COURT FILE NOs.: 03-9726 and 04-14563
DATE: June 2, 2008

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DONALD B. GREER, by his Litigation Guardian, William David Greer, WILLIAM DAVID GREER, personally, DONNA GREER, JAMES GREER, GARY McCARTHY, TAMMY GREER and KERRY GREER	David F. MacDonald, Michael Bennett and Adrienne M. Kirsh, for the Plaintiffs
Plaintiffs	
- and -	
KARL KURTZ, CITY OF HAMILTON, TOWN OF PARIS, CITY OF BURLINGTON, and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO	Gerald A. Swaye, Q.C. and Stephen H. Fay, for the Defendants
Defendants	
- and -	
INTEGRATED MAINTENANCE & OPERATIONS SERVICES INC. and JOHN BOUWMEESTER	No one appearing
Third Parties	**HEARD:** January 14,15, 16, 17, 18, 21, 22, 25, 28, 29 & 31, February 1 & 4, 2008

AND	)	
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	)	
B E T W E E N :	)	
	)	
DONALD B. GREER, by his Litigation Guardian, William David Greer, WILLIAM DAVID GREER, personally, DONNA GREER, JAMES GREER, GARY McCARTHY, TAMMY GREER and KERRY GREER	)	David F. MacDonald, Michael Bennett and Adrienne M. Kirsh, for the Plaintiffs
Plaintiffs	)	
- **and –**	)	
DAIMLER CHRYSLER SERVICES CANADA INC.	)	Gerald A. Swaye, Q.C. and Stephen H. Fay, for the Defendant
Defendant		

MATHESON, J.

JUDGMENT

[1] This is a civil automobile negligence action. There were a number of actions arising out of this accident. Fortunately, counsel and some of the parties were able to settle their claims.

[2] The parties left are Donald Greer, by his Litigation Guardian William David Greer, Karl Kurtz, Daimler Chrysler Services Canada Inc., Integrated Maintenance & Operations Services Inc. and the City of Hamilton.

[3] Either all other parties have settled, or the cause of action has been withdrawn.

[4] The parties mentioned in paragraph two, other than Karl Kurtz and Daimler, have entered into a Pierringer Agreement. This agreement was signed on the 10th of January 2008 and is Exhibit 27.

WHAT IS A PIERRINGER AGREEMENT?

[5] The courts of Canada are facing an increasing workload and counsel are coming up with new ways to avoid costly and lengthy trials. I have reviewed a paper given by Peter Cronyn and James Brown. They presented this paper at Montebello, Quebec on November 1, 2002. It deals with Mary Carter Agreements and Pierringer Agreements.

[6] The authors favourably quoted Justice Callaghan when he stated:

> "... [T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interest of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system ...."

[7] Rule 2.02 (2) of the *Rules of Professional Conduct* provides:

> "A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do soon on a reasonable basis ..."

[8] Counsel have come up with these agreements in order to resolve or shorten trials.

[9] The authors state the following:

> "Under a Pierringer Agreement, the plaintiff agrees to accept a specific amount in full satisfaction of his or her claim against one or more settling defendants, and the plaintiff then discontinues the actions against the settling defendants. The essential difference between a Mary Carter Agreement and a Pierringer Agreement is that the settling defendant in a Pierringer Agreement does not continue their involvement in the case.
>
> The following are the hallmarks of a Pierringer Agreement:
>
> - the settling defendant's liability is segregated
> - the satisfaction of the settling defendant's liability to the credit of all parties to the litigation
> - the plaintiff's ability to continue with the action against the remaining defendants
> - the plaintiff's agreement that it will indemnify the settling defendant for any contribution sought from it by the non-settling defendant(s)."

[10] The Agreement must be disclosed to all parties including the court almost as soon as it is finally executed. There must be procedural safeguards to protect the non-settling party or parties.

[11] In this Pierringer Agreement the settling defendants are City of Hamilton ("Hamilton") and Integrated Maintenance & Operations Services Inc. ("IMOS").

[12] In the Agreement, the settling defendants agreed to pay a certain amount to the plaintiffs. The plaintiffs will give a full and final release to the settling defendants.

[13] The settling parties agree to make their witnesses available to the plaintiff.

[14] Paragraph 9 of the Agreement states that all parties are bound by the decision of the court under section one of the *Negligence Act*.

[15] Section one of the *Negligence Act* reads as follows:

> "**1.** Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. R.S.O. 1980, c. 15 s. 2."

[16] I find that the present Pierringer Agreement has greatly shortened the trial and all parties' interests have been protected.

[17] Counsel for all the parties have indicated that the amount of damages has been agreed upon and that the only issue remaining is the question of allocation of liability.

THE ACCIDENT

[18] This accident, like all such accidents, has changed the lives of the three people injured but also members of their families and friends.

[19] Donald Greer ("Greer") was 29 years of age at the time of the accident, having been born on August 10, 1973. Karl Kurtz was 72 at the time of the accident, having been born July 10, 1931. Emmy Kurtz would be 70 at the time of the accident, having been born June 20, 1933.

[20] All three have suffered greatly, and nothing that this court can do will restore them to the positions of health that they all had before the accident.

