

Muhitch v. Lemieux, [1977] O.J. No. 137

Ontario Judgments

Supreme Court of Ontario - High Court of Justice

Toronto Non-Jury

Keith J.

Heard: May 12, 13 and 16, 1977.

Judgment: May 25, 1977.

[1977] O.J. No. 137

Between Anton Muhitch, Maria Muhitch and Elfriede Poje, plaintiffs, and Judith A. Lemieux, Kostandinos Nedelkos, John Nestor and the Registrar of Motor Vehicles, added pursuant to Section 12 of The Motor Vehicle Accident Claims Act, R.S.O. 1970, defendants And between Judith Lemieux, plaintiff, and Kostandinos Nedelkos, John Nestor and the Registrar of Motor Vehicles, defendants

(27 pp.)

Counsel

J.M. Regan, for the plaintiffs, Anton Muhitch, Maria Muhitch and Elfriede Poje. D.S. Forbes, for Judith A. Lemieux, defendant in the first action and plaintiff in the second action. G.E. Vickers, for John Nestor, a defendant in both actions. Kostandinos Nedelkos, a defendant in both actions in person. R.A. O'Donnell and Eva Frank, for the Registrar of Motor Vehicles, a defendant in both actions.

KEITH J.

1 These actions are brought to recover damages for personal injuries and other expenses suffered by the plaintiffs Anton Muhitch, his wife Maria Muhitch, her sister Elfriede Poje, and Judith A. Lemieux, as a result of a serious collision that occurred about 9:20 pm. on the evening of Friday the 3rd December, 1971.

2 The question of liability as between the defendants Nedelkos and Nestor on the one hand and the Registrar of Motor Vehicles on the other, is an unusual and a difficult one.

3 At the time referred to, Anton Muhitch was driving his motor vehicle northbound in the passing lane on Kipling Avenue, approaching an overpass that carries the traffic on Dundas Street West. The evening was clear and the road was dry. Mrs. Muhitch was seated to her husband's right and Mrs. Poje was seated in the centre of the back seat.

4 All of a sudden and without warning a car driven by Miss Lemieux, which had been proceeding southerly at about 30 mph. in the curb lane of Kipling Avenue, at a point south of the mouth of the ramp which carries eastbound traffic off Dundas Street into the southbound lanes of Kipling Avenue, came diagonally across Kipling Avenue, across a

concrete island or median which is 7 inches high and 4 feet wide separating the two southbound lanes from the two northbound lanes, and almost head-on into the left front of the Muhitch car.

5 It is asserted that Miss Lemieux lost control of her car as a result of being struck on the right front fender of her car by a car that failed to yield the right of way to her as it came off the ramp into the southbound lanes on Kipling Avenue, and sped away without stopping.

6 It is further alleged that the hit-run car was owned by the defendant Nedelkos and driven by the defendant Nestor. This allegation is vigorously denied by these defendants who assert that the car owned by Nedelkos for which Nestor had the keys and general permission to use, was, in fact not in operating condition that evening and was not the vehicle that interfered with Miss Lemieux's car. If on a reasonable balance of probabilities having regard to the onus of proof, the court is constrained to dismiss the action against Nedelkos and Nestor, then responsibility for any negligence of an unknown driver that caused or contributed to the damages complained of must be borne by the Registrar of Motor Vehicles pursuant to s. 12 of The Motor Vehicle Accident Claims Act, R.S.O. 1970 c. 281.

7 There was no evidence of negligence with respect to the driving of Anton Muhitch.

8 With respect to Miss Lemieux it is argued that accepting it as a fact that some vehicle coming off the Dundas Street exit ramp had struck her car and thrown it out of control, she nevertheless, had she been keeping a proper lookout, must have had an opportunity to see and avoid such vehicle, and having failed to do so, must bear some part of the responsibility for her collision with the Muhitch vehicle.

9 Miss Lemieux was recovering from a nervous breakdown for which she was being treated at the Lakeshore Psychiatric Hospital. Her physicians had permitted her to be out for the evening, and at the time of the accident she was returning to the hospital. She was not familiar with Kipling Avenue and as one of the investigating officers frankly admitted, that particular area for southbound traffic on Kipling Avenue with two exit ramps and the entrance ramp from Dundas Street following each other in quick succession, is confusing enough in daylight, and more so at night. While she had no clear memory, it would appear from the evidence of a following motorist that she was trying to recognize an exit that would take her back to the hospital. She believes her speed to have been about 30 mph.

