

CITATION: Ontario Society for the Prevention of Cruelty of Animals v. Hunter,
2014 ONSC 6084
DIVISIONAL COURT FILE NO.: 746/13
DATE: 2014/10/20

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)
Ontario Society for the Prevention of)
Cruelty to Animals)
Appellant/Defendant) Brian Shiller and Gerald Chan, for the
Appellant/Defendant)
– and –)
Kenneth Hunter)
Respondent/Plaintiff) Kurtis R. Andrews and Donald R. Good, for
the Respondent/Plaintiff)
)
)
) **HEARD:** September 10, 2014

APPEAL DECISION

RATUSHNY J.

[1] The appellant, the Ontario Society for the Prevention of Cruelty to Animals (the “OSPCA”) appeals the decision dated September 10, 2013 of the Superior Court of Justice, Perth Small Claims Court granting judgment in favour of the respondent, Kenneth Hunter (“Mr. Hunter”) and awarding him damages in the total amount of \$11,926.83 under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the “Charter”).

[2] The issue on this appeal is the correctness of this award of damages under s. 24(1) of the *Charter*.

1. Summary of Background Facts

[3] The OSPCA is a statutory body with powers and duties set out in the *Ontario Society for the Prevention of Cruelty to Animals Act* (the “*OSPCA Act*”), R.S.O. 1990, c. O.36, tasking it with facilitating and providing “for the prevention of cruelty to animals and their protection and relief therefrom” (s. 3) and granting OSPCA agents and inspectors the powers of a police officer for the purposes of enforcing the *OSPCA Act* and other Ontario animal welfare laws (s. 11).

[4] Mr. Hunter lives on a dairy farm containing three barns. Cattle are kept in the larger barns and pigs in the smaller barn.

[5] On October 14, 2010, Laura Lowson, a municipal law enforcement officer with the Township of Montague, attended Mr. Hunter’s property at his invitation; however, Mr. Hunter was not home. While she was there she heard something and thinking it might be Mr. Hunter, she walked towards the smaller barn and found herself standing in wet manure. In looking through an opening into the barn to see if Mr. Hunter was there, she saw pigs in liquid manure up to their chests. She heard cattle mooing and bawling in another barn and looked inside that barn for Mr. Hunter but he was not there. She saw puddles everywhere. There was no food. She then went to another barn and saw cattle tied up inside. There was water and liquid manure everywhere. There was no food in front of the animals.

[6] She took photographs to record her observations.

[7] She returned to her truck and called Inspector Larry Wilkinson of the OSPCA. She told him she had seen Mr. Hunter’s pigs in a sea of manure and mud, that his cattle had no place to lie down and that she had seen no food or water for the animals. She asked Inspector Wilkinson to get there as soon as he could and told him that it had been a long time since she had seen something this bad.

[8] After ascertaining when Dr. Rinfret, a veterinarian, was available to accompany him to Mr. Hunter’s farm, the next day, October 15, 2010, Inspector Wilkinson of the OSPCA went on

Mr. Hunter's property with Dr. Rinfret. He did so without first obtaining a warrant. He believed, he testified, that s. 12(6) of the *OSPCA Act* provided him with the authority to conduct a warrantless search because he had reasonable grounds for believing that animals were in "immediate distress".

[9] Inspector Wilkinson knocked on the door of Mr. Hunter's residence but no one answered. He saw two large pigs loose on the property and Dr. Rinfret attempting to direct them away from the highway.

[10] He heard other pigs vocalizing inside a barn and smelled the foul smell of manure coming from it. He looked into the door of that barn and saw what Ms. Lowson had said she had seen. He did not enter that barn.

[11] He walked towards the dairy barn and heard cows vocalizing or bawling as he approached. He entered the barn and saw twelve cattle tied up, a few loose cattle, a dead calf on the ground, no bedding, no food, lots of manure and leaky water that was green and slimy.

