CITATION: Penner v. Niagara (Police Services Board), 2010 ONCA 616
DATE: 20100927
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COURT OF APPEAL FOR ONTARIO

Laskin, Moldaver and Armstrong JJ.A.

BETWEEN

Wayne Penner

Plaintiff (Appellant)

and

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow

Defendants (Respondents)

James A. Scarfone, for the appellant

Eugene G. Mazzuca, for the respondents

Heard: March 25, 2010

On appeal from the order of Justice Eugene B. Fedak of the Superior Court of Justice, dated October 27, 2009.

Laskin J.A.:

A. INTRODUCTION

[1] This appeal raises the broad question whether findings made in a police disciplinary proceeding preclude re-litigating those same issues in a civil action.

[2] The appellant, Wayne Penner, was arrested for causing a disturbance during a trial in the Ontario Court of Justice. He filed a complaint under the *Police Services Act* alleging misconduct by the two officers who arrested him, the respondents Parker and Koscinski. He claimed that his arrest was unlawful and that the officers used unnecessary force on him, both during and after his arrest.

[3] Mr. Penner's complaint led to disciplinary proceedings against the two police officers. A hearing officer dismissed the complaint. He found that Mr. Penner had been lawfully arrested and that no unnecessary force had been used on him, either during or after his arrest.

[4] Mr. Penner appealed the hearing officer's decision to the Ontario Civilian Commission on Police Services, which largely overturned the hearing officer's decision. However, officers Parker and Koscinski applied for judicial review of the Commission's ruling. Their application was granted. The Divisional Court overturned the Commission's ruling and restored the hearing officer's decision.

[5] The present appeal arises out of a civil action that Mr. Penner brought shortly after filing his complaint under the *Police Services Act*. In this action, Mr. Penner has sued the

officers involved in his arrest together with the Niagara Regional Police Services Board. His allegations against them include unlawful arrest, unnecessary use of force, false imprisonment and malicious prosecution.

[6] After the Divisional Court's decision in the *Police Services Act* proceedings, the respondents moved under r. 21.01(1) to strike these allegations from Mr. Penner's statement of claim on the ground of issue estoppel. Fedak J. granted the motion.

[7] Mr. Penner appeals the motion judge's ruling on three grounds:

> (i) He submits that the motion judge erred in finding that his claim was barred by issue estoppel because the questions decided in the disciplinary proceedings are not the same as the questions to be resolved in the civil action;
>
> (ii) He also submits that issue estoppel does not preclude a civil action because he was not a "party" in the disciplinary proceedings; and
>
> (iii) Finally, Mr. Penner submits that the motion judge erred by refusing to exercise his discretion not to apply issue estoppel.

B. THE PROCEEDING GIVING RISE TO THIS APPEAL

(1) The Arrest of Mr. Penner

[8] On January 28, 2003, Mr. Penner attended a trial before a Justice of the Peace in St. Catharines. His wife was the defendant. She had been charged under the *Provincial Offences Act* with driving a motor vehicle without displaying two licence plates. Officers

Parker and Koscinski were also in the courtroom that day. Officer Parker testified at Mrs. Penner's trial; officer Koscinski was there on an unrelated matter.

[9] These two officers claim that Mr. Penner was causing a disturbance in the courtroom during his wife's trial. They arrested him under s. 175 of the *Criminal Code*, and took him to the police station for booking,

(2) The Hearing Under the *Police Services Act*

[10] A retired police superintendent conducted the disciplinary hearing against the two police officers. The hearing took place over several days.

[11] Mr. Penner, as the complainant, had standing at the hearing. He was entitled to counsel but chose not to retain one. However, he gave oral evidence, cross-examined other witnesses and made written submissions on points of law.

[12] In all, 13 witnesses testified at the hearing. Numerous exhibits were filed, including a videotape of Mr. Penner taken at the police station during the timeframe he was allegedly assaulted, and 13 photographs of Mr. Penner following his arrest. These photographs showed scrapes and bruising on Mr. Penner's face, a blackened eye, scrapes on his wrists, swelling and bruising on his left elbow, and scrapes and bruising on his left knee.

[13] An important legal issue raised at the hearing was whether the police officers had the legal authority to arrest an individual in the courtroom. The hearing officer found the

law on this issue to be unclear. He resolved the issue by holding that the prosecution had the onus of showing that the arrest was not authorized by statute and that the prosecution had not met its burden.