10 She said "I just remember feeling a really hard impact and heading towards the other car. The impact was on the right side - it was hard. The next thing I saw was the island and car in front of me and I hit it. I couldn't help myself".

11 In cross-examination she said she never at any time saw the car that struck her or its lights, and that this impact rendered her out of control of her car.

12 Two independent witnesses that had been following Miss Lemieux for some appreciable distance down Kipling Avenue were called on her behalf.

13 The first of these was a Mrs. Jenner who was driving her car in the southbound passing lane 5 or 6 carlengths to the rear of Miss Lemieux' red car. She said she saw the red car make a sharp turn to the right as if to take the exit ramp to Dundas Street, then turn back to the left and continue to proceed south. Mrs. Jenner was familiar with the area and was nervous of traffic coming on to Kipling Avenue southbound off the ramp from Dundas Street. As a result, she was looking toward the ramp and saw a car travelling much too fast coming down the ramp. It should be noted that cars entering Kipling Avenue from that entrance are faced with the familiar large "Yield" sign, effectively vesting the right of way in traffic on Kipling Avenue.

14 She saw the speeding car come off the ramp and strike the red car which "moved to the left - wobbling - go over the median" and collide with the northbound car. The car which struck the red car then sped off at high speed.

There was obviously no opportunity to read a licence plate but Mrs. Jenner was able to note that it was a full size car with a blue body and a white top and she so reported to the police.

15 At the time of being struck, the red car was in the southbound curb lane and probably past the point where she would have any view of the approaching blue and white car. In cross-examination she said that while she couldn't swear to seeing the impact, the red car behaved as if it had been hit.

16 I have no doubt that it was and find this as a fact and that Miss Lemieux had no opportunity to regain control of her car before colliding with the northbound Muhitch vehicle. I will refer to certain marks on her car that were consistent with a glancing collision at her right front fender.

17 The collision with the northbound vehicle occurred in the centre of the passing lane northbound, and according to the investigating officer, approximately 1,000 feet south of the Dundas Street overpass. A sketch and a series of photographs of the relevant section of Kipling Avenue were filed as Exhibits and from them it is clear that the collision occurred an appreciable distance south of the mouth of the ramp leading on to Kipling Avenue. An extra lane is provided to the right of the normal curb lane to permit vehicles coming off the ramp to gradually merge with southbound traffic in the curb lane.

18 This extra or merging lane gradually narrows until it ceases to exist several hundred feet south of the mouth of the ramp by which time merging traffic would have been deflected into the southbound lane. A car barging into the curb lane in front of a southbound vehicle would be the obvious source of an impact involving the right front of the vehicle with the right of way and the left rear of the vehicle under an obligation to yield, that would be likely to throw the vehicle in the dominant position out of control exactly as it occurred in this case.

19 As to Mrs. Jenner's opportunity to note the colours of the cars involved, from the exit ramp southwards and well beyond where the collision with the northbound vehicle occurred, the road is well lit by overhead lighting.

20 Mrs. Jenner's mother, Mrs. Gray, was a passenger in her daughter's car and confirmed Mrs. Jenner's evidence in all respects and was asked no questions in cross-examination.

21 It was urged by all counsel with an interest opposing that of Miss Lemieux that she should be found negligent to some degree in failing to observe the blue and white car in time to take evasive action and thus prevent the impact that threw her car out of control. In my judgment this submission is not tenable for two reasons. In the first place, as a matter of law, even had Miss Lemieux had an opportunity to see the blue and white car on her right in the merging lane, she was entitled to proceed on the assumption that that driver would yield the right of way to her as he was obliged to do.

22 Much more important however, are the inescapable inferences to be drawn from Mrs. Jenner's evidence, confirmed as it is by Mrs. Gray. On the evidence of these witnesses the blue and white car was travelling at such a high speed coming down from the top of the ramp as to attract their attention and to cause Mrs. Jenner to exclaim "Look at that idiot!" Miss Lemieux was travelling at only the modest speed of 30 mph. I infer from the evidence of the excessive speed of the blue and white car that Miss Lemieux was past the mouth of this ramp before the blue and white car entered the merging lane, that the blue and white car travelling in the merging lane on her right overtook her and struck her right front fender as the driver was forced into the curb lane near where the merging lane ended, and having done so, failed to stop and as the evidence is, sped off at high speed.