[12] Mr. Hunter arrived soon afterwards at approximately 12:25 p.m. He was cordial and polite and shook Inspector Wilkinson's hand. He did not ask either Inspector Wilkinson or Dr. Rinfret to leave. Inspector Wilkinson discussed his observations with Mr. Hunter and left with Dr. Rinfret at approximately 1:00 p.m.

[13] Dr. Rinfret was concerned about the living conditions of Mr. Hunter's animals although he found that all of the pigs were in good and healthy condition and all of the cattle with the exception of two were in average condition.

[14] Based on Dr. Rinfret's recommendations and pursuant to his authority under s. 13(1) of the *OSPCA Act*, Inspector Wilkinson wrote a number of compliance orders requiring Mr. Hunter to improve the living conditions of his animals. He left them at Mr. Hunter's residence and returned a dozen times over the next few weeks pursuant to his authority under s. 13(6) of the *OSPCA Act* to ensure that Mr. Hunter was complying with the orders.

[15] Mr. Hunter had the right to appeal the compliance orders under s. 17 of the *OSPCA Act* but chose not to do so.

2. The *POA* Trial

[16] Inspector Wilkinson charged Mr. Hunter with three offences under the *OSPCA Act*: failing to comply with the prescribed standards of care; permitting an animal to be in distress; and failing to comply with compliance orders. The Crown prosecuted these charges under the *Provincial Offences Act* (the “*POA*”), R.S.O. 1990, c. P.33.

[17] At his *POA* trial, Mr. Hunter successfully brought a *Charter* application alleging that on October 15, 2010 Inspector Wilkinson had violated his s. 8 *Charter* right to be secure against unreasonable search and seizure. The Crown conceded the s. 8 breach. As a consequence the *POA* court excluded all of the evidence gathered from the October 14 and 15 searches of his property by Ms. Lowson and Inspector Wilkinson and declared all of the compliance orders to be null and void. The Crown then withdrew all the charges.

[18] The *POA* court declined to award costs requested by Mr. Hunter from the OSPCA, not from the Crown, for the \$9,426.83 in legal fees he had incurred to bring his *Charter* motion, stating it had no jurisdiction to grant such a remedy.

3. The Civil Trial

[19] After his *POA* trial, Mr. Hunter brought a civil action for damages against the OSPCA in Small Claims Court, alleging the same *Charter* breach and the tort of trespass. Mr. Hunter claimed general damages in the amount of \$10,000.00 and special damages in the amount of \$9,426.83 representing legal fees incurred in bringing his *Charter* motion at the *POA* trial.

[20] At the civil trial the OSPCA did not concede, as the Crown had at the *POA* trial, that Inspector Wilkinson had breached Mr. Hunter’s s. 8 *Charter* rights.

[21] However, the trial judge agreed with the *POA* court's finding that there had been a s. 8 breach and also rejected Inspector Wilkinson's testimony that there were reasonable grounds to believe the animals were in immediate distress such that a warrantless entry was authorized under s. 12(6) of the *OSPCA Act*.

[22] The trial judge found that Inspector Wilkinson's actions in obtaining Dr. Rinfret's assistance and waiting until daylight hours to attend at the property "were not done in bad faith," however, "genuine concern and lack of bad faith cannot cure the breaches," referring to Ms. Lowson's warrantless search on October 14 and Inspector Wilkinson's warrantless search on October 15.

[23] The trial judge then said the following in the concluding paragraphs (19-22) of his judgment:

Having found that the S. 8 *Charter* Breach was serious, significant, and fatal to the Defence's case, and that S. 24 of the *Charter* could not save it, the issue of damages must be determined.

The leading case of *Ward v. Vancouver* [2010] SCJ No. 27 (SCC), was cited by both Plaintiff and Defendant in arguing their positions. Having weighed all the evidence and keeping in mind that *Ward* was by far more invasive than this case, the Court awarded \$5,000.00 in damages.

In this case, the Court accepts that Mr. Hunter did experience paranoia, stress, and a sense of violation of his property. However, in comparison to the *Ward* case, this Court finds that the appropriate damage relief to be \$2,500.00.

