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# R. v. Trigiani

Between
Her Majesty the Queen, and
Michael Trigiani

[1999] O.J. No. 4924
Information No. 91915

**Ontario Court of Justice**
**Toronto Region**
**Libman J.**

December 3, 1999.
(233 paras.)

**Counsel:**

David McCaskill, for the defendant.
James Palangio, for the Crown.

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I. Disposition

**LIBMAN J.**: —

A. Introduction

¶ 1 The defendant is charged that on 24 October 1998, at the City of Toronto, in the Toronto Region, he committed the offence of careless driving, contrary to s. 130 of the Highway Traffic Act, R.S.O. 1990, c. H.8.

¶ 2 Following his arraignment on 4 October 1999, the defendant pleaded not guilty. The taking of evidence followed on this date, and on 5, 6, 8, 13, 18 October. Upon the completion of the submissions of counsel on 26 October, judgment was reserved until today.

B. Overview

¶ 3 On 24 October 1998, at approximately 1:15 a.m., Sgt. Erskine of the Ontario Provincial Police (OPP) was on patrol with his partner, Constable Robinson. They were in a fully marked OPP cruiser, driving along the Highway 401 east collector lanes, having entered at Keele Street. Traffic was light at this time.

¶ 4 Upon seeing a GMC Jimmy motor vehicle weaving slightly within its lane, the officers signalled for it to pull over onto the right (south) shoulder, in the area of the Allen Road exit ramps. Thereafter, the driver of the Jimmy, Christopher Brown, was given a 12-hour licence suspension; his passenger, Jaymie Cabanatan, was unable to drive it away. A tow truck was therefore summoned. Its driver was the deceased, Ronald Ball.

¶ 5 An eastbound tractor trailer driven by the defendant, Michael Trigiani, approached this area of the 401 collector lanes where the three vehicles were located. There were flashing lights on the police cruiser and the tow truck. The tractor trailer was in good working condition at the time, there being no mechanical defects. However, as the tractor trailer drove by, it crossed over partially onto the shoulder, striking first the police cruiser with its occupants (Erskine, Robinson and Brown), the GMC Jimmy (Ms. Cabanatan was inside), and then the tow truck driver who was standing outside (Mr. Ball), along with his tow truck.

¶ 6 The driver of the tow truck was killed instantly. None of the four other persons suffered life-threatening injuries. The defendant stopped his tractor trailer a short distance away. He too was shaken up and treated at hospital. Later that morning he was charged with careless driving.

C. The Evidence

(i) Admissions

¶ 7 At the commencement of proceedings, counsel indicated that much of the evidence was not in dispute. In particular, there is no issue as to the day, time or locus of the accident, nor that the defendant was the operator of the tractor trailer which collided with the three other vehicles, resulting in the death of the tow truck operator.

¶ 8 On consent, a commercial vehicle inspection report was tendered into evidence (Exhibit 1), indicating that the tractor trailer driven by the defendant had no mechanical defects. [See Note 1 below] In addition, numerous photographs of the accident scene were made exhibits (Exhibit series 2, 3, 4, 5, 7, 8, 11) as were scale diagrams (Exhibits 9 and 10) and an accident reconstruction videotape (Exhibit 12). Neither was any issue taken regarding a chart showing the number of hours worked by the defendant in the months preceding the accident (Exhibit 6).

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Note 1: Senior Constable Wilson inspected the tractor trailer driven by the defendant on 24 October 1998 at 6:00 a.m., that is, just hours after the accident. The registered owner was Canada Cartage Ltd. It had last been inspected in July, 1998. Collision damage to the tractor

was described as initial impact to the right front corner involving the bumper, hood, wheel and fender.

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(ii) Occupants of the GMC Jimmy vehicle [Christopher Brown and Jaymie Cabanatan]

¶ 9 Christopher Brown was returning home from his girlfriend's birthday party on 24 October 1998, at approximately 1:30 a.m. - 1:45 a.m. He was driving a grey 1989 GMC Jimmy motor vehicle. His girlfriend, Jaymie Cabanatan, was sitting in the front passenger seat. He entered Highway 401 eastbound, at Keele Street, in the collector lanes. Being in the habit of not buckling his seat belt until he was driving, he attempted to reach over for his buckle, causing the vehicle to move to the left.

