

2008 CarswellOnt 7629  
69 C.C.L.I. (4th) 93, 75 M.V.R. (5th) 176

Ng v. Beline

Marian Ng and Kong Tsang (Plaintiffs) and Alexandre Beline and Durham Regional Municipality  
(Defendants)

Ontario Superior Court of Justice

Perell J.

Judgment: December 15, 2008  
Docket: 06-CV-31967PD3

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Proceedings: additional reasons to *Ng v. Beline* (2008), 2008 CarswellOnt 5957 (Ont. S.C.J.)

Counsel: **Sue Chen** for Plaintiffs  
Zevi Rosenzweig for Defendants

Subject: Insurance; Civil Practice and Procedure; Torts

Insurance --- Actions on policies — Practice and procedure — Costs — General principles

Defendants brought motion for partial summary judgment in automobile negligence action — Defendants' motion raised important question about operation of Limitations Act, 2002 — Motion was dismissed — Plaintiffs sought costs — Defendants were ordered to pay costs — Defendants appealed decision, but did not challenge amount of costs — Normal rule about costs being paid to successful party was to be followed — Court has discretion not to order costs when parties are litigating novel or uncertain point, but that discretion was not to be exercised in this case.

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous

Defendants brought motion for partial summary judgment in automobile negligence action — Defendants' motion raised important question about operation of Limitations Act, 2002 — Motion was dismissed — Plaintiffs sought costs — Defendants were ordered to pay costs — Defendants appealed decision, but did not challenge amount of costs — Normal rule about costs being paid to successful party was to be followed — Court has discretion not to order costs when parties are litigating novel or uncertain point, but that discretion was not to be exercised in this case.

**Cases considered by Perell J.:**

*Chenderovitch v. Budget Car Rentals Toronto Ltd.* (2004), 183 O.A.C. 284, 8 C.C.L.I. (4th) 1, 2004 CarswellOnt 784, 44 C.P.C. (5th) 243, 48 M.V.R. (4th) 190 (Ont. C.A.) — referred to

**Statutes considered:**

*Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B  
Generally — referred to

s. 4 — referred to

s. 5 — referred to

ADDITIONAL REASONS to judgment reported at *Ng v. Beline* (2008), 2008 CarswellOnt 5957, 69 C.C.L.I. (4th) 83, 75 M.V.R. (5th) 166 (Ont. S.C.J.), respecting costs.

**Perell J.:**

1 This is a costs endorsement.

2 The Defendants moved for a partial summary judgment in an automobile negligence action. As noted in my Reasons for Decision, the Defendants' motion raised an important question about the operation of the *Limitations Act, 2002*, S.O. 2002, c. 24.

3 The Defendants submitted that there is no genuine issue for trial that the claims of the plaintiffs, Marian Ng and Kong Tsang, for pecuniary damages (loss of income, loss of competitive advantage, loss of earning capacity and/or incurred housekeeping losses or loss of housekeeping/home maintenance capacity) were statute-barred by operation of sections 4 and 5 of the *Limitations Act, S.O. 2002, c. 24*. The defendants made this submission relying on the Court of Appeal's judgment in *Chenderovitch v. Budget Car Rentals Toronto Ltd.*, [2004] O.J. No. 681 (Ont. C.A.).

4 I disagreed with the Defendants' well-argued submission about the effect of the *Chenderovitch v. Budget Car Rentals Toronto Ltd.* decision, and I dismissed their motion for summary judgment. The Plaintiffs now seek costs of \$8,212.41.

5 The Defendants, who have appealed my decision, did not challenge the amount of the costs, but they submitted that no costs should be payable because their motion was reasonable and necessary because the Court of Appeal's judgment in *Chenderovitch* left the state of the law unclear.

6 In their written costs submissions, the Defendants' stated:

The Court of Appeal in *Chenderovitch* had left us with a decision that had ambiguous repercussions. The court had decided that the motor vehicle insurance legislation provided two separate causes of action. The court did not conclude whether this meant that there would be two separate and independent limitation periods. Due to the ambiguity, the motion that was brought was reasonable and necessary in order for the costs to provide clarity on this issue. Were the motion not brought by us in this matter, it would have inevitably been brought by other defence when a similar situation arose.

7 Put somewhat differently I understand the Defendants' submission to be that their motion for a summary judgment was brought because of ambiguity in the case law, and it was reasonable and necessary for them to bring a motion to clarify the law. In these circumstances, they submit that there should be no order as to costs.

8 It is true that the court has the discretion not to order costs when the parties are litigating a novel or uncertain point, but I would not exercise that discretion in the case at bar.

9 As I view it, in bringing their motion, the Defendants were not motivated by any ambiguity in the law; rather, they interpreted the Court of Appeal's judgment and confidently submitted that the logic of the *Chenderovitch* judgment favoured a partial summary judgment dismissing a significant portion of the Plaintiffs' action.

10 Subject to what the appellate court may do about the merits of their argument, it was unsuccessful and, in my opinion, the normal rule about costs being paid to the successful party should be followed in the circumstances of this case.

11 Accordingly, I order the Defendants pay costs in the amount of \$8,212.41 forthwith.

*Order accordingly.*

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