

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

CORNELIS SPEK, IDSCHE SPEK,  
ANDREW SPEK and JUDITH SPEK

Plaintiffs

) Aleks Mladenovic, for the Plaintiffs

**- and -**

HENDRIK VAN ALTEN and HYNDMAN  
TRANSPORT [1972] LIMITED

Defendants

) Robert B. Ledgley, for the Defendants

Court File No. 22878/96

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

HYNDMAN TRANSPORT [1972] LIMITED

Plaintiff

) Robert B. Ledgley, for the Plaintiff

**- and -**

THE ESTATE OF STEVEN SPEK	)	Aleks Mladenovic, for the Defendant
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	<b>HEARD:</b> November 25, 26, 27 and 28 and December 17 and 18, 2003

**MORISSETTE, J.:**

**OVERVIEW**

[1] This Court has been asked to determine the point of impact of a motor vehicle accident which occurred on Highway 86 in the Township of Woolrich on April 28th, 1994, at around 10:00 pm, when tragically Steven T. Spek was killed.

[2] Mr. Spek was travelling westbound in a 1988 Toyota Tercel, and the defendant, Mr. Hendrik Van Alten was travelling eastbound while operating a tractor-trailer unit owned by his employer, Hyndman Transport. The roadway is a two-lane highway with a sweeping curve at about where the accident occurred.

[3] The plaintiffs say that as Mr. Van Alten’s truck and Steven’s Toyota Tercel automobile approached each other from opposite directions through a sharp curve in the road, Mr. Van Alten’s tractor-trailer combination crossed the centre line of the roadway and collided with Steven’s car, causing his death.

[4] Conversely, the defendants say that Steven’s car crossed the centre line of the roadway and collided with the tractor-trailer in the eastbound lane. The evidence presented at trial consisted of both lay evidence and expert evidence.

[5] Other than the vehicle damage, the two key pieces of evidence are the “gouge” located in the westbound lane and the “white erasure mark” running from a point in the eastbound lane in a northwest direction across the westbound lane to the edge of the asphalt. Put simply, the plaintiffs point to the gouge as evidence of the point of impact. If they are correct, the impact

was in the westbound lane. The defendants, however, identify the white erasure mark, and particularly the southeast end of that mark, as evidence of the point of impact. If this is correct, the impact was in the eastbound lane, the car must have crossed the centre line and the action should be dismissed.

[6] In addition to the main action, and prior to this action having been commenced, Hyndman commenced an action under Rule 76 of Ontario's *Rules of Civil Procedure* seeking damages for the costs to repair the damage to the trailer resulting from this accident. By the Order of The Honourable Justice Killeen dated August 29, 1997, this action was ordered to be tried at the same time as or immediately after the Speks' action, under the direction of the trial judge. It has been agreed between the parties and accepted by this Court that since the issue of the quantum of the damages for both the main action and that of the property damage claim had been settled, it was unnecessary for any evidence to be called in the property damage action.

**Evidence of Hendrik Van Alten:**

[7] On April 28, 1994, Mr. Van Alten, the defendant and only living witness to this accident, started the morning in Milton, Ontario, waking early. He made an early morning delivery in Mississauga and eventually arrived at Hyndman's yard in Wroxeter, Ontario at about 1:00 or 1:30 pm where he rested, awaiting another assignment. He was sent out on a run to Etobicoke in the early evening. He drove east on Highway 86 toward Listowel. Before he arrived in Listowel, he had an engine problem and had to return to Wroxeter where Hyndman's mechanic diagnosed a problem and told him to take the tractor to an Etobicoke service garage. He was told not to work the engine "too heavy" and left the yard at 8:45 or 9:15 p.m. It was dark and there was a light rain. Nothing unusual happened as he proceeded through Listowel. He has a recollection of other vehicles in the area as he approached the Elmira bypass and recalled that he tried to overtake one but could not. As he entered the Elmira bypass, travelling 75 to 85 kilometres per hour, he recalled that there was one car some distance behind him.

[8] As he entered to curve of the Elmira bypass, Mr. Van Alten testified to having seen a flat object lying across his lane of travel as he was negotiating the curve. He claims to have driven over the object, which object was never identified. Immediately after driving over the object in

the road, he checked both left and right mirrors but was unable to visualize the object he had driven over. As he was bringing his eyes back to the road in front of him, he claims to have perceived something going past the tractor and then feeling a thump on the trailer.

