

2009 CarswellOnt 3513
75 C.C.L.I. (4th) 231, 86 M.V.R. (5th) 204

Ng v. Beline

Marian Ng and Kong Tsang v. Alexandre Beline and Durham Regional Municipality

Ontario Superior Court of Justice (Divisional Court)

Low J.

Heard: June 18, 2009
Judgment: June 18, 2009
Docket: Toronto 281/09

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Proceedings: refusing leave to appeal *Ng v. Beline* (2008), 69 C.C.L.I. (4th) 83, 95 O.R. (3d) 71, 2008 CarswellOnt 5957, 75 M.V.R. (5th) 166 (Ont. S.C.J.); additional reasons at *Ng v. Beline* (2008), 69 C.C.L.I. (4th) 93, 2008 CarswellOnt 7629, 75 M.V.R. (5th) 176 (Ont. S.C.J.)

Counsel: Bois P. Wilson, **Sue Chen** for Plaintiff / Respondent
Zev Rosenzweig for Defendants / Appellant

Subject: Insurance; Civil Practice and Procedure; Torts

Insurance --- Automobile insurance — Threshold issues — Extent of impairment

Plaintiffs commenced action arising out of motor vehicle accident more than two years following date of accident, claiming both pecuniary and non-pecuniary loss — Defendants' motion for partial summary judgment dismissing plaintiffs' claim for pecuniary loss on grounds that it was commenced after expiry of limitation period was dismissed — Motion judge found there was genuine issue for trial about whether claim for non-pecuniary damage was statute-barred and this meant there was genuine issue for trial about non-threshold claims for pecuniary damages — Defendants brought motion for leave to appeal — Motion dismissed — Effect of motion judge's order was that all of issues would be tried and if and when matter went further to appeal, appellate court would have benefit of decision in context of full factual record — Question of whether separate limitation period applied for pecuniary damages was important one within meaning of R. 62.02(4) of Rules of Civil Procedure — That issue, however, was not crux of effect of order from which leave to appeal was sought — Principal effect of motion judge's order was that there would be trial as opposed to no trial of pecuniary damage claims — There was not good reason to doubt correctness of order made — Test in R. 62.02(4)(b) of Rules was not met — Court of Appeal decision relied upon by defendants was not conflicting decision — Issue of when limitation began to run on plaintiff's claim for pecuniary damages in presence of claim for non-pecuniary damages was not decided in that case — Test under R. 62.02(4)(a) was not met.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — General principles

Plaintiffs commenced action arising out of motor vehicle accident more than two years following date of accident, claiming both pecuniary and non-pecuniary loss — Defendants' motion for partial summary judgment dismissing plaintiffs' claim for pecuniary loss on grounds that it was commenced after expiry of limitation period was dismissed — Motion judge found there was genuine issue for trial about whether claim for non-pecuniary damage was statute-barred and this meant there was genuine issue for trial about non-threshold claims for pecuniary damages — Defendants brought motion for leave to appeal — Motion dismissed — Effect of

motion judge's order was that all of issues would be tried and if and when matter went further to appeal, appellate court would have benefit of decision in context of full factual record — Question of whether separate limitation period applied for pecuniary damages was important one within meaning of R. 62.02(4) of Rules of Civil Procedure — That issue, however, was not crux of effect of order from which leave to appeal was sought — Principal effect of motion judge's order was that there would be trial as opposed to no trial of pecuniary damage claims — There was not good reason to doubt correctness of order made — Test in R. 62.02(4)(b) of Rules was not met — Court of Appeal decision relied upon by defendants was not conflicting decision — Issue of when limitation began to run on plaintiff's claim for pecuniary damages in presence of claim for non-pecuniary damages was not decided in that case — Test under R. 62.02(4)(a) was not met.

Civil practice and procedure --- Practice on appeal — Leave to appeal — Miscellaneous

Plaintiffs commenced action arising out of motor vehicle accident more than two years following date of accident, claiming both pecuniary and non-pecuniary loss — Defendants' motion for partial summary judgment dismissing plaintiffs' claim for pecuniary loss on grounds that it was commenced after expiry of limitation period was dismissed — Motion judge found there was genuine issue for trial about whether claim for non-pecuniary damage was statute-barred and this meant there was genuine issue for trial about non-threshold claims for pecuniary damages — Defendants brought motion for leave to appeal — Motion dismissed — Effect of motion judge's order was that all of issues would be tried and if and when matter went further to appeal, appellate court would have benefit of decision in context of full factual record — Question of whether separate limitation period applied for pecuniary damages was important one within meaning of R. 62.02(4) of Rules of Civil Procedure — That issue, however, was not crux of effect of order from which leave to appeal was sought — Principal effect of motion judge's order was that there would be trial as opposed to no trial of pecuniary damage claims — There was not good reason to doubt correctness of order made — Test in R. 62.02(4)(b) of Rules was not met — Court of Appeal decision relied upon by defendants was not conflicting decision — Issue of when limitation began to run on plaintiff's claim for pecuniary damages in presence of claim for non-pecuniary damages was not decided in that case — Test under R. 62.02(4)(a) was not met.

