

**Breau v. Powell Estate, [1991] O.J. No. 604**

Ontario Judgments

Ontario Court of Justice - General Division

Kitchener, Ontario

Salhany J.

March 28, 1991

Action Nos. 325/84 and 326/84

**[1991] O.J. No. 604**

Between Albert Breau, Plaintiff, and Colin Jackson, Litigation Administrator for the Estate of Timothy Powell, deceased Joanne Meyer and Harold Edwin Meyer, Defendants And Between Boyd Greenfield, Plaintiff, and Colin Jackson, litigation administrator of the estate of Timothy Powell, deceased, Joanne Meyer and Harold Edwin Meyer, Defendants

(7 pp.)

M. Grossman, for Albert Breau and Boyd Greenfield. James Regan, Q.C., for Joanne Meyer and Harold Edwin Meyer.

---

**SALHANY J.**

On June 22, 1983, the plaintiffs, who had finished their shift at J.M. Schneider in Kitchener at 2:45 p.m., decided to take a drive on their motorcycles throughout the Region of Waterloo and neighbouring counties. At approximately 9:15 p.m., they were returning home travelling south along Regional Road No. 17, known as the Bloomingdale Road. As they proceeded around a curve that veers to the west, they were overtaken in the north bound lane by a Camaro driven by a youth, Timothy Powell. Powell had a car load of young people. As is too often the case, Powell had consumed an excessive amount of alcohol and narcotics so that his manner of driving was dangerous to others using the highway. Both plaintiffs were driving at the posted rate of speed, namely 80 kilometres an hour. Powell was driving the Camaro at a speed estimated to be at least twice that of the plaintiffs. As Powell proceeded to pass the plaintiffs on a curve, he set off a chain of unfortunate events that caused his death and that of all of his passengers.

The first vehicle he struck was a northbound oncoming Ford van driven by Alfred Babineau, causing the death of Mr. Babineau and injuries to a number of his young passengers. The Powell vehicle then went out of control and proceeded southely along the Bloomingdale Road where it collided with a plymouth volare owned by the defendant Harold Meyer and driven by his daughter Joanne Meyer. Miss Meyer has since married and her married name is Langstaff. The plaintiffs, who were met with this emergency situation, attempted to stop their motorcycles in time to avoid injury but were unsuccessful. At issue in this action is whether Joanne Langstaff was negligent in her attempt to avoid collision with the Powell vehicle anti thereby caused or contributed to the plaintiffs' injuries.

The Bloomingdale Road begins its curve to the west approximately 200 metres north of where the first collision occurred. As the plaintiffs approached the curve, they were travelling approximately 80 kilometres per hour. For some distance, they had been following three vehicles. Two of the three vehicles turned left before they reached the

curve. The third, a pinto was being driven somewhat slower causing the plaintiffs to reduce their speed a little as they entered the curve.

Both plaintiffs testified that when they were approximately one-quarter way into the curve, they become aware of a vehicle, which turned out to be the Powell camaro, passing them on the other side of the road, that is the north bound lane, at a very high rate of speed. They estimated that speed to be twice that of their own vehicles. As Powell passed them, they observed for the first time the approaching Babineau van followed by the Meyer volare, a short distance behind. They were of the view that both approaching vehicles were travelling at a moderate rate of speed. Because of the speed and position of the Powell vehicle, they realized that a collision was imminent and inevitable. Both applied their brakes. As they did so, a collision, which they described as an explosion like a fireball, occurred in front of them scattering debris and wreckage.

As the Powell camaro approached the Babineau van, Powell must have realized that there was going to be a collision because he turned his wheel to the right. Alfred Babineau had at most two seconds to react from the time he saw the Powell camaro. He applied his brakes and pulled to the right. His brakes apparently locked because the van left a skid mark of 7.9 metres to the point of collision. The result was that the left front part of the Powell vehicle struck the left front part of the Babineau van. The van then went into the east ditch spinning approximately 90 degrees in a counter clockwise direction. The Powell vehicle also made a 90 degree counter clockwise turn and ended up sliding southerly down the highway straddling the centre line until it eventually crossed over onto the south bound lane. It travelled a distance of approximately 36 metres until it was struck at right angles by the Meyer vehicle which had crossed from the north bound lane onto the south bound lane.

The size of a camaro has been estimated at ranging from 15 feet to 18 feet. The first collision pushed in the left front part of the Powell camaro approximately three feet. This undoubtedly caused damage to the vehicle's radiator. The evidence indicates that as it slid down the road facing easterly, the radiator left a fluid stain on the north bound lane a distance of approximately 24 metres. The rear tires of the Powell vehicle also left a 26.5 metre skid mark beginning on the north bound lane a distance of 3.5 metres from the east edge of the roadway and ending 7.2 metres from the east edge of the roadway in the south bound lane. The paved portion of the roadway was measured by Constable Paul Gross and found to be found to be 7.4 metres, that is 3.7 metres in each lane.