[9] Mr. Van Alten testified that at no time while negotiating the curve did his right side tires ever cross the southern fog line. In cross-examination, he could not be sure if his trailer crossed the centre line.

[10] Shortly after feeling the thump on his trailer, Mr. Van Alten testified that he noticed the marker lights on the trailer were out. He was able to see this by performing a “wiggle manoeuvre” with his truck which involved steering abruptly left and right in order to angle the trailer enough to enable him to visualize the entire right side in his mirror. When he realized his marker lights were out on both sides, Mr. Van Alten testified that he formed the intention to stop his vehicle.

[11] At approximately the same time, according to Mr. Van Alten, he observed a vehicle behind him negotiating the curve and swerving abruptly off the road. Mr. Van Alten thought that perhaps the vehicle had collided with the same object which had caused the thump on his trailer. Mr. Van Alten testified that he believed he had brushed up against a tree trunk or some “junk” in the roadway and he continued to drive for an additional 7.3 kilometres, to a place where he knew he could stop and place a phone call.

[12] When he finally did stop his vehicle, he inspected the damage to his trailer and realized right away that the damage was extensive. He walked to a nearby restaurant and telephoned the dispatch at Hyndman Transport. Upon returning to his truck, Mr. Van Alten was met by two ambulance attendants, who advised him that he had been in an accident.

**Evidence of Constable Peter Osbourne:**

[13] Constable Peter Osborne of the Ontario Provincial Police attended the accident scene on the night of the collision and also the following morning. As the O.P.P.’s Technical Traffic Accident Investigator assigned to the case, Constable Osborne took measurements and photographs and collected the evidence at the scene. The measurement records from his two

attendances at the scene were admitted into evidence and mostly relied on by all other experts in this case. A brief of the 26 police photographs depicting the accident scene and the vehicles was admitted into evidence as Exhibit 1.

[14] On the night of the accident, Constable Osborne noted the presence of a single gouge mark in the pavement of the westbound lane, which he associated with the accident. Directly beside the gouge mark, Constable Osborne observed a reddish fluid stain, which he believed to be transmission fluid from the Spek Toyota Tercel.

[15] Constable Osborne did not observe any other markings on the roadway that night. He did, however, note the location of various items on the roadway, including parts of both vehicles.

[16] The left front wheel and axel of the Spek vehicle had been ripped from the vehicle during the collision. The axel with the wheel attached was found on the shoulder of the westbound lane. Another motorist who had arrived at the scene in advance of the police had moved it from its original location on the roadway.

[17] Constable Osborne noted the locations of other portions of the vehicles including the headlight housing, and steel fender well of the Spek vehicle and the air trailer handles and side marker gasket of the tractor trailer driven by Mr. Van Alten.

[18] Constable Osborne documented the gouge mark, fluid stain and vehicle parts in his measurement record. The following morning, Constable Osborne re-attended at the scene. At that time, he observed a relatively straight white mark in the shape of a reverse check mark, which extended in a northwesterly direction from approximately the middle of the eastbound lane to the edge of the asphalt of the westbound lane. Police photographs 5 and 6 of Exhibit 1 were taken by Constable Osborne to show the white mark and he noted the dimensions and location of the white mark in his measurement record.

**EXPERT EVIDENCE:**

[19] There is agreement amongst the experts that the front left corner of the car came into contact with the left side of the trailer, just ahead of the rear dual wheels, causing the accident,

which took the life of Steven Spek. It is also generally agreed that after impact, the car rotated counter clockwise for about 320 degrees and travelled in a more or less north westerly direction, coming to rest facing northwest partly on the north shoulder and partly in the grass to the north of the shoulder. Beyond this, the experts disagree and accordingly, I wish to summarize the opinions of the experts, Barry Raftery, John Mustard and James Hrycay.

**Evidence of Barry Raftery for the Plaintiff:**

[20] Mr. Raftery was qualified by this court as an expert in the field of accident reconstruction and, in particular, in the area of vehicle dynamics, interpretation of roadway evidence and the determination of the location of vehicles at the point of impact. Mr. Raftery has testified as an expert witness in over 150 cases. In the course of his career, he has investigated nearly 2000 accidents, many involving tractor-trailer combinations. He is a member of the Professional Engineers of Ontario, the Society of Automotive Engineers, the National Association of Professional Accident Reconstruction Specialists and the Canadian Society of Forensic Science. Mr. Raftery gave expert opinion evidence on behalf of the plaintiffs and testified that in his expert opinion, the point of impact was in the westbound lane near the gouge mark.