[21] The accident occurred on the 2nd of March 2003 shortly after 8:00 pm on Highway 5. The site of the accident was approximately halfway between Woodhill and Orkney Roads.

[22] Neither driver had consumed alcohol.

[23] Greer was not able to provide much evidence with respect to the accident because of the severe head injuries that he incurred because of the accident. He worked in a security firm in Greensville, and would drive from his home in Paris to Greensville five times a week. It would take him about 45 minutes to do the drive, after picking up cigarettes and a coffee.

He was to start work at 8:30 pm, so he was of the belief that he was not in a hurry. He would be traveling east on Highway 5.

[24] Karl Kurtz and his wife Emmy had been visiting their daughter in Waterford. They arrived between 3:00 and 4:00 in the afternoon. They were driving back to their home in Brantford. They would be traveling west on Highway 5.

[25] Karl Kurtz did not find the driving bad, except for the blowing snow. It was windy. He said to Emmy, "We should take it easy, you know." (See Question 68 of Discovery).

[26] He stated on his Examination for Discovery that he did not know if the road was icy or not. (Question 72)

[27] He stated that the traffic was light. He stated that he had good vision even with the blowing snow.

[28] On the Examination for Discovery he stated that his wife said "Look", and he said to her, "Oh, we better watch out." (Question 102 of his Discovery)

[29] The answers he gave to the police, the insurance company, on Discovery, and at trial vary. They vary from 70 kilometres per hour to 45 kilometres per hour. The highway was posted for a maximum speed of 80 kilometres per hour. It must be remembered that the posted speed limit is under the best conditions in daylight. At the time of the police statement Karl Kurtz was still in hospital and was under medication for pain.

[30] He stated that he did not go over 65 kph, yet in a statement to insurance agent Anna Petronio on July 4, 2003, he states that he was going 70 kph. (See Exhibit 30)

[31] Emmy stated that she felt that he was going between 55 and 60 kph at the time of the impact.

[32] He stated on Discovery that he was driving carefully because of the weather. He took his foot off the gas when he saw the Greer vehicle go into his lane for the first time. He said if there were ice you are not to use your brakes. (Examination for Discovery Questions 170-171)

[33] There is no dispute that Greer's car went into the Kurtzes' lane, anywhere from 200-300 metres on the first occasion. He stated on the Examination for Discovery that it could have been 50-100 metres. (Questions 113-115)

[34] The next time that Greer's vehicle went into the Kurtzes' lane is in dispute. In his Examination for Discovery, Karl Kurtz stated that the Greer vehicle came into his lane one to two car lengths before the impact. (See Questions 132-133)

[35] He stated that if the Greer car had come into his lane 20-30 yards he would have taken evasive steps and gone onto the shoulder or onto the vacant field. (Questions 176-178).

[36] In a statement that Officer Lenters took from Karl Kurtz on the 20th of March 2003, it reads as follows: "I saw the car coming towards us sliding all over the street back and forth." (Exhibit 1, page 14)

the defendants of the authenticity of the named documents. This will be Schedule "A" to my judgment. It is also Exhibit 8.

EXPERT EVIDENCE

[83] Mr. Joseph J. Lynch ("Lynch") has a P.Eng and is an employee of Hrycay Consulting Engineers Inc. He has been employed there since July 2003. He has taken many courses in traffic accident reconstruction.

[84] On the 6th day of December 2007, he and others attended at the accident scene. He had in his possession the police photographs of the accident scene. These pictures are in Exhibit 2. There is an Exhibit 2(a) as well. These are glossy prints of the accident site and show the final resting places of the Kurtz and Greer vehicles.

[85] Lynch stated he would set up his Leica Total Station in the area of the accident site. He would then look at the photographs and note the items that were still there at the time of the accident. He would then operate the Total Station to obtain measurements. He would then be able to locate the vehicles at their final resting point.

[86] He had a reference point, which in this case was a pole which was behind the Greer vehicle in picture 14 in Exhibits 2 and 2(a).

[87] He made 92 measured points. He made field notes, which are tab 2 of Exhibit 19. He took photographs that are found at tab 3 of Exhibit

19. The police pictures that he took to the site are found at Exhibit 2, tabs 3, 4 through 17. There are also glossy prints of same that are Exhibit 2(a).

[88] There were tests that he did to make sure that the measurements that the Total Station made were accurate.

[89] He would then come back to the office and consult with James Hrycay. He would then download the information obtained by the Leica Total Station on a machine known as an AutoCAD.

[90] The 92 points obtained by the Total Station would then show up on the AutoCAD screen. By connecting to points, the outline of the roadway is shown. Later, using the police photographs and from the site inspection, one is able to show the final resting points of the vehicles.

[91] These are then printed out, and one can see the end result at Exhibit 11, Figure 1, Accident Site.

[92] Mr. Hrycay did some of the calculations.

[93] One must remember that this was done shortly before the start of the trial and some four and a half years after the accident, that the width of the road had been widened slightly, and the ditch had some gravel put into it lessening the depth.

[94] Lynch did Google the site and he was satisfied that it confirmed his findings in Exhibit 11, figure 1.