[14] In his written reasons, the hearing officer then made several findings, which are relevant on this appeal. First, he found that the officers had reasonable and probable grounds to arrest Mr. Penner for causing a disturbance. Second, he found that the officers had not used unnecessary force in arresting Mr. Penner. In making this finding, the hearing officer relied on the evidence of independent witnesses, who testified that Mr. Penner resisted arrest. Third, the hearing officer found that the police officers had not used unnecessary force on Mr. Penner at the police station. In making this finding, he relied in part on the videotape.

[15] On the basis of these findings, the hearing officer dismissed the complaint of misconduct against the two officers.

(3) The Appeal Before the Ontario Civilian Commission on Police Services

[16] Mr. Penner appealed the hearing officer's decision to the Commission. The appeal was heard by the Chair and a member of the Commission. The Commission held that the hearing officer had erred by failing to determine whether the police officers had the lawful authority to arrest Mr. Penner in the courtroom without being directed to do so by the presiding Justice of the Peace. Although not excusing Mr. Penner's conduct, the

Commission went on to hold that "his arrest ... was both unlawful and unnecessary and that accordingly any force used was unjustified." The Commission also held that the hearing officer's finding of no unnecessary force at the police station was "both correct and proper in law." Still, the Commission found both Parker and Koscinski guilty of unnecessary or unlawful exercise of authority.

(4) The Judicial Review Application

[17] The two officers applied for judicial review of the Commission's decision. Their application was granted. The Divisional Court held that the Commission erred in law by holding that the hearing officer ought to have determined whether the officers had the legal authority to arrest Mr. Penner in the courtroom. The Divisional Court was of the view that the powers of the police and the powers of the Justice of the Peace could coexist. It was unnecessary to decide which was paramount in this case because the officers' actions did not conflict with those of the presiding Justice of the Peace.

[18] Significantly for this appeal, the Divisional Court upheld the hearing officer's findings of fact and restored his decision. The court held that there was an ample evidentiary basis for his findings of fact, and that any of the Commission's findings casting doubt on the hearing officer's findings were themselves unreasonable.

[19] Mr. Penner sought leave to appeal the Divisional Court's costs order but did not otherwise seek to review its decision.

C. ANALYSIS

(1) Legal Framework

(i) Rule 21.01(1) motions

[20] The respondents moved under r. 21.01(1) of the *Rules of Civil Procedure* to strike from Mr. Penner's statement of claim his allegations of unlawful arrest, unnecessary use of force, false imprisonment and malicious prosecution on the ground of issue estoppel. Rule 21.01(1) provides:

> A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> >
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

[21] The principles governing r. 21.01(1) motions are well established. The court assumes that the facts pleaded in the statement of claim capable of being proven are true. The court then considers the legal sufficiency of the plaintiff's claim, viewing the claim in its most positive light. The court is not restricted to striking the entire pleading but may strike only parts of it.

(ii) Issue estoppel

[22] Issue estoppel prevents the re-litigation of an issue a court or tribunal has decided in a previous proceeding. It is "founded upon the twin principles ... that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause." See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 946. Issue estoppel applies both to decisions made by courts and decisions made by administrative tribunals. See *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.).

[23] The respondents seek to estop Mr. Penner from litigating in his civil action issues decided in the disciplinary hearing under the *Police Service Act*. To do so, they must show three things:

> (i) The same question was decided in the disciplinary proceedings;
>
> (ii) The judicial decision said to create the estoppel is final; and
>
> (iii) The parties, or their privies, to the judicial decision are the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.

[24] Even if these three requirements of issue estoppel have been met, the court retains the discretion to refuse to apply it if doing so would be unfair or work an injustice. See *Danyluk*, *supra* and *Minott*, *supra*.

[25] Mr. Penner accepts that the second requirement of issue estoppel has been met. The decision of the hearing officer was a final decision. Moreover, Mr. Penner has not sought to review the Divisional Court's affirmation of the hearing officer's decision. The hearing officer's decision was also a judicial decision for the purpose of issue estoppel: the hearing officer was carrying out a judicial function and the hearing was conducted with basic standards of procedural fairness. See *Minott* at para. 35.

[26] Thus, the issues on this appeal are: whether the same question and same parties requirements are met; if so, whether issue estoppel also precludes Mr. Penner's claims for false imprisonment and malicious prosecution; and finally, if the three requirements of issue estoppel are met, whether the motion judge erred in not exercising his discretion to refuse to apply issue estoppel.

(2) Same Question?