[21] Mr. Raftery explained that in his opinion, the white tire mark was not produced by the Toyota because it would be physically impossible for the rapidly rotating Toyota to leave a relatively straight tire mark after this type of impact.

[22] Mr. Raftery further states that if the white tire mark represented the point of impact, then the right side of the tractor-trailer would be placed off the asphalt and onto the gravel shoulder. Mr. Van Alten's testimony, if accepted, suggests that he did not drive off the shoulder. Further Mr. Osbourne did not record any tire marks on the gravel shoulder.

[23] In Mr. Raftery's opinion, the gouge mark in the westbound lane is the single most important indicator of the point of impact in this case. The massive force of the trailer acting horizontally and vertically on the Toyota at the point of maximum engagement caused some component on the underside of the Toyota to make contact with the asphalt in the westbound

lane. This same shearing and crushing force ripped the left front axel and wheel from the Spek vehicle during the collision.

[24] Mr. Raftery is of the view that as a result of such massive force, inevitably a gouge would be formed and would show the point of impact. Mr. Raftery testified that he had considered the possibility that the white tire mark was produced by the Toyota but after careful consideration, he had ruled it out for several reasons, namely:

- 1) It would be physically impossible for the rotating Toyota to leave a straight tire mark after this type of impact; he testified that it was impossible to have the Spek vehicle rotate 340 degrees within 20 meters travelling at 20.2 meters per second in a decelerating fashion without producing a pronounced curvature in the mark.
- 2) If the white tire mark and its change in direction represent the point of impact, then the right side of the tractor-trailer would be placed off the asphalt and onto the gravel shoulder. Mr. Raftery pointed out that it would be very unlikely for Mr. Van Alten to be driving so far to the right in his own lane, particularly when Mr. Van Alten testified that he perceived no oncoming vehicles. In addition, there were no tire marks found on the gravel of the eastbound shoulder;
- 3) The direction of the white tire mark is not aligned with the final resting position of the Toyota; and
- 4) In order to accept that the white tire mark recorded in the police measurement record is indicative of the point of impact, one would have to discount the presence of the other white tire mark shown in police photograph 6 of Exhibit 1.

[25] When asked his opinion about the source of the white tire mark, Mr. Raftery conceded that he was not certain, but he was confident it was not created by the Spek vehicle. Mr. Raftery pointed out that the mark might have been created by the tow-truck, which pulled the Spek vehicle from the side of the road. He also pointed out that other vehicles had passed through the scene during the night.

[26] Mr. Raftery was asked in chief about the pattern of debris and whether it had assisted him in reaching his conclusions about the point of impact. Mr. Raftery explained that debris will often be scattered across an accident scene. Many times, the debris will be carried in the

directions traveled by the vehicles themselves. As such, debris patterns are often not an accurate sign of the point of impact. Constable Osborne testified that the debris was scattered over the entire road surface.

[27] Mr. Raftery was asked to comment on the defence theory of the case. In particular, he was asked to give his opinion regarding a diagram introduced as Exhibit 15, prepared by the defence expert, Mr. Hrycay which illustrates his opinion on the relative positions of the two vehicles at the point of impact.

[28] Mr. Raftery explained that in his opinion, Exhibit 15 does not accurately depict the vehicles at the point of impact. The tractor-trailer combination is shown with all of its right-side tires perfectly aligned with the edge of asphalt. According to Mr. Raftery, this is not a realistic portrayal. In particular, the diagram does not account for the articulated nature of the tractor-trailer or the principle of off tracking.

[29] Off tracking was explained by Mr. Raftery, as a phenomenon observed in articulated vehicles when they are making turns or negotiating curves in the road. Due to the articulated nature of a tractor-trailer combination, the path that the rear trailer tires will follow is somewhat to the left of the path taken by the corresponding tires of the tractor, when negotiating a curve as in this case.

[30] In a tractor trailer combination like that driven by Mr. Van Alten, the off-tracking as the vehicle negotiates a curve such as the one in this case would be about 6 inches to the left, according to both Mr. Raftery and Mr. Van Alten.

[31] If the trailer were positioned with its left forward axel directly above the point where the white tire mark changes direction, then due to off-tracking, the right side tractor tires would, by necessity, be further south than the right side trailer tires. In fact, the right side tractor tires would have to be on the gravel shoulder as illustrated in Exhibit 10 prepared by Mr. Raftery.