[95] The expert called by the defendants, Mr. Raftery, indicated that the final resting place of the Kurtz vehicle was some 20 metres west of that

shown in Exhibit 11 at Figure 1. Other than that, he had no argument with the drawing.

DWAYNE D. ELLIS

[96] Hrycay Consulting Engineers Inc. has employed Mr. Dwayne D. Ellis ("Ellis") since July 1997. He specializes in the area of Motor Vehicle Accident Visualization.

[97] He has attended courses in that field and has given lectures and written papers as well.

[98] He prepared a visualization of the accident based on the information he received from Lynch and from Hrycay.

[99] He would take the material that Lynch had prepared and put it into a machine known as an Autodesk 3ds Max 2008. Hrycay would give him more information, such as the speed of the two vehicles and how they reacted. It is important to remember that this is information that Hrycay found as a result of the damage done to the vehicles and the road conditions and the lighting at the time of the accident.

[100] Once Autodesk 3ds Max 2008 was inputted with this information, Lynch was able to prepare a video of how the vehicles reacted to the conditions. It must be remembered that if there is a difference in the information inputted there will be a difference in the resulting video. With respect to the final diagrams prepared by Lynch, there was not much

difference between Lynch and the defendant's expert witness, Raftery. The difference was that Raftery felt that the Kurtz vehicle came to rest about 20 meters to the west of where Lynch had it placed.

[101] Hrycay had indicated that if there were changes in the road surface, such as more or less black ice, or if the cars were proceeding at speeds different than he stated them to be, there would be differences in the resulting video.

[102] At the trial a video was played that re-enacted how Hrycay found the two vehicles to have acted. This was Exhibit 31. There was a second video that indicated how, according to Hrycay and another expert witness Dean Korolas called by the plaintiff, Kurtz should have reacted. It indicated evasive action on behalf of Mr. Kurtz. I did not allow that video into evidence, the reason being that I found that it was entering into the judge's realm. I gave a partial ruling on that during the trial and will be giving fuller and better reasons later.

[103] Exhibit 31, in my opinion, gave an accurate reflection of the evidence as provided by Lynch, Ellis and Hrycay. As indicated, the expert witness Raftery, called by the defence, differed somewhat in his evidence. I will be commenting on that at a later time.

JAMES HRYCAY

[104] Hrycay, on consent, was deemed to be an expert in accident reconstruction, accident investigation and computer simulation. His *curriculum vitae* is found at Exhibit 15.

[105] He gave evidence that he had instructed Lynch and Ellis to prepare the graphics. They acted under his instructions.

[106] He did view the police photos and the work of Ellis and Lynch, and felt that Exhibit 11, Figure 1 Accident Site, was an accurate reflection of the accident scene and the final resting positions of the Greer and Kurtz vehicles. As indicated, Raftery felt that the Kurtz vehicle was 20 metres to the west.

[107] He acknowledged that the shoulder of the roadway had been changed and that the ditch to the north had been partially filled in since the accident.

[108] Hrycay did not attend the site of the accident until the 23rd of January 2008, after the trial had started.

[109] He indicated that lighting for a visualization video is always difficult. He stated that he had made changes to the video lighting on several occasions.

[110] He made the following assumptions or findings:

1. He did not rely on the debris from the accident as shown in the police photos. He did that because of the wind. This position is also backed up by the police who stated that the ambulance people had moved them in giving medical attention to the Kurtzes.
2. He did not consider that there were dry spots on the asphalt pavement. He based his findings that the roadway was uniformly icy at the time.

3. Because of that, he states that the road friction was 0.25. Hrycay stated at a different time that the road friction was between 0.2 to 0.3. If it were asphalt only, it would be 0.8. (As I understand the evidence, a road friction of 0.25 is much slipperier than a road friction of 0.8.)

4. That on March 2, 2003, the date of the accident, he found that the illumination from the moon was only 5%, and thus not a factor in lighting.

5. He stated that the Greer vehicle was in the Kurtz lane 4.5 seconds before the impact. He states that Mr. Kurtz had 1.5 seconds to perceive and react, and thus had 3 seconds to take evasive action. It would appear that he was relying on the same information that Raftery was using. This was information taken from a paper entitled "Driver Perception Response Time" by Paul Olson. This is found at Exhibit 12 at page 26. (I will have more to say about this later when I make my findings concerning the accident.)

6. The speed of both vehicles was between 55-60 kph at the time of impact.

7. Greer's vehicle was in the Kurtz lane for the second time about 300 meters before the impact.

[111] The basic statement of Hrycay is that Mr. Kurtz had more than sufficient time to avoid the accident and he should have gone onto the shoulder and avoided the accident. While he is acknowledged as an expert in accident reconstruction, accident investigation, and computer simulation, he was not qualified as an expert in perception/reaction time.

[112] Hrycay provided the court with some findings from a paper dated April 18, 2001, which was a summary of simulated crashes of automobiles. This is Exhibit 23. From these crashes, investigators are able to determine the speed of the car at impact. From that, one could determine

because of the damage sustained and the position of the damages a good estimate as to the speed of the car.

[113] I find that both Hrycay and Raftery are in the same area as to the total speed of the cars at impact. The difference is the allocation of the speed to each car. That will play an important part in determining the speed of the vehicles. Greer, because of his injuries, is not able to assist on that issue. Mr. and Mrs. Kurtz gave a number of different speeds. I will deal with that later as well.