¶ 10 Shortly thereafter, a police cruiser flashed its lights at his car, signalling him to pull over onto the shoulder of the highway. He thought he was east of Keele Street by this time, under the Allen Road Expressway, there being two collector lanes in this location. The highway at this juncture curves to the right and he had passed under some bridges. His tires were far enough to the right of the shoulder line [See Note 2 below] that they rubbed against the curb. He agreed in cross-examination that he moved his car as far to the right as possible, given the "highly dangerous" nature of that area. The police car pulled in behind him, stopping less than one car length behind and slightly offset, that is, not quite as far to the right, by a matter of inches, as the Jimmy.

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Note 2: This line separating the travel portion of the two eastbound collector lanes of the highway from the shoulder area is referred to by the witnesses throughout the proceedings as both the white or yellow shoulder or fog line. The confusion as to the colour of this solid line is likely due to the fact that on the north or left side is a paved asphalt shoulder, delineated by a solid yellow line whereas the right side or south shoulder is delineated by a solid white line.

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¶ 11 One of the police officers asked Mr. Brown whether he had been drinking. He replied that he had consumed two bottles of beer and one glass of wine cooler. He was also asked to produce his driving documents. Subsequently, he was escorted back to the police cruiser for the purpose of taking a breath test, exiting the driver's door of the Jimmy. Brown walked along the shoulder of the highway, entering the cruiser on the driver's side where he slid over to the passenger side. Both cars, according to the witness, were off the travel portion of the highway. He thought that the red lights of the police car were on, bouncing off the underpass.

¶ 12 The breath test resulted in Brown's licence being suspended for 12 hours. Arrangements were then made to have a tow truck remove his vehicle from the scene.

¶ 13 According to the witness, a tow truck arrived from behind them, and swung over onto the shoulder. Its orange lights were flashing, bouncing off in reverse as well as off the overpass. The tow truck reversed to within five feet of his car. There was then a discussion between the police officers and Mr. Ball, the tow truck driver, regarding arrangements for towing the Brown vehicle. Subsequently, the police officers did some paper work, checking his name and insurance. He was certain that the orange lights of the tow truck remained on the whole time.

¶ 14 The next thing that Mr. Brown remembered was feeling cold. He asked the officers to retrieve his jacket from his vehicle. One of them did so. Subsequently, he asked the driver (Sgt. Erskine) to remind the tow truck operator that the Jimmy was a four-wheel drive vehicle and that it had to be put into neutral. The officer was about to exit the cruiser but then stopped, stating that the tow truck driver would figure it out.

¶ 15 Within a matter of seconds "every glass" in the cruiser exploded. It was like a snowstorm; glass was flying everywhere. The witness felt a sharp pain in his back, knees and right arm. The "big" officer (Sgt. Erskine) was also injured and in pain, Constable Robinson got on the police radio, stating that an officer was "down" and needed help. It appeared that Sgt. Erskine was in shock; he did not want to exit the vehicle.

¶ 16 Eventually, Mr. Brown was able to climb out of the police car due to Sgt. Erskine breaking down the driver's door. This was the only door that could be opened. He and Constable Robinson tried unsuccessfully to

hold onto Erskine. Brown told the Constable Robinson that he could give him as many tickets as he wanted, but he was not going to remain behind in the cruiser.

¶ 17 After the three men managed to extricate themselves from the car, Sgt. Erskine collapsed and passed out onto the pavement. Mr. Brown then went to check on his girlfriend. He had to pull her out of the Jimmy; she was somewhere in between the passenger seat and the back. She had bruises on her body. Ms. Cabanatan was crying. She told him, "He's gone. I was just talking to him." She was referring to the driver of the tow truck. The Jimmy itself was "totally finished".

¶ 18 Mr. Brown was asked whether prior to the impact he heard any noises or sounds. He replied that there was no advance warning that there was going to be an accident. There had been no screeching of rubber or locking of brakes. Neither did he observe any skid marks afterwards. It had been a cold, dry evening; visibility was fine. As for the lighting in the area, there were overhead street lamps and both the cruiser and tow truck had their lights on. These lights were bouncing off the underpass and walls. The area was well lit in his opinion.