23 In these circumstances, I have no hesitation in absolving Miss Lemieux from responsibility.

24 I turn now to the evidence with respect to the allegation of all plaintiffs that the hit-run vehicle that caused this accident was owned by the defendant Nedelkos and driven by the defendant Nestor.

25 Constable Woodburn, a member of No.2 Traffic Division, Metropolitan Toronto Police, was driving north on

Kipling Avenue when he came upon the scene of the accident within a minute or two of its occurrence. Having arranged for the removal to hospital of the injured parties, he conducted a preliminary investigation during which he formed his opinion as to the point of impact, and observed marks on the island or median strip made by Miss Lemieux' car. Both the Muhitch vehicle and the Lemieux vehicle were in his opinion damaged beyond repair.

26 At the hospital, Miss Lemieux told him what she knew of the cause of the accident. The officer returned to the scene and carefully collected debris including pieces of chrome, body filler and scraps of paint.

27 He found a minor scrape on the right front fender of the Lemieux vehicle 24 inches above the road level, which had no connection with the impact with the Muhitch car. This scrape was parallel to the road and extended from front to rear of the right front fender.

28 On Sunday, 5th December, at about 2:30 p.m. in the company of Constable Peever of the "hit-run squad" who was now in charge of the investigation, a 1964 Buick "Wildcat" blue with a white roof was observed parked near a small restaurant at 1116 The Queensway which is in the general area of the scene of the accident and about three-quarters of a mile away. The officers stopped to examine this vehicle and observed damage on the left rear fender near the bumper area, measured at 24 inches above the road level. Having noted the licence number the officers returned to the Kipling auto pound to make further observations and measurements on the right front fender of the Lemieux vehicle.

29 As a result, both officers formed the opinion that this Buick car was indeed the one they were looking for.

30 Having secured particulars of the registration of this car to Nedelkos at 64 Madeleine Avenue in Scarborough, the officers in uniform, went to that address.

31 Constable Woodburn testified that a man answered the door and before the officers could say anything, this individual who turned out to be John Nestor, asked if we were there about his cousin's car.

32 He further said the vehicle was at Nestor's restaurant at 1116 The Queensway and had been parked there because the battery was dead. He said it hadn't been driven since the 25th November, as it had been involved in an accident in a parking lot at Main Street and Dawes Road. He further said the keys were in the till at the restaurant.

33 Continuing with Woodburn's evidence, he stated that at 7:30 pm. on the following day Nedelkos was interviewed at the restaurant. He too told the officers that the car hadn't been driven for ten days. It had been involved in an accident at Main and Dawes Road on the 21st November and was parked at the restaurant on the Sunday following. This minor accident had not been reported to the police.

34 In cross-examination he said no debris was found in the southbound lanes on Kipling Avenue, but one piece of debris picked up at the scene of the accident appeared to be the first part of the word "Wildcat". A portion of this word was missing from the vehicle found at the restaurant and the piece the officers had, fitted what remained to complete the word. This witness thought it came from the left front fender but I am of the opinion that this is an understandable error in memory as he had no note of the location of this word on the car, and five and a half years have passed since the accident.

35 He further said that at the time of interviewing Nestor on Sunday the 5th December, Nestor made the gratuitous statement that if his cousin's car had been involved in the accident being investigated, he, Nestor, would have had to be the driver. Nestor further said to the officers that he didn't believe his cousin's story about the accident at Main and Dawes Road and "thought there was something fishy about it." He didn't explain this comment to the police.

36 David Peever, who in December, 1971, was a constable attached to the same traffic division and a member of the "hit-run squad" was the next witness. He is no longer a police officer.

37 His evidence as to the discovery of the car and the conversation with Nestor on the Sunday afternoon was substantially the same as Woodburn's.

38 On the following day Peever had noted that he had again questioned Nestor at the restaurant and was told that on the day of the accident Nestor had been at the restaurant working until closing time at 8:00 p.m., that then some friends came in and stayed until after 10:00 pm. when one of the friends - "the lad next door" drove him home. Nestor further said that he had never left the restaurant that evening prior to going home, that the keys for the car were at the front of the restaurant and no one else had driven the car.

39 In a subsequent interview based on what the "lad next door" Ken Gallie had told Peever, Nestor admitted that his first story was quite wrong, that in fact he and Gallie had left the restaurant about 8:00 pm. and had gone to a bar for a drink. The officer then advised him that Gallie had also said that Nestor had left the bar about 9:00 p.m. and returned a half hour later and that Nestor agreed that this also was true.