With respect to the issue of legal fees, this Court finds that in all of the circumstances in order to successfully argue the Charter motion, the Plaintiff, Defendant in the Provincial Offences case the fees were reasonable and this Court awards the sum claimed by the Plaintiff in the amount of \$9,426.83.

[24] The trial judge also awarded costs to Mr. Hunter fixed at \$2,000.00 plus HST.

4. The Parties' Positions on this Appeal

Position of the OSPCA

[25] The OSPCA does not appeal the trial judge's costs award nor does it appeal his finding that there had been a s. 8 *Charter* breach. The OSPCA restricts its appeal to the question of remedy, namely the damages award in the total amount of \$11,926.83 to Mr. Hunter under s. 24(1) of the *Charter*.

[26] The OSPCA submits the *Ward* case required the trial judge to award damages under s. 24(1) of the *Charter* only after conducting an analysis that damages were "appropriate and just," having regard to the functions of vindication, deterrence and compensation as well as countervailing factors including the existence of alternative remedies and concerns for good governance.

[27] The OSPCA alleges the trial judge committed an error of law when, with very little analysis, he simply moved from the question of whether there was a *Charter* breach to the issue of the quantum of damages to be awarded under s. 24(1) of the *Charter*.

[28] The OSPCA argues that had the test in *Ward* been properly applied, no *Charter* damages would have been granted. The OSPCA says in all of the circumstances including the single *Charter* breach, the lack of bad faith and the remedies granted at the *POA* trial, that there was and is no basis in fact or law to award *Charter* damages to Mr. Hunter for Inspector Wilkinson's actions on October 15, 2010.

[29] The OSPCA concedes a trespass was committed but that in all of the circumstances a nominal damages award of \$100.00 is appropriate for the tort of trespass.

[30] The OSPCA also alleges that in addition to the error of law, the trial judge committed a factual error in finding that Mr. Hunter experienced "paranoia, stress, and a sense of violation of his property" as a result of the *Charter* breach.

[31] The standard of review for findings of fact is reasonableness, so that such findings are not to be reversed unless it is established that the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 10.

[32] The OSPCA alleges there was no evidence allowing for this finding of fact.

Position of Mr. Hunter

[33] Mr. Hunter does not concede there was a single *Charter* breach and instead, characterizes Inspector Wilkinson's actions after October 15 in attending with respect to the compliance orders as amounting to twelve subsequent *Charter* breaches committed after the original breach of October 15.

[34] Mr. Hunter submits the trial judge's findings must be accorded deference not only with respect to his findings of fact but also in his conclusion, arrived at after acknowledging the *Ward* case, that damages were to be awarded.

[35] Mr. Hunter argues the functional justifications set out in *Ward* for *Charter* damages awarded, particularly those of deterrence and compensation, were applied and satisfied by the damages award based on the evidence before the trial judge. Mr. Hunter characterizes that evidence as amounting to a pattern of *Charter*-ignoring behavior by Inspector Wilkinson beginning in earlier years and culminating in the October 2010 events that amounted to a "blatant", "willful" and "reckless" breach of his *Charter* rights stemming from a purposeful ignoring of the *Charter*'s requirement for a warrant.

5. Analysis

[36] I have concluded that the trial judge committed an error of law when he failed to engage in any analysis of factors justifying his award of *Charter* damages, as required by *Ward*. I agree with the OSPCA that he simply moved from his finding of a *Charter* breach to the issue of the quantum of damages for that breach. I agree that the trial judge failed to address the relevance of the prior remedies granted to Mr. Hunter in the *POA* trial.

[37] While it is arguable, as Mr. Hunter has asserted, that the trial judge was also awarding damages for the tort of trespass as had been claimed in addition to the claim for *Charter* damages, the trial judge's reasons more clearly indicate a progression from a consideration of the *Charter* breach to damages for that breach. The trial judge's reasons make no reference to the tort of trespass.