[32] In Mr. Raftery's opinion, his diagram Exhibit 11 more accurately illustrates the vehicle positions at the point of impact. Exhibit 11 shows the left portion of the tractor-trailer crossing

the centre line to make contact with the Toyota Tercel in the westbound lane. The Toyota Tercel is positioned with its front end just above the area of the gouge mark.

**Mr. John Mustard:**

[33] Mr. Mustard is a forensic engineer employed by the Centre of Forensic Sciences in Toronto. He became involved in this case as a result of a written request from Constable Osbourne in July of 1995. Mr. Mustard's analysis consisted solely of reviewing material sent to him by Constable Osbourne. This material consisted of 21 photographs, two scale diagrams prepared by the defence expert, Mr. James Hrycay and the police field notes. In addition to reviewing this material, Mr. Mustard spoke with Constable Osbourne on at least one occasion. Constable Osbourne had told him that the debris was "as shown" in the diagram that Constable Osbourne prepared and introduced as Exhibit 5, being "mostly in eastbound lane and some in westbound lane".

[34] Mr. Mustard chose to discount the gouge mark as something left by the car as it proceeded to its point of rest in a damaged condition. Mr. Mustard, in his report, placed a great deal of significance on the pattern of small debris, which he characterized as being concentrated in the eastbound lane around the tip of the white tire mark. However in chief examination and in cross-examination, he conceded that debris patterns are not always determinative of the point of impact. He further conceded in cross-examination that if the white mark was excluded, then the gouge mark in the westbound lane is the most significant piece of evidence regarding the point of impact. Mr. Mustard agreed that after impact, the Spek vehicle would have rotated rapidly counter clockwise as it moved to its final resting position. He acknowledged that a car moving in this manner would be expected to leave a curved, rather than a straight tire mark.

[35] On cross-examination, Mr. Mustard testified that Constable Osbourne had shared his opinions on the point of impact. Constable Osbourne told Mr. Mustard that he felt the commencement of the white tire mark represented the point of impact. Mr. Mustard was

essentially being asked to confirm Constable Osbourne's opinion in this regard. Mr. Mustard did just that.

[36] When Mr. Mustard was shown in cross-examination the other white tire marks on picture 6, he could not tell what it was but admitted that if both marks were created by the same vehicle, then he would have to change his opinion as to the point of impact.

[37] Mr. Mustard also testified that he would have expected a tire mark in the gravel portion of the roadway, after the vehicle leaving such a white eraser mark, as in this case. Finally, Mr. Mustard was unable to explain the principle of "off tracking" as he testified that it was not within his area of expertise.

[38] Mr. Mustard prepared a very brief written report summarizing his opinion that the change in direction of the white tire mark was evidence of a collision in the eastbound lane.

**Evidence of James Hrycay, expert for the Defence:**

[39] Mr. Hrycay was qualified by this court as an expert in the field of accident reconstruction and, in particular, in the area of vehicle dynamics, interpretation of roadway evidence and the determination of the location of vehicles at the point of impact. Mr. Hrycay has testified as an expert witness in many jurisdictions including Ontario, Alberta, Michigan, New York and New Jersey. In the course of his career, he has investigated nearly 3000 accidents, many involving tractor-trailer combinations. He too is a member of the Professional Engineers of Ontario, the Society of Automotive Engineers, the National Association of Professional Accident Reconstruction Specialists and the Canadian Society of Forensic Science.

[40] Mr. Hrycay gave expert opinion evidence on behalf of the defendants and testified that in his expert opinion, the white tire mark is the single most important indicator of the point of impact.

[41] James Hrycay stated that in his opinion, the gouge or "pavement scarring", as he preferred to call it, was caused in the post-impact phase as the car was sliding to its final resting position. He said it was not indicative of major components being thrust into the ground where

the impact occurred. Gouge marks like this are, according to Mr. Hrycay, not always created at the point of maximum engagement.

[42] Mr. Hrycay explained that the right side of the car would have “tipped up” as the left side was “pinched” under the trailer. There would have been more pressure on the left side of the car, which explains why the rear left tire might leave a mark and others might not. The movement was quick and there was no time for the right side to come back down as heavily as the left rear tire. As the car spun counter clockwise and moved laterally across the road in a northwesterly direction, each tire would follow a different path. If there were three tire marks, since one wheel came off, they would criss-cross. In his opinion, it is not uncommon for some tires to leave no marks. If all of the tires had left marks, Mr. Hrycay would expect to see some curved marks as well. Over a long distance, more curvature would become evident. Over a short distance, like in this case, the mark was only 8.3 metres. It is not unusual for marks to appear straight; this is a function of the length of the tire mark and the amount of rotation of the car. However, in cross-examination he agreed that the rotation would be more pronounced immediately after disengagement, decreasing in velocity to the point of rest.