40 If this evidence is accepted, Nestor had no alibi for the very period of time when this accident happened.

41 At the time when Nedelkos' vehicle was noticed early Sunday afternoon 5th December, Peever stated he found damage in the left rear fender and bumper area involving a chrome strip which had a smear of red paint on it which he removed, and a long scrape on this fender 24 inches above the ground. He then obtained a sample of the red paint from the Lemieux vehicle. All of these samples, including the letters apparently from the word "Wildcat" were in due course taken to the Centre of Forensic Science for testing.

42 In cross-examination he agreed that Nestor had told him that Atlas Collision had been consulted about the damage alleged to have occurred at Main and Dawes Road. He, also agreed that he had tried to start the car but couldn't as the battery appeared to be dead.

43 Under cross-examination by counsel on behalf of the Registrar, he stated that the scrape on the Lemieux vehicle was the same width as the chrome strip on the Buick from which he had removed the smear of red paint, and appeared to him to be the same colour. The bumper on the Buick was 26 inches above ground and there was damage to the Lemieux vehicle at this level.

44 Mr. Frank Cerar who has been with the Centre of Forensic Science for 21 years and whose specialty is the examination of material found at the scene of an accident involving a "hit-run" unidentified vehicle stated that on the 17th December, 1971, he received two envelopes, the first reportedly containing red paint samples from a 1962 Chevrolet licence 721044 which was the Lemieux car and the second containing paint samples from the 1964 Buick, the Nedelkos car, and some metallic pieces from a car emblem on which there were fine smears of red paint.

45 The red smears last referred to were examined under high and low power microscopes and no differences from the control sample in the first envelope from the Lemieux vehicle could be detected. Further these metallic pieces formed part of the word "Wildcat", a well-known General Motors Buick model designation.

46 A paint sample taken from the Buick revealed four layers of paint, the top and bottom layers being metallic blue. This same sample revealed a fine smear of red paint which again under microscopic examination revealed no differences from the red paint taken from the Lemieux vehicle.

47 Mr. Cerar conceded that the samples of paint in the second envelope were so small that he was not prepared to say affirmatively that the red paint was from the same source but he was able to assert that the most careful examination revealed no differences although there are many shades of red paint used in motor car finishes.

48 Nestor was called as a witness on his own behalf. His opening statement was that his cousin's car had been parked at the restaurant for 4 to 6 weeks so a body shop man could come to fix it. He said "Vince" from Atlas

Collision had come to the restaurant a couple of weeks before the police questioned him to look at the damage at the left rear. The only time the car had been moved was during the first week of this 4 to 6 week period for a trip to the Dominion store.

49 He said on the night the accident occurred he had left the restaurant with his friend Kenny about 8:00 p.m. to go to the Delmonico Tavern for a drink and had only stayed there 15 to 20 minutes when Kenny drove him to the subway station at Bloor and Christie Streets.

50 He said when the officers first questioned him he told them the car had been "bruised-up" 5 or 6 weeks ago. On Monday the 6th December, when the police were at the restaurant, Vince from Atlas had been called over, that someone tried to start the car but the battery had been dead for 3 or 4 days.

51 He further testified that every morning during this long period of waiting for Vince to repair the body damage he had methodically started the car and run it until the morning he found the battery dead.

52 He denied telling the officers that he had stayed at the restaurant until 10:00 p.m. or that he had left the Delmonico Tavern for a half hour.

53 In cross-examination by counsel for Miss Lemieux he re-iterated that he had started that car as he had said, every morning for 4 to 6 weeks.

54 In cross-examination by counsel for the Registrar he affirmed that at all material times he had the keys for the car with full permission to use it. He then said that he too had examined the damage at the left rear and there was no red paint - it was rusty-brownish but the police thought it was red. He again denied telling the police he had stayed at the restaurant until 10:00 p.m. or that "Ken" had driven him home.

55 Finally when challenged with Peever's evidence that he had been confronted with what "Ken" had told the police, he said he didn't remember.

56 It is of course, an indictable offence under the Criminal Code, to fail to remain at the scene of an accident in which a driver is involved, which immediately invokes caution on the part of the court in the consideration of evidence that implicates an individual in such conduct in the face of the individual's sworn denial.