[38] For an error of law it is accepted that the appellate standard of review is correctness: *Enbridge Gas Distribution Inc. v. Froese*, 2012 ONSC 6437 (Div. Ct.), at para. 40.

[39] I turn, therefore, to an analysis of a functional justification for the trial judge's award of *Charter* damages so as to determine its correctness.

[40] I approach this analysis on the basis of the wording of s. 24(1) of the *Charter* as clarified in *Ward*.

[41] Section 24(1) of the *Charter* states:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[42] In *Ward*, the Supreme Court of Canada stated that for damages to be granted under s. 24(1) of the *Charter* at least one of the related functions of compensation, vindication of the right, and/or deterrence of future breaches must be engaged. If the plaintiff can show that one or more are engaged, the state (here, the appellant) may still defeat those functional considerations supporting the claim of damages by pointing to countervailing factors, including the existence of alternative remedies and concerns for good governance, that render damages inappropriate and unjust (*Ward*, at paras. 3 and 44).

[43] Before beginning a *Ward* analysis, Mr. Hunter has made certain factual assertions with respect to the evidence before the trial judge that the OSPCA alleges, accurately I have concluded, are incorrect. The contested factual assertions merit clarification as follows:

1. I agree that the *Charter* breach by Inspector Wilkinson involved one attendance on October 15, 2010 and not a total of thirteen *Charter* breaches. Mr. Hunter conceded this at the civil trial on the basis of the evidence and cannot seek to change his position on appeal. I accept that the subsequent attendances by Inspector Wilkinson were not searches but authorized compliance attendances under s. 13(6) of the *OSPCA Act*.

2. While there was evidence regarding Inspector Wilkinson's previous attendances at Mr. Hunter's property, the trial judge made no findings of past misconducts so that these previous attendances cannot be said to have established a pattern of egregious conduct by Inspector Wilkinson.
3. The trial judge did not characterize Inspector Wilkinson's conduct as having amounted to a "willful ignoring" of *Charter* requirements or a "blatant" or "reckless" disregarding of Mr. Hunter's *Charter* rights. He only characterized Inspector Wilkinson's conduct in general terms as actions that "were not done in bad faith."
4. There was no finding by the *POA* court that Inspector Wilkinson had not acted in good faith.
5. While the OSPCA agrees the trial judge concluded the *Charter* breach was "serious" and "significant", its context serves to mitigate its degree of seriousness, namely as a one-time occurrence motivated by genuine concern and a lack of bad faith.

[44] The OSPCA also disputes the trial judge's factual finding that Mr. Hunter "did experience paranoia, stress, and a sense of violation of his property." I cannot conclude, however, that the trial judge committed a palpable and overriding error in this respect. His finding involved assessments of the credibility of witnesses appearing before him. His finding was not unreasonable and is to be accorded deference.

[45] Based on these clarifications and the evidence before the trial judge, I turn to a consideration of a functional basis for the award of *Charter* damages.

Functional Analysis

[46] Certainly the s. 8 *Charter* breach by the OSPCA engages the objectives of vindication of Mr. Hunter's s. 8 *Charter* right and deterrence of the OSPCA from future breaches, all in recognition of the importance of Mr. Hunter's constitutionally protected *Charter* rights.

[47] The objective of compensation is also engaged by the *Charter* breach by way of compensation for Mr. Hunter's non-pecuniary damages related to his paranoia, stress and sense of violation of his property from that breach.

[48] Contrary to the trial judge's award of *Charter* damages for Mr. Hunter's legal fees in the *POA* proceeding, however, I do not conclude that the *Charter* breach supports an award of damages to Mr. Hunter under s. 24(1) of the *Charter* for the legal fees he incurred in defending charges against him and bringing a *Charter* motion in the separate *POA* trial.