¶ 19 As for his observations of the vehicle which struck them, Mr. Brown explained that it kept going after the glass exploded in the cruiser. He thought he heard the sounds of air brakes, that is, a truck gearing down, although there was no visible braking. There were lights across the top and side of the truck; he did not remember seeing its brake lights on.

¶ 20 While standing by the GMC Jimmy with Ms. Cabanatan, the witness noticed two trucks. On the front grill of one of the tractor trailers was the tow truck. It had been picked up and carried about 30 to 50 feet from where they were stopped.

¶ 21 After the accident Mr. Brown went to the hospital for treatment of his injuries. He also went to the police station. He did not return home until 9:00 the next morning.

¶ 22 The other person in the GMC Jimmy vehicle, Jaymie Cabanatan, thought it was nearly 1:40 a.m. or 1:45 a.m. on the evening in question when she and her boyfriend, Christopher Brown, drove past the Allen Road exit in the collector lanes of Highway 401, travelling east. A police car had pulled up to them, flashing its lights for them to pull over. Chris moved their Jimmy over to the right; the cruiser stopped approximately one car length behind them. She could not say whether the cruiser was directly in line with the Jimmy or off to its side. However, there was enough room for the police officers to be on both sides of the car without standing on the highway. She could not remember whether the cruiser's lights were flashing.

¶ 23 After this point in time, Chris was asked what he had to drink. Upon admitting that he consumed beer and a cooler, he was taken back to the cruiser for a breathalyser test. Ms. Cabanatan remained in the Jimmy. About five minutes later, the driver of the police car returned for her boyfriend's jacket. She was asked to check the pockets to make sure nothing was missing. When she asked the officer what was happening, he told her to "just sit tight" and that they would let her know.

¶ 24 Subsequently, a tow truck arrived on scene. Its orange lights were flashing and remained on throughout. The witness jumped out of her vehicle, asking what was going on. She got out on the passenger side so as to be safer. In opening the passenger door of the Jimmy, she was careful not to let it hit the guide-rail. Had she let the door swing open all the way it would have hit the rail; however, she did not have to squeeze out of the vehicle and there was enough room to get out.

¶ 25 Ms. Cabanatan walked along the passenger side of the cars on the shoulder of the highway back to the cruiser. The officers were sitting in the front; her boyfriend was in the back seat. She asked the officer on the passenger side what was happening as she was starting to get nervous. The police were talking with Chris about his plates and insurance; she was told that she would be going home with the tow truck. However, she did not want to sit in the tow truck so she returned to the passenger side of the Jimmy and got inside.

¶ 26 The tow truck driver proceeded to hitch the Jimmy. At this point Ms. Cabanatan jumped out; she took a seat on the guide-rail. While the vehicle was being hoisted, it dropped back to the ground. As a result, the tow

truck driver got back out and told her that the Jimmy must have been in park and needed to be put in neutral.

¶ 27 Using her key, the witness walked back between the Jimmy and the cruiser, entering the former on the passenger side. She closed the door, leaning over to the ignition with the key in her right hand. There was then a boom and the car moved forward. Ms. Cabanatan found herself underneath the steering wheel, "eating" the brake pedal. She did not hear anything prior to the impact: the only sounds were a bang, followed by a crushing of glass and metal, as the police cruiser and Jimmy banged into each other.

¶ 28 Due to the size of the big lights, she knew the vehicle had been struck by a truck. It was on account of seeing these lights that she did not enter the vehicle on the driver's side. She estimated that she first noticed the truck's lights while it was coming in their direction from the area of the Yorkdale Mall. She could not tell which lane it was in. The tow truck driver was in the process of re-hitching the Jimmy at the time, standing in between the two cars.

¶ 29 Once the witness could feel herself moving, she noticed that there was glass everywhere, including in her hair and mouth. Her first instinct was to turn to the cruiser. She saw the men screaming. Chris was wincing. One of the officers was grabbing his shoulder; the one on the passenger side had something in his mouth which he was talking into.