57 In Phipson on Evidence, 11th Ed. at p. 58 (para. 123) under the heading "Proof of Criminal Offences in Civil Proceedings" the following statement is made - "The standard of proof required to prove a criminal offence in civil proceedings is no higher than the standard of proof ordinarily required in civil proceedings. However, the more serious the allegation the higher the degree of probability that is required' ".

58 The inserted quotation is from the judgment of Denning, L.J. (as he then was) in the case of Hornal v. Neuberger Products Ltd., [1957] 1 Q.B. 247 at p. 258.

59 This judgment was followed in Canada in Dunn v. Darbyson (1960), 31 W.W.R. 422 (B.C. Supreme Court) and referred to with apparent approval in M.N.R. v. Taylor, (1961] Ex. C.R. 318, but the issue in that case did not depend on this principle. In my opinion however, it is a correct statement of the present law.

60 The evidence of the police officers as to the visible damage and its height above ground level on the left rear fender of the Buick and the right front fender of the Lemieux car, the observable red paint smears on the Buick and the evidence of Mr. Cerar that no difference could be detected between such smears and the paint sample from the Lemieux vehicle plus the matching of a portion of the chrome lettering of the word "Wildcat" found at the accident scene with the portion of the word remaining on the Nedelkos vehicle, is certainly sufficient to call for an explanation by Nedelkos and Nestor.

61 There is so much conflict in what Nestor told the police officers at various times and in his evidence at trial as to render him a wholly discredited witness.

62 It was said that his erstwhile friend Ken Gallie, was now somewhere on the east coast of Canada and hence unavailable to substantiate Nestor's alibi. Be that as it may, Nestor was not prepared to deny that he had been confronted by the police with Gallie's statement to the police that Nestor had left the Delmonico Tavern about 9:00 p.m. on the night of the accident for a period of half an hour and had agreed that this was true. I have no hesitation in accepting Peever's evidence in this regard.

63 There was nothing in Nedelkos' evidence to help his cousin, and his evidence that the car was at the restaurant awaiting repairs only since the Sunday following the 21st November, is in direct conflict with Nestor's story of it being there for 4 to 6 weeks as he said at trial, and with his original statement to the police.

64 His story of starting the car every morning until he found the battery dead "3 or 4 days" before the police questioned him is preposterous. The battery could easily have been drained in a few hours after the accident.

65 Nor was there any explanation as to why the car was parked at the restaurant instead of being taken to the auto body shop for repairs of the alleged pre-existing damage, and the evidence of "Vince" did nothing to help him as he had no real recollection of dates or damage.

66 In the circumstances I find that the plaintiffs have satisfied the standard of proof required, namely that on a balance of probabilities, sufficiently weighted to recognize that it involves the commission of a criminal offence on the part of Nestor. Accordingly, I find that the blue and white car that sent the Lemieux car out of control and into collision with the Muhitch vehicle was the car owned by Nedelkos and driven by Nestor at the time, with the consent of Nedelkos.

67 It follows that no liability attaches to the Registrar of Motor Vehicles, and both actions against the Registrar will be dismissed with costs.

68 Two matters remain, namely the assessment of the damages of the four plaintiffs and the disposition of costs.

ASSESSMENT OF DAMAGES - ANTON MUHITCH

69 Mr. Muhitch who is now 68 years of age escaped from this collision with remarkably light injuries considering the violence of the impact. He was admitted to the Queensway General Hospital where it was found that he had suffered a non-displaced fracture of the greater trochanter of the left femur, fractures of the left 4th and 5th ribs "associated with a moderate sized left pneumo-thorax and considerable surgical emphysema involving the left chest wall".

70 "X-rays of right hand and wrist revealed slightly comminuted fracture involving the shaft of the 5th metacarpal - the fragments however were not significantly displaced - and a similar fracture involving the shaft of the 1st metacarpal". (Report of Dr. E.C. Werry, 26th May, 1972).

71 The collapsed lung was restored the following day and his continued recovery was uneventful. He was discharged from the hospital on the 19th December, 1971.

72 He suffered no head injury and never lost consciousness.

73 Dr. Werry was of the opinion that he would have no residual disability.

74 He returned to his work as a machine operator at Massey Ferguson on the 20th March, 1972. He is still employed there but doing lighter work. He has lost little if any time away from work since returning.