DEAN KOROLAS

[114] He gave evidence from his experience in teaching drivers how to safely drive vehicles on the roadways. He teaches them the best way to drive and what dangers they should be looking for.

[115] It is interesting to note that his report, Exhibit 26, was dated December 21, 2007, for a trial starting January 14, 2008.

[116] He states that there should be a "Minimum Eye Lead Time" of 20-30 seconds. This, in his opinion, would allow the driver to "spot the problem and respond/react appropriately". He did not give the scientific basis for this, and whether there are variations because of age, health, lighting, and visibility.

[117] He also took for granted that the Greer vehicle was in the lane of the Kurtz vehicle for the time stated by Hrycay. He also stated that Kurtz

should have taken evasive action by going onto the shoulder. If the Greer vehicle was moving to the north, then the movement to the shoulder would not be advisable.

[118] The police place the point of impact two metres south of the centre line. The point of impact as shown by the diagrams and video of Hrycay has the Kurtz vehicle veering to the left away from the shoulder.

[119] In my opinion, Mr. Korolas was called in at the last minute to bolster the position taken by Hrycay. While I am sure he does excellent work for Young Drivers of Canada, he did little to assist the court with his testimony.

LIABILITY OF THE CITY OF HAMILTON, INTEGRATED MAINTENANCE & OPERATIONS SERVICES INC. and JOHN BOUWMEESTER

[120] As indicated in paragraph 14 of this judgment, the City of Hamilton and IMOS have agreed to be bound by the decision of the court as to the apportionment of liability pursuant to s.1 of the *Negligence Act*.

[121] The only direct *viva voce* evidence that we heard from the City or IMOS was that of the employee John Bouwmeester.

[122] Bouwmeester recounted his activities that day. He, as indicated, had little or no training in the operation of a snowplow/salter truck. He stated that the roads were wet and that when the temperature fell the roads became quite slippery. When he arrived at the scene, it was, in his opinion,

quite slippery and he had to back into the accident scene. People that were there took salt from his truck and applied it to the area around the accident site.

[123] Certainly the City and, in particular, IMOS had a duty to have trained and experienced snowplow operators doing their job. Because of the lack of attention and training, serious injuries have been done to Greer and the Kurtz family. Much of the blame is attributable to the lack of attention by the City and IMOS. It would appear that each thought that the other was covering any deficient areas.

[124] The City and IMOS entered into a contractual agreement on the 26th of August 2002. This agreement covered services by IMOS to the City streets and included snowplowing and de-icing, etc. If there were any misunderstandings between the two parties, it would be up to the parties to resolve that misunderstanding. Apparently, there were shortfalls but neither party drew it to the other's attention.

[125] Hrycay, in his report of October 1, 2006 (Exhibit 9), goes into great detail as to the areas where there was a misunderstanding between the parties. Both had a duty to resolve those issues. They did not.

[126] Aside from the personnel that was at the site of the accident, much of the evidence with respect to the duty of care of the City and IMOS comes from the very detailed reports of Hrycay. These are Exhibits 9 and 10.

[127] From these reports it is evident that IMOS gave very little training to Bouwmeester. This was also confirmed by Bouwmeester himself.

[128] In Hrycay's report of October 1, 2006, Exhibit 9, he gives the weather data from March 1 until the accident. He states:

> " This weather data indicates that the Hamilton area generally experienced continual below freezing temperatures for the last week of February 2003 leading up to 1 March with no less than 12 cm of snow on the ground.
>
> According to the Monthly Meteorological Summaries and the Hourly Data Report, on 1 March 2003 the maximum temperature peaked above freezing and the area experienced 1.4 cm of new snow which continued into the next day resulting in an additional 3.4 cm falling on 2 March 2003. In the early morning hours of 2 March the winds were calm and snow and freezing fog were recorded as having occurred. The wind speed picked up by 5 am to 13 km/h and the winds were steady at that speed climbing to about 17 km/h at 8 am when the last falling snow was recorded. This left 15 cm of snow on the ground.
>
> From 8 am to approximately 1 pm the winds continued to blow between 17 to 22 km/h while the temperature remained at about freezing. However, during the afternoon of the 2nd, the temperatures rapidly dropped from freezing to -10.2° C in a matter of 4 hours while the wind speed had doubled from what it was when the last snow had fallen.
>
> For the 8 hours leading up to the time of the accident (8:12 pm), the air temperature was rapidly dropping reaching approximately -16° C while the winds continued to blow at 30 km/h."

[129] In the letter of Hrycay to Thomson Rogers, dated the 29th of October 2007, Exhibit 10, he states the following:

> "I do not agree with the Griffin conclusion that IMOS duties were carried out in a timely fashion. The dispatch record for 2 March 2003 indicated that John Bouwmeester was called in at 2 pm and arrived at 3 pm. The Hours of Service specification (SW 2 of the City of Hamilton Tender Document) require IMOS operators to be operational within 30 minutes of being notified. Mr. Bouwmeester took twice the allotted time."