¶ 30 Turning the other way to look in the front, she instantly saw the tow truck driver in the middle of the road. Looking further down the highway, approximately 150 metres, she observed that the truck had also stopped. It had the tow truck on it, having been dragged across the guard-rail. Ms. Cabanatan began to panic.

¶ 31 The officer on the driver's side of the cruiser began kicking down his door to get out. Jaymie then saw Chris. The bald officer (Sgt. Erskine) was trying to help him. He could not walk straight; he was staggering. The officer walked past her and collapsed. She thought he had died in front of her.

¶ 32 It was Chris who pulled Ms. Cabanatan out of the back window of the Jimmy. The driver's side door was pushed up against the guide-rail. A few minutes later there were police officers and ambulances all over the place.

¶ 33 Prior to the impact she did not notice any other vehicles in the area. The only other lights that she noticed on the highway were coming from the truck; this made her think that it would not be safe to enter the Jimmy on the driver's side. She also observed that the cruiser was on the other side of the white line dividing the travel portion of the highway. While there was room for her to walk along the drivers' side of the vehicles without crossing over the white "security" line, she considered it safer to walk along the passenger side of the Jimmy and cruiser.

¶ 34 According to the witness, the weather that day was kind of cold. There was no rain or fog; the roads were dry. The lights on the highway were illuminated. There was nobody on the road at the time.

¶ 35 Ms. Cabanatan received "lots" of bruises due to the accident, mostly in her shoulders. Her right side and knee hit the centre console. There was also glass in her hands, neck and shoulders.

(iii) Occupants of the OPP Cruiser [Sgt. Erskine and P.C. Robinson]

¶ 36 Sgt. Erskine is a ten year veteran of the OPP Downsview detachment. On the evening of 23-24 October 1998, he was working a twelve hour shift as the acting sergeant; he was responsible for allocating officers to the road and supervising reports. The Downsview detachment has responsibility for primary traffic enforcement on the 400 series of highways in the Toronto region.

¶ 37 At approximately 1:15 a.m. on 24 October 1998, he and Constable Robinson went out on patrol, entering the 401 east collector lanes from Keele Street. Traffic was very light at the time. They were in a fully marked cruiser assigned to a supervisor. Sgt. Erskine was the driver. Prior to heading out he checked that all the emergency lights were in proper working order and that no weapons had been left in the car.

¶ 38 While the officers were travelling in the area of the Allen Road off ramps, Sgt. Erskine noticed a 4 by 4 Jimmy weaving slightly within its lane. After following it for about half of a kilometre, he activated his emergency lights and had the vehicle pull over on the south side of the highway, onto the shoulder. At this point the vehicles were just east of the Allen Road exit.

¶ 39 According to Sgt. Erskine, each of the two lanes of the highway is 3.4 metres in width. The right shoulder is approximately the same dimension. However, it was not for travel, being designed for stopping in the case of emergencies and emergency vehicles.

¶ 40 The witness stopped his car about six feet directly behind the Jimmy on the shoulder. The officers exited from their vehicle. It was parked to the right of the yellow fog line, denoting the shoulder area. The Jimmy was also stopped to the right of the yellow line. The vehicles were facing east.

¶ 41 An investigation commenced with the driver of the Jimmy, P.C. Robinson being the primary investigator. They were trying to determine why the car had been weaving, and whether the driver had something to drink or was tired. Sgt. Erskine stood on the passenger side; there was a female passenger in the front seat. He did not observe any weapons or drugs.

¶ 42 The driver of the Jimmy was escorted back to the police cruiser. He sat in the back seat behind Robinson, on the passenger side. Due to the odour of alcohol on his breath, Constable Robinson administered a roadside screening test. The result was a warn. Consequently, the driver, Mr. Brown, was issued a 12-hour driver's licence suspension.

¶ 43 Upon determining that the female passenger's licence did not permit her to operate the vehicle on the highway, the officers called for a tow truck. Sgt. Erskine also recollected that there was a problem with the plates of the vehicle, requiring that they be removed from the Jimmy due to their "unattached status".