[49] The OSPCA was not a party to the *POA* trial. The Crown as an agent of the state under the *POA* directed the prosecution and the Crown's response to the *Charter* motion, not the OSPCA. As a result and notwithstanding the finding that the OSPCA had breached s. 8, the OSPCA should not have to bear Mr. Hunter's legal fees for the *Charter* motion in that other proceeding when it was the Crown exercising its prosecutorial discretion and not the OSPCA directing the proceeding and influencing the quantum of those fees. I agree with the OSPCA that to do otherwise in these circumstances would impose disproportionate liability on the OSPCA for a good faith breach.

[50] I also agree with the OSPCA that Mr. Hunter's request to be compensated for his legal fees in the *POA* trial raises concerns related to good governance, as explained in *Ward* at paras. 38-42. The concern involves the undermining of the ability of the Crown as an agent of the state to exercise its prosecutorial discretion in connection with enforcing a law and dealing with a *Charter* breach, unfettered by the fear of future liability under s. 24(1) of the *Charter* and particularly so where there has been an appropriate exercise of its prosecutorial discretion, no finding of an abuse of power and no finding of bad faith or other severe misconduct by the OSPCA.

[51] In all of these circumstances I conclude it would be inappropriate and unfair to find that the goal of compensation for a *Charter* breach needs to be fulfilled by a damages award under

s. 24(1) of the *Charter* for legal fees incurred in a separate court case. Such a damages award would be inappropriate and unjust and not, therefore, in accordance with s. 24(1).

Countervailing Factors

[52] With the determination that the functions of vindication, deterrence and compensation are all engaged by the *Charter* breach, the next step in the analysis is a consideration of countervailing factors that could defeat these functional objectives supporting a damages award and render damages inappropriate and unjust.

[53] The countervailing factors serving to “defeat the functional considerations that support a damage award” (*Ward*, at para. 4) are, as the OSPCA has argued, the remedies already received at the *POA* trial for the *Charter* breach, namely the exclusion of evidence, the declaration of the invalidity of the compliance orders and the withdrawal by the Crown of all of the charges against Mr. Hunter.

[54] I agree with the OSPCA that those measures served to vindicate Mr. Hunter’s s. 8 right and deter the OSPCA from committing similar breaches. Neither were they insignificant remedies, resulting as they did in a complete withdrawal of all charges against Mr. Hunter in a situation where the *Charter* breach was a brief one-time occurrence underpinned by a genuine concern for animal welfare and a lack of bad faith.

[55] For the paranoia, stress and sense of violation of his property experienced by Mr. Hunter as a result of the *Charter* breach as found by the trial judge, the evidence of this was slight. It was experienced in the context of a *Charter* breach that was of short duration and motivated by a genuine concern for animal welfare and a lack of bad faith. At the *POA* trial, Mr. Hunter was the beneficiary of significant remedies awarded for the breach. In all of these circumstances, these non-pecuniary damages do not rise to a level of compensable harm by the OSPCA under s. 24(1).

[56] It is in this context, together with the concern for good governance, that I conclude a further remedy for the *Charter* breach by way of a damages award would be an excessive

reflection of the applicable functional objectives that have already been adequately served and would not, therefore, be a “just and appropriate” remedy under s. 24(1).

6. Trespass

[57] The OSPCA concedes that Inspector Wilkinson trespassed on Mr. Hunter’s property on October 15, 2010 but submits that in all the circumstances a nominal damages award of \$100.00 for that trespass is appropriate. I agree. All of the circumstances referred to before including the factors negating the need for an award of *Charter* damages also operate to make the trespass minimally intrusive (and certainly less egregious than in *Cantera v. Eller*, [2007] O.J. No. 1899 (S.C.J.), at para. 63) and a tort of minor significance.

7. Conclusions

[58] For these reasons the appeal is allowed.

[59] A nominal damages award of \$100.00 is substituted for the awards granted by the trial judge in his September 10, 2013 judgment.

[60] Costs are awarded to the OSPCA. If the parties are unable to agree on their quantum, written submissions on costs, a maximum of three pages exclusive of attachments for each party, are able to be forwarded to me before November 14, 2014.

Justice L. Ratushny

Released: October 20, 2014

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