[130] I agree with that assessment. When Bouwmeester did arrive, he took his time and indicated that he went to other roadways before going to the accident scene. He apparently arrived at 3pm and had not attended the accident area until after the collision had occurred.

[131] The Government of Ontario passed Ontario Regulation 239/02 under the *Municipal Act*. This deals with the responsibility for maintaining a minimum maintenance standard for municipalities' roads including winter conditions.

[132] On the day in question I find that these winter maintenance standards were not met by either the City or IMOS. Specifically, I find the shortfall as follows:

1. They did not react in a prudent manner when the weather forecasters indicated a drastic fall in the temperature after being above freezing for a period of time.
2. IMOS did not properly train its snowplow operators.
3. At least Bouwmeester was called in late.

4. There would appear to be a lack of training.

5. Both the City and IMOS were aware of the shortfall in the agreement, at least with respect to the duties of each. Both felt that the other would look after the shortfall, to the detriment of the public.

[133] I have reviewed the conclusions as set out in Exhibit 9 at page 25. They are as follows:

"All of my opinions and conclusions have been outlined in detail in the body of this report. As a result of my investigation and analysis I can summarize some of the main conclusions as follows:

1. ... (This is omitted because I will deal with question of liability between the Kurtzes and Greer)

2. With the use of the available technology and information, the City of Hamilton and IMOS should have know(sic) well in advance that icy road conditions would form in the afternoon of 2 March 2003.

3. IMOS knew its failure to co-operate with the City of Hamilton in identifying the required level of service for Priority 1 Roads within the City placed the motoring public in danger in the event of a winter storm.

4. The City of Hamilton and IMOS were not keeping with standards set by the City of Hamilton for winter maintenance and they failed to meet the minimum maintenance standards specified in Ontario Regulation 239/02.

5. Ice likely formed on the road surface on Highway 5 between Woodhill Road and Orkney Road around 4 pm on 2 March 2003.

6. The failure by the City of Hamilton and IMOS to meet their own standards or the minimum maintenance standards resulted in the occurrence of the slippery road conditions which caused this accident."

[134] I will deal with the question of apportionment of liability with respect to the City and IMOS after I have deal with the liability of Greer and Kurtz.

LIABILITY OF GREER and KURTZ

[135] The main issue to decide is the liability of Messrs. Greer and Kurtz.

[136] We have the lack of evidence from Greer as to what he did on the night in question and what his speed was.

[137] The Kurtzes give a number of estimates as to what their speed was and what they did and saw. One must remember that they too were injured and were in hospital for some time. Some of the interviews took place in the hospital. I have already stated what their beliefs were as to the speed.

[138] As to what the speeds of the vehicles were at the time of impact, the court must rely on, to a degree, the reports and evidence of Hrycay and Raftery.

[139] The first Hrycay report did not deal with the issue of speed or avoidance by either driver. See Exhibit 9.

[140] The second Hrycay report, dated 29 October 2007, and filed as Exhibit 10, deals with speed and avoidance issues. He states quite candidly

that there are difficulties in reconstruction. On page 3 of his report he states:

> "I am well aware of the foregoing described complexities in reconstructing the vehicle speeds and impact positions in this accident based upon my 25 years of experience in using similar computer programs as PC-Crash (in my case SMAC, CRASH2, CRASH3, EDCRASH, EDSMAC, the EDVAP family, and the HVE 2 and 3D family of computer software programs) and I would assume Mr. Young and Ms. Cooper would also be aware of these same issues. Hence, I reserve my opinions regarding the results derived from this analysis until I am able to review all of the data relied upon by the Giffin authors including the input data and parameters that make up and control the vehicle model and roadway model, and the simulated driver inputs used for the various simulated runs."

[141] That was all that he mentioned in that report.

[142] The Raftery report dated October 18, 2007, and filed as Exhibit 12, deals with the issues of speed and avoidance. He refers at pages 22-23 of his report to the difficulty in determining speed.

[143] He states in his report that the speed limit was 80 kilometres per hour. He also states that "[w]hile it was reasonable to conclude that Karl Kurtz braked at some time before the impact occurred, there is no way to establish if that braking was in response to:

a) seeing the Nissan Pathfinder enter the westbound lane the first time; or

b) seeing the Nissan Pathfinder start to move into the westbound lane the second time; or

c) both the above."

[144] Raftery, in his report, does not give an estimate of the speed of the Kurtz vehicle.

[145] In his evidence he states that the combined speed of the vehicles at impact was some 80 kph. This was different than the combined speed given by Hrycay of 120 kph. He did change that later in his testimony, that the speed on impact was 120 kph. Raftery did feel that the Greer vehicle was traveling much faster than the Kurtz vehicle.