¶ 44 A tow truck arrived shortly afterward. It stopped directly in front of the Jimmy and the cruiser, on the shoulder or off-travel portion of the highway. The officer could not recall whether its lights were activated. He directed the operator, Mr. Ball, to the passenger side of the police car where his partner, Robinson, provided a quick explanation as to what happened and requested that he remove the licence plates. The tow truck driver proceeded to do so. The driver of the Jimmy, Mr. Brown, remained in the rear seat of the cruiser behind Constable Robinson during such time. The female passenger was standing on the sidewalk by the guide-rail.

¶ 45 The next thing that happened, according to Sgt. Erskine, was that there was a crushing sound to his left side. He had been sitting on an angle, with his right shoulder turned to the back seat, the passenger Brown sitting in the cruiser's right rear corner. It forced him forward, on a 45 degree angle, into Robinson. As the front windshield exploded, he saw a tractor trailer passing by him. Upon looking down, he could not see his legs as the door and compartment were covering them and he was on top of the police radio. From that point on, he did not remember "a lot of things".

¶ 46 Prior to the impact, it was Sgt. Erskine's belief that he had activated some sort of emergency lighting on the cruiser; however, he was not sure if he had turned on the master switch which would have activated all of the car's lights, or if only some of the lights were switched on in the rear. His car was equipped with master lights on the front, which flashed white and then red. The rear lights were red; there were also intermittent amber lights. The windows were up in the cruiser and the radio was on; Constable Robinson was speaking with the driver of the Jimmy. He heard "absolutely nothing" before the collision.

¶ 47 Sgt. Erskine was disoriented after the crash. The Jimmy had been moved forward and was facing a different angle up against the guide-rail. It seemed like two or three tractor trailers went by them. He was having trouble breathing. He did not know how he got out of the cruiser.

¶ 48 Subsequently, he started walking in an easterly direction. However, the next minute he was on the floor, looking up at a strange woman who was hovering over him, under the stars. He had not seen her before; nor did

he know where she came from. The officer felt himself lying on the ground. He did not want to remain there as he was afraid he was going to die. He told himself that he did not want to die so he got back up.

¶ 49 Constable Robinson approached him afterwards. He told him that he was okay. Sgt. Erskine then noticed an object about 10 metres east of their location. He told his partner that he would check it out and he should try to control the scene. As he walked up to it, he noticed it was a human person, only it was not "human any more", the body of the deceased being "totally mangled". Out of respect for Mr. Ball, he took off his motorcycle jacket and placed it over the body. He did the same with Constable Robinson's jacket.

¶ 50 Down the road beyond the body, Sgt. Erskine noticed a white tractor trailer unit parked on the shoulder. It was close to the guide-rail. He thought this was the trailer which he noticed before but he was not sure. He was still woozy and dazed while he was trying to piece things together. He was clear, though, that he did not look back at the cruiser after the impact and had no memory of seeing more than one truck.

¶ 51 All of a sudden there were numerous emergency personnel on scene, including the fire department and police officers. They were running down the hill trying to get to him. At first they thought the body covered with the OPP jacket was a police officer. They also tried to gather the name of witnesses and collect their driver's licences while preserving the scene. He also had to calm down Mr. Brown and his girlfriend who were "freaking". It was very chaotic.

¶ 52 Following the arrival of these other police officers, the investigation was taken over by Sgt. Yule. The witness just sat there. It was at this point that he began feeling pain. His right arm would not move. Subsequently, he went to the hospital for treatment of his injuries. He had soreness in both shoulders and his lower back. He was off work for a couple of months.

¶ 53 In cross-examination, Sgt. Erskine agreed that he pulled over the Brown vehicle for precautionary reasons, as opposed to making an emergency stop. The roadway leading up to this area, as depicted in Exhibit 2a (photograph 251), [See Note 3 below] swings to the right past Yorkdale and the Allen Road off ramps. There are a number of bridges and abutments as well as pillars supporting bridges in the area. While the road is flat in this location and the grade downhill, there is some hilly terrain on the south side of the road along with grassy areas. A close-up of the final resting place of the Brown and OPP vehicles relative to these overpasses is shown in Exhibit 2b (photograph 223). There are fixed guide-rails on either side of the shoulder of the highway.