After the collision, the speedometer in the Powell vehicle was found to be jammed at 140 kilometres per hour which was consistent with the evidence given by the plaintiffs as to the speed of the vehicle. Consulting engineers called on behalf of both parties, Mr. Alan Davidson and Mr. Raymond Boulding agreed that the force of the first collision would de-accelerate the speed of the Powell vehicle as it slid down the road. It was their view that the Powell vehicle was probably travelling at a speed of approximately 80 kilometres per hour from the first collision to the second collision. They both agreed that this meant that there was a two second interval between the first and second collision. In other words, Joanne Langstaff had approximately two seconds to react from the time that she observed the first collision until her vehicle came in contact with the Powell vehicle.

Both Mr. Davidson and Mr. Boulding were of the opinion that consulting engineers involved in the reconstruction of accidents accept that the average person's perception time is three quarters of a second and that his or her reaction time is an additional three quarters of a second. In other words, it takes one and half seconds from the time that the average person observes a situation of danger until that person actually applies the brakes.

As the plaintiffs proceeded southerly along the Bloomingdale Road, Boyd Greenfield was driving his motorcycle on the inside while Albert Breau was to his, left and slightly behind. Greenfield testified that when he realized that a collision was going to occur, he immediately applied his brakes which caused them to lock. Although he was able to stay on his motorcycle, at some point of time, it turned over and the vehicle slid down the highway coming into collision with the left rear of the Powell vehicle. He sustained a number of serious injuries. Since counsel have settled the issue of damages for both plaintiffs it is not necessary to outline those injuries. Albert Breau similarly applied his brakes when he realized that a collision was imminent. His brakes did not initially lock but eventually they did. He said that he lost control of his vehicle due to the debris on the roadway caused by the first collision. He found himself lying in the centre of the roadway approximately five feet north of the Powell vehicle. He also had a number of injuries, although not as serious as his companion.

As I said earlier, at issue in this action is whether Joanne Langstaff's action in turning from the north bound lane into the south bound lane was negligent thereby causing and contributing to the plaintiffs' injuries. Turning first of all

to the injuries sustained by Albert Breau, the evidence clearly indicates that he lost control of his vehicle because he applied his brakes to avoid the imminent collision between the Powell camaro and the Babineau van and that he eventually lost control of his vehicle because of the debris created by that collision. He did not come in contact with either the Powell or the Langstaff vehicle, nor did he ever reach that second collision. In my view, there is nothing in the evidence to suggest that even if Ms. Langstaff was negligent in turning to the left, that negligence or caused or contributed to Albert Breau's injuries. For these reasons, his action will be dismissed.

Turning now to the injuries suffered by Boyd Greenfield, Mr. Grossman argued that there is an obligation upon drivers of the road to drive defensively. He relied upon the evidence of Mr. Davidson who had prepared an Accident Reconstruction Schematic. This Reconstruction Schematic pinpointed where he believed all the vehicles were located for approximately 165 metres prior to the first collision. This Reconstruction Schematic was prepared in 1988, five years after the accident. It suggests that had Ms. Langstaff been driving defensively and looking ahead more particularly to her left, she would have seen all of these approaching vehicles in the distance. The difficulty with that submission is that on Mr. Davidson's own evidence she would not have been necessarily able to recognize that the Powell vehicle was in the process of passing the plaintiffs and the vehicle in front of them and creating a situation of danger.

It has been long settled that the conduct of a defendant driver must be assessed in the light of the crisis that was looming up before him or her, that is, the "agony of the moment." When one is confronted with the shock of an emergency, he or she should not be judged by standards involving deliberation and opportunity for conscious decision or, as what has been called, "nice judgment and prompt decision": see *Harding v. Edwards and Tatisich* (1929) 64 O.L.R. 98, affirmed (1931) S.C.R. 167; *Neufield v. Landry* (1974) 55 D.L.R. (3d) 296; and *Bridges v. Hunter* (1977) 17 N.B.R. (2d) 451.

What is significant in this case is that Alfred Babineau, who was in front of Mrs. Langstaff and who had a clear view of the Powell vehicle, was unable to avoid a collision. The fact that his vehicle only left a 7.6 metre skid mark indicates that he probably only had two seconds to react. Assuming that we could reconstruct what Mrs. Langstaff was faced with in the calm atmosphere of these chambers and with the opportunity for "conscious decision", we must ask ourselves what was Mrs. Langstaff faced with? She said that what she saw in her lane was a car coming straight towards her. That the Powell vehicle was travelling towards her straddling the centre of the line for almost 26 metres is clear on the evidence. Ms. Langstaff had a little over one second to decide whether to turn to the left or to the right. It is true that she might have been able to avoid the collision had she pulled onto the right shoulder but, ironically, it is equally possible that this manoeuvre might have caused her to run over Mr. Breau. In my view, it was a natural reaction for her, faced with the prospect of the oncoming Powell vehicle, to pull to the left to avoid it. She can not be said to be negligent because, in hindsight, we can now say she might have been able to avoid a collision with the Powell vehicle if she had taken to the shoulder on her right. For these reasons, the action of Boyd Greenfield will also be dismissed.

The costs will follow the event and the defendants will be entitled to their costs of these actions against the plaintiffs unless counsel wish to make submissions in writing within 15 days.

SALHANY J.