[43] During his examination in chief, Mr. Hrycay admitted that up until the trial of this action, he had been operating under the mistaken assumption that Constable Osbourne had seen the white tire mark on the night of the accident. Based on Constable Osbourne’s evidence at trial, Mr. Hrycay acknowledged that he now understood that Constable Osbourne had first seen the mark the following morning.

[44] Mr. Hrycay completely discounts the gouge mark as an indicator of the point of impact. Both in his reports and at trial, he insisted that no vehicle components were thrust downward to make the gouge.

[45] On cross-examination, however, Mr. Hrycay conceded that if a gouge were to be created at all during the accident, it would most likely occur at the point of maximum engagement, when the collision forces were greatest. In cross-examination, Mr. Hrycay was asked about his diagram identified as Exhibit 15, a diagram which he created in order to show the position of the vehicles at the point of impact.

[46] Mr. Hrycay was asked whether Exhibit 15 accurately depicts the positions of the vehicles at impact. Mr. Hrycay testified that it did. Mr. Hrycay also testified that the diagram was to scale, including the sizes of the car and tractor-trailer. Mr. Hrycay was then asked whether Exhibit 15 takes the principle of off tracking into account. Mr. Hrycay had previously testified that the off tracking would be negligible, approximately two inches to the left at most.

[47] Mr. Hrycay was then asked to measure the respective distances between the centre line and each of the tractor and trailer. He was given a ruler for this exercise. After performing this measurement, Mr. Hrycay acknowledged that his diagram actually showed the trailer to be off tracking approximately 8 inches to the right; a phenomenon, which even Mr. Hrycay conceded, was a “physical impossibility”.

[48] Upon realizing the problem with his diagram, Mr. Hrycay testified that he would have to move the tractor further south. By necessity, this would then place its right side tires onto the gravel shoulder.

**The theory of the Defendants’ case:**

[49] The theory of the defendants’ case is that the evidence of Constable Osbourne, Mr. Mustard, and Mr. Hrycay, is consistent. If the erasure mark came about as these experts have suggested and particularly as Mr. Hrycay has suggested, its existence can be explained by the location of the car in the eastbound lane, and the movement of the car after the impact. The gouge and the red fluid stain, they argue, are consistent with this theory because they are located along the path of the erasure mark and in very close proximity to it. The pattern of debris as described to Mr. Mustard and Mr. Hrycay by Constable Osborne supports this theory.

[50] Not only does the mark travel in the same general direction as the car is known to have travelled but it displays a similar, albeit slight, curvature in the same counter clockwise rotation as the car is believed to have travelled.

**The theory of the plaintiffs’ case:**

[51] The theory of the plaintiffs’ case is that through expert evidence, the plaintiffs have demonstrated that the white tire mark could not have been produced by the Spek vehicle in its

post-impact movement. The rotation of the vehicle, the lack of alignment of the white mark with the final rest position of the car and the presence of other white marks at the scene, all work to rule out the white mark as an indicator of the point of impact.

[52] More importantly, they argue that the presence of the gouge mark in the westbound lane and the absence of any such markings in the eastbound lanes is powerful evidence supporting the plaintiffs' case.

**The standard of proof:**

[53] The degree of probability required to discharge the burden of proof in a civil case has been defined by several leading jurists. Cartwright J. in *Smith v Smith* [1952]2 S.C.R. 312, articulated the test as follows:

...In every civil action, before the tribunal can safely find the affirmative of an issue of fact required to be proved, it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

As stated by Sopinka J. in *The Law of Evidence in Canada*:

Simply put, the trier of fact must find that “the existence of the contested fact is more probable than its non-existence.” Conversely, where a party must prove the negative of an issue, the proponent must prove its absence is more probable than its existence.

**Analysis of the evidence and findings of fact:**

[54] This case is whether or not the white eraser mark was produced by the Spek vehicle. For reasons set out herein, I find that the Spek vehicle did not produce the white eraser mark and therefore find the gouge mark in the westbound lane to be the point of impact.

[55] The lack of curvature in its post-impact phase, and the presence of other white marks which were not recorded by Constable Osbourne and seen to be present in the pictures, suggests that these white marks could have been made by other vehicles on or around that evening. In particular, the white mark that seems to be perfectly aligned with the checkmark portion of the

eraser mark, which the defendants rely upon as the point of impact, has not been properly explained in my opinion.