[146] Hrycay, in his report dated 21 of December 2008 and filed as Exhibit 11, stated the following at page 7:

> "... In order for the impact to have occurred at the likely impact orientation, the brakes of the Pathfinder would have to have been active at some point after the beginning of the oscillations and during the loss of control to induce a loss in steering and maintain the desired vehicle rotation towards the impact area. Furthermore, it was determined that an initial travel speed of approximately 80 [km/h] resulted in the Pathfinder reaching the impact location in the required orientation at an impact speed of 55 [km/h] to be consistent with the physical evidence from impact to rest. Although variation of the initial speeds on the part of the Pathfinder higher and lower than 80 km/h resulted in different lengths of time that the Pathfinder was obviously out of control, these speed deviations were less likely to result in the Pathfinder reaching the range of impact locations at the correct position, orientation, and speed to be consistent with the impact to rest evidence.
>
> Based upon the results of my analysis of the pre-impact and impact events I must conclude that the Greer vehicle was likely travelling approximately 80 km/h when it lost control. It eventually rotated clockwise such that by the time it collided with the Sebring it was oriented more perpendicular to the road with its driver's side exposed to the westbound Sebring and it

> had lost approximately 20-25 km/h of its initial speed. The two vehicles collided with their front-ends straddling the centerline and the Sebring angled slightly toward the south with the Sebring and the Pathfinder experiencing impact speeds of approximately 55 to 60 km/h (110 to 130 km/h closing speed).

[147] There is evidence that the Kurtzes were aware of the Greer vehicle being out of control the first time. They were not certain if the Greer vehicle ever regained control. Both state that Mr. Kurtz took his foot off the gas pedal, but did not apply the brakes because of black ice.

[148] I make the following findings:

1. The Greer vehicle was initially out of control. It had a duty to reduce its speed in a safe manner.
2. The Greer vehicle did not reduce its speed sufficiently to keep in control.
3. There was black ice as well as some uncovered asphalt on the roadway. This would allow for better traction.
4. The Kurtz vehicle did slow down, but did not do so sufficiently. It should have slowed down from first seeing the Greer vehicle in its lane some 300 metres ahead. It would have at least lowered the impact speed.

[149] The next issue to be decided is whether the Kurtz vehicle should have taken evasive action.

[150] The night in question was dark, windy, and very cold. There was black ice on portions of the highway. The shoulder was free of black

ice. The shoulder and roadway had been altered slightly since the accident. There was a ditch that was some three metres deep and was snow-covered.

[151] Hrycay states that there was some 4 ½ seconds after the Greer vehicle that Kurtz had to slow down and move to the shoulder. He states the following at page 11 of Exhibit 11:

> "The degree of slipperiness of the roadway precludes the ability of either vehicle to undergo any sudden or sharp movements. Hence, it takes some time for Mr. Greer's vehicle to lose control and rotate into the position it was in at the time of impact. Prior to the ultimate loss of control that sent his vehicle over the centerline, there likely was additional unstable movement of the Greer vehicle that first caught Mr. Kurtz's attention. I believe that with the existing weather conditions, the obvious pending approach of the Greer vehicle combined with the advanced warning of the unusual and unstable oscillation movement of the Greer vehicle, Mr. Kurtz should have been at a heightened level of awareness with respect to his perception-reaction as he described in his Examination for Discovery. Certainly by the time the Greer vehicle ultimately lost control as I have calculated in my analysis, Mr. Kurtz should have started his perception-reaction process.
>
> If Mr. Kurtz even took 1.5 seconds to perceive and react, starting at the point the Greer vehicle was pointing and about to enter the westbound lane for the last time, and then steered to the right shoulder while slowing his vehicle, this accident would not have occurred."

[152] No evidence was led by either side as to how it was determined that the perception-reaction time is arrived at. Certainly a star athlete in the CFL or NHL has better reflexes than a 70-year old. One would have hoped that this would have been dealt with in more detail.

[153] Raftery in his report, Exhibit 12, deals with the issue of perception-reaction time. He writes at page 25 the following:

> "Role of Perception/Reaction Time:
>
> It is important to emphasize the difference between *braking* distance and *stopping* distance, when considering man-machine systems such as automobiles in emergency situations. Braking distance is the distance required to physically reduce the speed of a vehicle, given variables such as initial vehicle speed, road surface and tire conditions, grade of the roadway and other physical factors. Total *stopping distance* gives consideration to the fact that the operator of the vehicle needs a certain amount of time to: (i) recognize the need to brake, and (ii) undergo the physical (muscular) response required to effect the evasive manoeuvre. This human requirement is referred to as perception/reaction time or perception-response time.
>
> Components of Perception-Response time. It is clear that there are certain steps or stages in information processing that occur from the presentation of a stimulus until the individual responds. These have been given various names and descriptions by different authors.
>
> Step 1: Detection. Perception-response time begins when some object or condition of concern enters the driver's field of vision. [For example] perception-response time began when it first became possible [for Karl Kurtz] to see [that the approaching vehicle was moving in a northeasterly direction, into the westbound lane]. This first step concludes when the driver develops a conscious awareness that "something" is present. The "something" may be within the field of view of the driver for some time before it is detected. Hence, there is the potential for a significant delay between the presentation of the stimulus and its being detected. Typically, once detection occurs the eyes will be moved to bring that which has been detected into focus on the central portion of the retina so that the next step can be undertaken.

Step 2: Identification. In this step sufficient information is acquired about the object or condition to be able to reach a decision as to what action, if any, is required. Identification need not be complete in detail. For example, it is not necessary to know if the object ahead is a truck or boulder, it is enough to know that the lane is blocked. If that which is being identified is moving, or capable of movement, it is also necessary to determine what it is doing. This may require estimates of speed and trajectory.