75 He testified that for a period of 3 or 4 months he suffered from headaches and pain in his neck area, his right hand and left hip. He further stated that he used to enjoy home carpentry, cross-country skiing in the winter and had plans to build a new cottage. The impression that he intended to make on the court was that his life apart from his daily work had completely changed. Whereas he had been a very energetic person, now he just wanted to rest and relax. He was supported in this connection by his daughter's evidence.

76 In view of the medical report of Dr. Werry and his steady employment record which continues to this day, years after most industrial workers have retired, I am inclined to discount these complaints.

77 His special damages including lost income in the sum of \$2,395.40 and expense for household help for about a year in the sum of \$1,451.00 were admitted and totalled in all \$5,589.55. I assess his general damages at \$6,500.00.

78 He will have judgment against Nestor and Nedelkos for \$12,089.55

ASSESSMENT OF DAMAGES - MARIA MUHITCH

79 Mrs. Muhitch, sitting in the passenger seat in the front of her husband's car, was the only person who suffered severe injury with permanent disability. She had no broken bones and was conscious on admission to the Queensway General Hospital.

80 She had multiple bruises and abrasions and lacerations on her left leg. Far more important however, was a severe laceration of the tongue and severe bruising of the left periorbital area.

81 The tongue became gangrenous and she has had about 2 square centimetres of her tongue removed from the front left portion.

82 This is a permanent and severe disability. It affects her speech, it causes drooling, she has great difficulty in managing food, swallowing is impaired and worst of all she is very self-conscious of these abnormalities. The blow to the left periorbital region has damaged a nerve permanently with the result that her left eye turns inward and upward. She has lost her senses of taste and smell.

83 From one who was very much an extrovert with the ability to participate enthusiastically in social work, church work and the general enjoyment of life, she has become depressed and given to uncontrollable crying spells.

84 Regrettably however, she has not accepted the advice of her ophthalmologist, Dr. Albertson, and submitted to an operation involving minimal risk to repair much of the damage to her left eye.

85 She is now 63 years old. Her family has grown up and one would wish that she would accept her doctor's advice and do as much as possible to alleviate her distress from her injuries. In law, she has an obligation to mitigate her damages but quite apart from this, in her own interest and with regard to her husband and family who suffer with her, one would hope that she would take advantage of the relief that her medical advisers believe is available to her. She required help in the house for about a year. She was in hospital upwards of two weeks. She suffers from double vision with the eye in its present condition, which would be eliminated if she submitted to the operation I have mentioned.

86 Taking all these factors into consideration I would assess her general damages at \$30,000.00. Her special damages were agreed at the sum of \$1,561.90. She will have judgment therefore against the defendants Nestor

and Nedelkos for \$31,561.90.

ASSESSMENT OF DAMAGES - ELFRIEDE POJE

87 Mrs. Poje also escaped with minimal injury. After examination in the emergency department of the Queensway General Hospital, she was not admitted and returned home. She suffered a good deal of bruising and there was appreciable tenderness in the left lower chest, left abdomen and left costo-vertebral area.

88 She had been employed for many years at a Dominion Store and was forced to remain off work for about a month. Even when she returned to work she had problems of balance if she got up on a step-stool and tended to drop articles.

89 She has however, made a full recovery. I would assess her general damages at \$1,000.00. Her special damages were agreed at the sum of \$1,182.19 and she will have judgment against Nestor and Nedelkos for \$2,182.19.

ASSESSMENT OF DAMAGES - JUDITH LEMIEUX

90 Miss Lemieux was the luckiest of all the four people injured in this accident. Apart from bruising, a sore chest and sore right hand all of which healed rapidly, her only significant injury was a laceration on her chin that required 6 or 7 stitches.

91 Unfortunately a scar resulted which required some revision. I would assess her general damages at \$500.00 and allow her special damages which were agreed at \$133.00.

92 She then will have judgment against Nestor and Nedelkos for \$633.00.

93 The question of costs is a complicated one. All plaintiffs are entitled to their costs on the Supreme Court scale against the defendants Nestor and Nedelkos. Miss Lemieux has been successful in defending the action against her brought by Mr. and Mrs. Muhitch and Mrs. Poje, but her costs will be recovered in her own action against Nestor and Nedelkos, as both actions were tried together.

94 The Registrar is entitled to costs of both actions against the plaintiffs but these, if paid, are recoverable by the plaintiffs from the defendants Nestor and Nedelkos.

95 As the question of costs was not argued, if my initial disposition is not satisfactory, counsel for any party and Mr. Nedelkos who defended himself may apply for an appointment to make submissions.

KEITH J.