[56] Mr. Hrycay was evasive when cross-examined about the other white marks in police photograph 6 of Exhibit 1. At first, he attempted to dismiss these marks as “white shadows” and “patches.” Later, he claimed they were not as pronounced as the white reverse check mark and were therefore not significant. Later still, he claimed that the significance of these other markings was diminished by the fact that they had not been recorded or documented by Constable Osbourne. At one point during the cross-examination, Mr. Hrycay refused to even agree that the unrecorded white mark in police photograph 6 was located a few feet away from the short portion of the reverse check mark.

[57] John Mustard testified that white marks are common but very short lived and that this mark would have to have occurred during some event that happened close to this accident. Mr. Raftery admitted that such marks fade quickly and that the mark that Constable Osbourne saw had to have been left fairly close in time to the accident. Was it the tow truck as suggested by Mr. Raftery? This court has insufficient evidence to answer that question definitely.

[58] The other factor in my consideration is the non-alignment of the white mark and the final resting position of the vehicle. According to Mr. Hrycay, the white tire mark shows the path of the left rear tire in its post-impact phase. Yet, the end of the mark is 13 metres east of where the left rear tire ends up. In other words, according to Mr. Hrycay, the left rear tire travelled in a nearly straight northwesterly path across the eastbound and westbound lanes only to sharply change direction and begin moving west the instant it came into contact with the gravel.

[59] Mr. Hrycay’s explanation for this abrupt directional change was that the force of friction acting on the tire was greater on the gravel than it was on the pavement. Mr. Hrycay provided no evidence to support such a theory.

[60] More importantly, if, in fact, the car had travelled a distance of 13 metres along the gravel shoulder, certainly this would have left a very pronounced mark in the gravel itself. Mr. Mustard believed the same thing. No gravel mark was ever seen or documented.

[61] Finally, if the southern portion of the white eraser mark was the point of impact, then the gravel portion of the eastbound lane would have shown tire markings from the tractor having travelled on the gravel, contrary to Mr. Van Alten's evidence, but certainly in accordance with Mr. Raftery and Mr. Hrycay's evidence once the off-tracking was properly taken into consideration. No such mark was ever seen or documented.

[62] There is universal agreement that the gouge and red fluid stain were caused during or immediately after the collision; according to every expert that testified, they are both related to the collision.

[63] If the defendants' theory of the point of impact is to be accepted, then the testimony of the sole surviving witness to the accident, Mr. Van Alten, must be disregarded, as it relates to the fact that his right tires did not cross the south fog lines of his laneway. More importantly, the fact that Constable Osbourne made no observations of any tire marks in the gravel on the south side of the eastbound lane, is indicative that Mr. Van Alten was telling the truth when he said that his tires did not cross the fog line. I accept that evidence and find that it is impossible for the point of impact to be located at the southern most portion of the white eraser mark.

**Decision:**

[64] As a result of my review and analysis of the evidence and my findings of fact, I find that the white eraser mark could not have been created by the Spek vehicle and, as a result, I accept the plaintiffs' theory that the gouge mark is the point of impact of this tragic accident. I therefore grant judgment in the plaintiffs' favour. The parties having already agreed on the quantum of damages, the judgment shall issue in the amount agreed upon. The action for property damage is hereby dismissed.

[65] Should the parties be unable to agree on the issue of costs, I am prepared to review brief written submissions on costs for the plaintiffs within 20 days of today and for the defendants, within 20 days thereafter and any reply, if necessary, within 10 days after that.

“Justice J.N. Morissette”

Justice J.N. Morissette

**Released:** April 1, 2004

**COURT FILE NO: Toronto 96-CU-99749  
London: B-27375T and Court  
file no.22878/96**

2004 CALL 115925 (ON SC)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CORNELIUS SPEK, IDSHE SPEK, ANDREW  
SPEK and JUDITH SPEK.

Plaintiff

- and -

HENDRICK VAN ALTEN and HYNDMAN  
TRANSPORT [1972] LIMITED

Defendants

**AND BETWEEN:**

HYNDMAN TRANSPORT [1972] LIMITED

- and -

CORNELIUS SPEK, Litigation Administrator of THE  
ESTATE OF STEVEN SPEK

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**REASONS FOR JUDGMENT**

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**MORISSETTE J.**

**Released:** April 1, 2004