Step 3: Decision. At this point the operator must decide what action is appropriate. Assuming some action is decided upon, the choices come down to change in speed and/or direction.

Step 4: Response. In this step commands are issued by the motor center of the brain to the appropriate muscle groups to carry out the required actions.

Perception-response time typically ends when the driver begins to turn the steering wheel or presses on the brake pedal. However, certain situations call for more complex maneuvers that can be time consuming.

Driver Expectancy. "Expectancy" is a predisposition of drivers to believe that things will happen or be configured in certain ways. All drivers have expectancies, which are based on exposure to general practices in Civil and Traffic Engineering, as well as the behaviour of other drivers. Recognizing that drivers develop expectations, there has been a strong trend toward making road design, signing and signalling practices as uniform as possible. When expectancies are violated, it requires a more potent stimulus and/or more information to reliably capture the driver's attention and communicate the essential data than would otherwise be the case. The result is that perception-response time may be increased, primarily because the detection and/or identification intervals are lengthened. There are, unfortunately, no data to provide guidance in determining how much longer perception-response time should be when expectancies are violated.

> Conspicuity. Delays or outright failures in detection are most likely to arise from poor target conspicuity. Something that is small or contrasts poorly with its background is less likely to be detected during each available unit of time than something that is larger or has good contrast.
>
> Given a reasonably clear stimulus, and a fairly straight forward situation, a great deal of data suggests that most drivers (i.e.: about 85%) should begin to respond by about 1.5 seconds after the first possible visibility of the object or condition of concern. If the situation under consideration has some complicating elements, then it may be appropriate to allow more than the basic 1.5 seconds. How much more is, unfortunately, a matter of judgment. All that the investigator can do is analyze the specifics of the situation as carefully as possible to determine whether there were problems in any components of perception-response, and how complex they were. If, for example, evidence suggests that a driver took 2.5 to 3.0 seconds to respond to a given situation, an analysis of this type may be used to argue that the time was within reason. However, any attempt to produce hard estimates of perception-response time for a situation that has some complicating features is fraught with uncertainty."

[154] He then states that that section was excerpted from a paper by Paul L. Olson. The court is left with the various positions taken by the experts, but no basis was given as to how the perception-reaction time was actually arrived at.

[155] The court must use its own common sense and not rely exclusively on the opinions of experts. To do otherwise would compromise the role of the judge.

[156] I am not able to accept the statements made by Hrycay or Raftery about the findings of the time it takes to perceive, identify the problem, make a decision, and respond.

[157] I make the following findings as to whether Kurtz had the time and obligation to take evasive action:

1. The weather was very cold, there was snow blowing across the highway.

2. Kurtz saw the Greer vehicle for the first time some 300 metres up the road on his side. He had a duty to slow down.

3. He may or may not have felt that the Greer vehicle was under control when it went back into its own lane.

4. He need not take evasive action until at least the Greer vehicle was in his lane for the second time. If he had gone onto the shoulder, his vehicle might have slid into the ditch. The Greer vehicle might have passed in safety and Kurtz would have put his life and that of his wife into danger.

5. I believe that, contrary to the evidence of Hrycay and the video (which is Exhibit 31), the Greer vehicle was still sliding towards the Kurtz vehicle and the north shoulder of the highway.

6. The reason I make the finding is that Kurtz felt that he could not avoid the accident. In addition, Hrycay has Kurtz steering towards the south, not towards the shoulder. Kurtz was trying to avoid the Greer vehicle.

7. I find that taking into account Kurtz's age, the weather, and the road conditions Kurtz did not have sufficient time to take evasive action.

DECISION

[158] Based on the findings that I have made, I apportion the liability as follows: City of Hamilton 30%, Integrated Maintenance & Operations Services Inc. 30%, Donald Greer 25%, and Karl Kurtz 15%.

[159] If the parties are not able to agree on costs, I may be spoken to.

Justice B. H. Matheson

Released: June 2, 2008

COURT FILE NO.: 03-9726
DATE: 20080602

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DONALD B. GREER, by his Litigation Guardian William David Greer, WILLIAM DAVID GREER, personally, DONNA GREER, JAMES GREER, GARY McCARTHY, TAMMY GREER and KERRY GREER

Plaintiffs

- and –

KARL KURTZ, CITY OF HAMILTON, TOWN OF PARIS, CITY OF BURLINGTON, and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF TRANSPORTATION FOR THE PROVINCE OF ONTARIO

Defendants

- and -

INTEGRATED MAINTENANCE & OPERATIONS SERVICES INC. and JOHN BOUWMEESTER

Third Parties

JUDGMENT

Justice B. H. Matheson

Released: June 2, 2008

AND:

COURT FILE NO.: 04-14563
DATE: 20080602

ONTARIO

SUPERIOR COURT OF JUSTICE

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Plaintiffs

- and –

DAIMLER CHRYSLER SERVICES CANADA INC.

Defendant

JUDGMENT

Justice B. H. Matheson

Released: June 2, 2008

2 of 8 Schedule "A"

Court File No. 03-9726

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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Court File No. 04-14563

ONTARIO

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TAMMY GERRY and KERRY GREER

Plaintiffs

- and –

DAIMLER CHRYSLER SERVICES
CANADA INC.