Cases considered by Low 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.) — distinguished

Grewal v. Ivany (2008), 69 M.V.R. (5th) 179, 2008 ONCA 687, 2008 CarswellOnt 5953 (Ont. C.A.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 62.02(4) — considered

R. 62.02(4)(a) — considered

R. 62.02(4)(b) — considered

MOTION by defendants for leave to appeal from judgment reported at Ng v. Beline (2008), 69 C.C.L.I. (4th) 83, 95 O.R. (3d) 71, 2008 CarswellOnt 5957, 75 M.V.R. (5th) 166 (Ont. S.C.J.), dismissing defendants' motion for partial summary judgment.

Low J.:

1 The defendants seek leave to appeal the order of Perell J. dated October 8, 2008 dismissing the defendants' motion for partial summary judgment. The defendants had moved for

summary dismissal of the plaintiffs' claim for pecuniary loss arising out of a motor vehicle accident that occurred on June 18, 2004. The plaintiffs commenced their action on October 3, 2006 which was outside the two years following the date of the accident. The statement of claim includes claims both for pecuniary loss and for non-pecuniary loss.

2 The defendants sought summary dismissal of the plaintiffs' claim for pecuniary loss on the grounds that the claim was commenced after expiry of the limitation period. The defendants relied on the Court of Appeal decision in *Chenderovitch v. Budget Car Rentals Toronto Ltd.*, [2004] O.J. No. 681 (Ont. C.A.), and in particular paragraph 23 thereof where Moldaver JA wrote, "Instead, I prefer to believe that in enacting s. 267.5, the legislature intended to draw a distinction that the common law does not recognize. To be precise, it chose to create separate causes of action for separate heads of damages arising out of the same act of negligence."

3 The nub of the defendants' argument is that if the legislature has created two separate causes of action, each one is subject to a limitation period, and not necessarily running from the same date. It is argued that regardless of when the limitation period might start to run for the non-pecuniary loss, the limitation period must begin to run in respect of pecuniary loss either on or very shortly following the date of the accident as it must have been clear to the plaintiffs that they had some pecuniary damages, no matter how small — that would trigger the limitation period.

4 Before considering whether either of the two two-pronged tests in rule 62.02(4) has been met, it is necessary to consider the nature of the order made by the motions judge.

5 The order is that the claim for pecuniary loss will not be summarily dismissed but will be permitted to go to trial where a full evidentiary record will be developed. The motions judge states at paragraph 31 of the reasons,

Applying the *Peixeiro* approach to the case at bar, there is a genuine issue for trial about whether the claim for non-pecuniary damages is statute-barred and this, in turn, means there is a genuine issue for trial about the non-threshold claims for pecuniary damages. In my view, this is a fair result. If the threshold claim is not timely then all the claims should be statute-barred, and conversely, if the threshold claim is timely, then it is just that all the claims should go forward....

6 The effect of the order is that all of the issues will be tried and if and when the matter goes further on appeal, the appellate court will have the benefit of a decision in the context of a full factual record.

7 It is argued by the defendants and conceded by the plaintiffs that the question of whether a separate limitation period applies for pecuniary damages is an important one within the meaning of rule 62.02(4). That is self-evident. I am not persuaded, however, that that issue is the crux of the effect of the order from which leave to appeal is sought. Although the motions judge has performed a careful and nuanced analysis of the issue, the principal effect of the order is that there will be a trial as opposed to no trial of the pecuniary damage claims.

8 I am not satisfied that there is good reason to doubt the correctness of the order made. While the motions judge did not have the benefit of the decision in *Grewal v. Ivany*, 2008 CarswellOnt 5953 (Ont. C.A.), the case is applicable to the facts at bar and there is no significant distinction between the two sets of facts. The court stated at paragraph 11 et seq.,

In all these circumstances, there is a genuine issue for trial as to when Gurcharn learned or through the exercise of reasonable diligence ought to have learned that he had a cause of action against the respondents for general injuries under the threshold. A trial is required to determine this issue.

We reach a similar conclusion regarding Gurcharn's claim for pecuniary damages.

Although the respondents rely heavily on the decision of this court in Chenderovitch v. Budget Car Rentals Toronto Ltd., [2004] O.J. No. 681 (Ont. C.A.) to argue that Gurcharn's pecuniary damages claim is statute-barred, that case is not dispositive of this issue. In Chenderovitch, the plaintiff abandoned her pecuniary damages claim prior to the summary judgment motion at issue. Thus, it was unnecessary for this court to determine whether her pecuniary damages claim was foreclosed by the expiry of a limitation period.

In addition, in this case, the nature and extent of Gurcharn's pecuniary damages claim are unclear. Perhaps for this reason, the motions judge's consideration of this issue was terse.

We conclude that the issue whether Gurcharn's pecuniary damages claim is statute-barred is best resolved on a full record. This will ensure that any consideration of this important issue by this court will be informed by a reasoned analysis in the courts below.

9 For the foregoing reasons, I am of the view that the test in rule 62.02(4)(b) has not been met.

10 The defendants rely on Chenderovitch in support of the contention that there is a conflicting decision. Chenderovitch is not, in my view, a conflicting decision. The issue of when the limitation begins to run on a plaintiff's claim for pecuniary damages in the presence of a claim for non-pecuniary damages, was not decided in that case.

11 In my view, the test under rule 62.02(4)(a) also has not been met.

12 The motion is dismissed. Costs fixed at \$5,000 payable to the plaintiffs forthwith.

Motion dismissed.

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