owner of that motor vehicle bears the reverse onus. They say that if s. 248(1) was designed to apply to situations which involved more than one vehicle on the highway, the statute would have addressed which owner faced the burden of proof. They say the section is silent in distinguishing which owner would have the burden in situation involving more than one vehicle.

[105] Counsel for the plaintiffs, Troy McCarthy and Jeffrey McPhee, in their pre-trial submission agree with the submission of Murray/Holland's that s. 248(1) of the *Act* does not apply to the defendants in this matter.

[106] Counsel for the plaintiffs, ING and First Communication, have provided no further submissions on this issue.

[107] After considering the submissions of the parties, and for the reasons submitted by counsel for Murray/Holland's, I am satisfied that s. 248(1) is not applicable and that the normal burden applies.

[108] Having so found, 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?

[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?

[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 CanLII 14730 (AB 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 it 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.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.

[116] The plaintiffs say the evidence establishes that a careful, thorough and proper inspection by the defendant Holland's and its employee should have revealed the fact that the chain was broken on the left rear stake and the risk the unsecured stake posed. They say failure to do so was a breach of the standard of care. They say a *prima facie* case of negligence is established requiring the defendants to establish there was no negligence in their inspections. They say they

cannot do so because a proper inspection of the stake would have revealed the failure of the broken safety chain.

[117] The plaintiffs say that Holland's was negligent in its inspection of the trailer, both at the time of the initial purchase and on an ongoing basis. In addition to the initial inspection which ought to have revealed the design defect, if any, a proper ongoing inspection method employed by Holland's would require actual disconnection of the safety chain and actual removal of the stake on a regular basis. They say that had a proper inspection been done, it should have been obvious to any reasonable person that the stake was resting on top of the chain. They argue that the safety chain could not be properly inspected by simply looking at it, or shaking it, as did Holland's employees, or by taking a flashlight and looking at the rear stakes.

[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".

[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.

[121] Brenton Holland described several inspections of the trailer, including checking the stakes and pockets for cracks. He said that these inspections are often done with a flashlight, yet they did not reveal any irregularities in the left and right rear stakes.

[122] Glenwood Holland described the logging trailer having 16 stakes and said 14 stakes could be viewed to determine their seating in the pocket and whether the safety chains were attached, but not the back two stakes because of the light box. He was asked on cross-examination whether it was possible to see the chains which secured the back two stakes by a visual inspection. He said there was not enough room to see in the taper with a flashlight. To properly see the chain, it would be necessary to take the stake out. He testified that he saw no reason to take the stake out.

[123] As to Glenwood Holland's testimony that you could not see where the safety chain was attached to the rear stakes, this appears to be contrary to the opinion of the defendants' expert, Mr. Hacquebard, who suggested you could see the assembly by looking in with a flashlight.

[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. The evidence from the defendants is that they did regular inspections of the stakes and chains but, in fact, and, on their evidence, they could only view the safety chain assembly on the bottom of the stakes in 14 of the 16 stakes.

[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.

[127] Because none of the witnesses ever heard of a tapered stake coming out of a pocket, the defendants argue that this was an unexpected and unforeseeable event. They say they were provided with no warnings regarding the stakes and that Holland's actions must be assessed in light of the fact that nobody expected or heard of a tapered stake falling out of the pocket. They say that in view of this lack of information, Murray/Holland's cannot be faulted for not removing the stakes to periodically examine them. They say Holland's must held to a standard of reasonableness, not perfection.

[128] I am not satisfied that the inspection and maintenance system was adequate and reasonable because by their evidence they could not view the very chain assembly which was welded to the rear two stakes and, all witnesses appear to agree when it failed, that this was the cause of the stake coming loose and the cause of the accident.

[129] The court in *Proctor & Gamble Co. v. Cooper's Crane Rental* [1973], 2 O.R. 124, 172 CarswellOnt 430 (Ont. C.A.), quoted from *United Motors Services, Inc. V. Hutson*, [1973] S.C.R. 294, at p. 297, as follows at para. 13:

> 13 There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

[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.

[131] Murray/Holland's suggest there was no evidence that there was a problem with the left rear stake on the date of the accident and their inspection of the stakes and the chain, on several occasions, did not reveal any defect.

[132] Holland's say that Mr. Murray and they did everything that a purchaser of a logging trailer ought to reasonably do to ensure that the trailer was safe and roadworthy. To support its position the defendants provide the case of *Jacob v Roy*, [2005] N.B.J. No. 557, 2005 NBQB 421, where a rear wheel came off the defendant's vehicle some time after she had heard a noise, investigated and found nothing. Creghan J. said:

> 47 All a person is required at law to do is to act reasonably in the circumstances. As the Supreme Court of Canada has said in Stewart v. Pettie, 1995 CanLII 147 (S.C.C.), [1995] 1 S.C.R. 131 at par. 50. "Tort law does not require the wisdom of Solomon." Prudence requires reasonable action be taken; it does not demand that all possible action be exhausted. On the facts of this case I cannot find that the Defendant knew, or had any reason to know, that there was a problem with one of the rear wheels of her car. I find her actions when she heard the "weird" noise on the day of the accident were such that a reasonable person would take. Check to see if any problem was obvious. If none was apparent go on with the intention that should a problem become apparent, then seek professional mechanical assessment and repair as might be required. It may be argued that to have sought such advice immediately when the noise was heard some 45 minutes prior to the accident, might possibly have avoided it. I find however that the Defendant did not act other than how a reasonable person would have acted in the circumstances.

[133] The defendants also offer the case of *Chiasson v. Gionet*, [2002] N.B.J. No. 256, 2002 NBQB 249,where a father sued his daughters for injuries incurred in a motor vehicle accident. The father purchased the vehicle, which had been inspected, and most of the driving was done by the daughter. On the day of the accident the father was riding as a passenger and the rear wheel came off. It was determined that the rear wheel came off because there were no nuts on the bolts. The court dismissed the action, holding that while the defendant had a duty to ensure that her passenger was safe, this did not extend to a duty to check the wheels each time she was about to operate the vehicle to ensure the bolts and the wheels were properly fastened.

[134] I am satisfied that these cases can be distinguished from the present fact situation in that the defect here could have been discovered and noticed if Holland's had, in fact, removed the stakes to inspect them, or used a flashlight to look in the back left and right rear assembly pockets, as was suggested, could be done by their expert Mr. Hacquebard. While they carried out regular inspections

they did not inspect the back left and right stake and pocket assembly, nor did they check whether the chain was secure on the stake.

[135] The testimony of the Holland's defendants was that they carried out regular inspections of the stakes but they readily admitted they could not notice damage to the rear stakes because of the rear light assembly and the stake sitting on the chain. Having been alerted to this issue, it would be prudent for a reasonable person to do what was necessary to carry out the inspection and, in this case, the evidence is clear that they could look into that area with a flashlight and/or take out the stakes.

[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.

[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.

[139] The plaintiffs will have their costs. In the event that the parties cannot agree on costs, I will hear submissions from counsel for the respective parties.

Pickup, J.