Defendant

**SUMMARY OF ADMISSIONS PURSUANT
TO THE PLAINTIFFS' REQUESTS TO ADMIT**

For the purposes of these proceedings only, pursuant to the Plaintiffs' Requests to Admit dated December 19, 2007, the truth of the following facts have been admitted by the Defendants, Karl Kurtz and Daimler Chrysler pursuant to a Response to a Request to Admit dated December 20, 2007:

(a) Donald Greer, born August 10, 1973, resides in Paris, Ontario and at all material times was the owner and operator of a 1997 Nissan Pathfinder bearing Ontario Licence Plate No. AENN916;

(b) Karl Kurtz was at all material times the operator of a 2002 Chrysler motor vehicle bearing Ontario Licence Plate No. OUROPI;

(c) Emmy Kurtz was at all material times a front seat passenger in the vehicle operated by Karl Kurtz.

(d) Daimler Chrysler was at all material times the owner of a 2002 Chrysler motor vehicle bearing Ontario Licence Plate No. OUROPI;

(e) On March 2, 2003, Donald Greer was travelling eastbound on Highway #5 in his Nissan Pathfinder. At or around the same time, Karl Kurtz was travelling westbound on Highway #5 in his 2002 Chrysler SLX motor vehicle;

(f) On March 2, 2003 at approximately 8:12 p.m., Donald Greer was involved in a motor vehicle collision with Karl Kurtz on Highway #5, near a residential location known as 1738 Highway #5 West, which is approximately one kilometre east of Woodhill Road, west of Orkney Road, in the Municipality of Flamborough, in the City of Hamilton;

(g) Karl Kurtz did not have any difficulty maintaining traction on Highway #5 up to the scene of the accident;

(h) Karl Kurtz made no attempt after perceiving that the eastbound vehicle was in the westbound lane of Highway #5 to manoeuvre his vehicle onto the north shoulder of Highway #5;

(i) Karl Kurtz did not attempt to bring his vehicle to a stop when he perceived the approaching Greer vehicle enter the westbound lane, when these two vehicles were approximately 200 to 300 metres apart;

(j) The stretch of roadway where the motor vehicle accident occurred is mostly rural and is comprised of empty fields on both sides of Highway #5;

(k) Both the driver's side and passenger's side airbags deployed in the Greer motor vehicle as a result of the collision;

(l) At 8:20 p.m. the investigating police officers found the accident scene on Highway #5 extremely slippery and would not allow emergency services on site until the roadway had been salted;

(m) When John Bouwmeester got out of his truck at the accident scene, he noticed that the roadway was extremely slippery.

For the purposes of these proceeding only, pursuant to the Plaintiffs' Requests to Admit dated December 19, 2007, the authenticity of the following documents has been admitted by the Defendants, Karl Kurtz and Daimler Chrysler pursuant to a Response to a Request to Admit dated December 20, 2007:

1. Greer/Kurtz Motor Vehicle Accident Report dated March 2, 2003;

2. District and Route Maps produced by the City of Hamilton;

3. Photographs of damage to the Greer and Kurtz motor vehicles;

4. Police photos of the damage to Greer and Kurtz motor vehicles and final resting positions;

5. Hamilton Police Services field notes including:

   a. P.C. Giuliani's notes;

   b. P.C. McMorran's notes;

   c. P.C. Vandercraatz's notes;

   d. P.C. Art Lenters' notes;

6. Benvenuti Motor Vehicle Accident Report dated March 2, 2003;

7. Winter Control Map D1-R02;

8. Weather data:

   a. Environment Canada Hourly Data Report for March 2, 2003 "Public Forecast" issued by Environment Canada for March 1st and 2nd, 2003.

   b. Precipitation Forecast issued by Environment Canada for March 1st and March 2nd, 2003.

   c. R.W.I.S. Road Casts issued by Environment Canada from St. George and Ancaster Stations.

   d. Surface Weather Maps from the Ontario Climate Centre of the Meteorological Service of Canada for March 1 and March 2, 2003.

   e. Weather Records from the Ontario Climate Centre of the Meteorological Service of Canada for weather stations for:
      i. Hamilton Airport.
      ii. Hamilton RBG.
      iii. Milgrove.
      iv. Brantford.
      v. Mount Albert
      vi. St. George R.W.I.S
      vii. Ancaster R.W.I.S.

   f. Environment Canada Hourly and Inter-hourly Observations from Automatic Stations (Environment Canada MTO).

g. Environment Canada Aviation Surface weather records for March 1st and March 2nd, 2003.

h. Environment Canada Climatological Station Reports for March 1st and March 2nd, 2003.

i. Environment Canada weather radar imagery for March 1st and March 2nd, 2003.

j. Forecasts prepared by Accuweather for March 1st and March 2nd, 2003.

K. Environment Canada Weather Records for March 1st, 2003 and March 2nd, 2003

DONALD B. GREER, ET AL - and - KARL KURTZ, ET AL, ET AL

Court File No. 03-9726

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Hamilton

SUMMARY OF ADMISSIONS PURSUANT TO THE PLAINTIFFS' REQUESTS TO ADMIT

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