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Note 3: I have referred to the number on the back of each photograph, in addition to the Exhibit number corresponding to it, as the pictures were at times described by counsel and the witnesses by the number on the back, and at other times by Exhibit number. To prevent confusion, I have cited both numbers when the photographs were first presented in evidence, and thereafter by exhibit number only.

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¶ 54 Sgt. Erskine also agreed that the highway curves to the right past Yorkdale, although he did not share defending counsel's view that it is a "sweeping curve". Neither did he agree that further to the east, towards Avenue Road, where the highway opens up, there would have been more room on the shoulder and greater visibility. The shoulder does widen later, though, due to the Allen Road and Bathurst Street exit ramps. Notwithstanding this, Sgt. Erskine felt he stopped the Brown vehicle in a "pretty safe area", having regard to the weather conditions, the lighting in the area, the fact that there was hardly any other traffic, the width of the shoulder and the clearness of the road markings. There was no difficulty pulling over the Jimmy and he did not want to drive to Avenue Road to stop it. Hence, he disagreed that he pulled it over in "a less than ideal place". In fact, he had stopped traffic in this location numerous times; it was not a high profile area for accidents.

¶ 55 With respect to the position of the police cruiser on the shoulder of the highway, Sgt. Erskine acknowledged that it was somewhat "offset" of the Jimmy vehicle, so as to provide a shielding zone. However, he was closer to the curb, and well to the right of the white or fog line. This would allow his door not to open onto the travel portion of the highway; at the same time he had to leave enough room on the other side for his partner, Robinson, to be able to exit the vehicle, which he did without difficulty.

¶ 56 Constable Robinson, in turn, described the cruiser being driven by his partner, Sgt. Erskine, as having fully marked emergency lights on the top, an amber light bar on the back, and two red lights inside the rear windows. Traffic at this time was light; the roads were dry and clear. They were patrolling the 401 eastbound collector lanes nearing the Allen Road exit when they observed the GMC Jimmy motor vehicle weaving slightly within its lane. They followed it for about one-half kilometre. Sgt. Erskine activated the police car's emergency lights, including the roof lights, flashing front headlights and rear red lights; he could not recall whether the yellow bar on top of the cruiser was also turned on. Both cars stopped on the right shoulder. The area was fairly well lit and visibility clear.

¶ 57 According to Constable Robinson, the vehicles were far enough over on the shoulder that the passenger door could be opened without striking the guide-rail or making it difficult to get out. The cruiser may have been off set to the left from the Jimmy by four to five inches at most. There was about three to four feet between the cars. He estimated that the driver's side of the Jimmy was about two or three feet from the white fog line which separated the shoulder from the travel portion of the highway. He could not recall whether the lights of the cruiser remained on as he was concentrating on Mr. Brown; however, it would have been standard procedure to leave them on. The officer had no difficulty getting out of his side of the police car although the door would have touched the guide-rail had it been fully opened.

¶ 58 Having approached the driver's side of the Jimmy and spoken to Mr. Brown, Constable Robinson detected an odour of alcohol on his breath and had him verbally identify himself. He confirmed the identification with the female passenger. The driver was asked to step out of his car and accompany the officer to the cruiser where a roadside screening test would be administered. They returned to the police car along the passenger side of the vehicles.

¶ 59 Mr. Brown had his licence suspended for 12 hours due to the results of the approved screening device test and a tow truck was summoned to remove his licence plates. The tow truck arrived a few minutes later. This was approximately five to ten minutes after the officers had initially stopped the Brown vehicle. The tow truck pulled in front of the Jimmy on the shoulder. It had flashing yellow and white lights on its roof.

¶ 60 Constable Robinson advised Mr. Ball to tow Mr. Brown's vehicle and remove his plates. He took the keys from Mr. Brown and noticed that the female passenger, Ms. Cabanatan, returned to the Jimmy, entering the passenger side. She appeared to be reaching for the steering wheel or the ignition. The officer then turned around and continued his conversation with Mr. Brown. He could not say how long the men had been in the cruiser to this point.

¶ 61 The next moment there was an impact. Constable Robinson did not hear anything beforehand: there was no sound