[27] Three questions were in issue in the disciplinary proceedings: Was the arrest lawful? Was unreasonable force used during the arrest? Was unreasonable force used at the police station? Mr. Penner's civil action, in which he sues for damages for false arrest and the use of unnecessary force both during and after his arrest, raises the same three questions.

[28] The hearing officer answered all three questions adversely to Mr. Penner. He found that the officers had reasonable and probable grounds to arrest Mr. Penner and that

the arrest was lawful. He also found that the officers had not used unnecessary force during or after the arrest. The Divisional Court affirmed his findings. Therefore, I agree with the motion judge that the respondents satisfy the same question requirement of issue estoppel.

(3) Same Parties?

[29] I also agree with the motion judge that the respondents satisfy the same parties requirement of issue estoppel. Mr. Penner and officers Parker and Koscinski were parties before the hearing officer, the Commission and the Divisional Court. And they are parties in Mr. Penner's civil action.

[30] Mr. Penner, however, contends that he was not a party in the disciplinary proceedings. I do not accept his contention. Mr. Penner filed a complaint under the *Police Services Act*. That complaint led to the disciplinary proceedings against the two officers. Section 69(3) of the *Police Services Act* stipulates that if the complaint was made, as in this case, by a member of the public, the complainant is a party to the disciplinary hearing.

[31] Even if s. 69(3) by itself is insufficient to meet the same parties requirement of issue estoppel, Mr. Penner's active participation in the disciplinary proceedings establishes this requirement. See *Minott* at para. 39. Although Mr. Penner was not

entitled to direct the prosecution of his complaint, he was in every other respect an active participant.

[32] At the hearing Mr. Penner had the right to retain counsel and he testified, cross-examined witnesses and made submissions on the legal issues. He appealed the hearing officer's decision to the Commission and participated in the appeal as the appellant. Finally, he was a respondent on the judicial review application and appeared before the Divisional Court on the application. The same parties requirement of issue estoppel is met.

[33] Therefore, the respondents have satisfied the three requirements of issue estoppel in respect of the questions of unlawful arrest and use of unnecessary force during and after the arrest.

(4) False Imprisonment and Malicious Prosecution

[34] In his civil action Mr. Penner seeks damages for false imprisonment and malicious prosecution. These claims were not in issue in the disciplinary proceedings against the two officers. Nonetheless, I agree with the motion judge that if the findings in the disciplinary proceedings are given effect to in the civil action, these two claims are bound to fail.

[35] Mr. Penner's claim of false imprisonment cannot succeed because his arrest was lawful. If a person is lawfully arrested, there can be no false imprisonment. See *R. v. Whitfield*, [1970] S.C.R. 46.

[36] Mr. Penner's claim of malicious prosecution cannot succeed because one of the elements of that tort is the absence of reasonable and probable cause. See *Nelles v. Ontario*, [1989] 2 S.C.R. 170. However, as the hearing officer found and the Divisional Court affirmed, the officers had reasonable and probable grounds to arrest Mr. Penner, and the arrest itself was lawful.

[37] Issue estoppel therefore precludes Mr. Penner's claims for false imprisonment and malicious prosecution, unless the court exercises its discretion not to apply it.

(5) Discretion

[38] Once a court is satisfied that the three requirements of issue estoppel have been met, the court must then decide whether to exercise its discretion not to apply it. This discretion exists because issue estoppel is intended to achieve a just result between the parties. Before applying issue estoppel a court should ask itself: "is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?" The court's discretion is case specific – it "must respond to the realities of each case." See *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.).

[39] In the present case, the motion judge found, at para. 26 of his ruling, "that no grounds exist in this specific case for me to exercise my discretion to refuse to give effect to the issue estoppel." Unfortunately, this conclusory holding was not supported by any analysis of the considerations bearing on the exercise of his discretion. The motion judge's failure to address the considerations relevant to his discretion is an error in principle. See *Danyluk* at para. 66. This error means that his discretionary ruling does not warrant any deference from this court. We are entitled to consider afresh whether to exercise our discretion not to apply issue estoppel.

[40] The catalogue of considerations bearing on the court's discretion is open ended. This is especially so when the findings found to give rise to issue estoppel are made, as here, in proceedings before an administrative tribunal.

[41] Of the considerations relevant to this case, two favour exercising our discretion not to apply issue estoppel: the two proceedings have different purposes, and Mr. Penner had no financial stake in the disciplinary proceedings.

[42] Different purposes. The disciplinary proceedings were held to determine whether the two police officers were guilty of misconduct. Those proceedings had no direct consequences for Mr. Penner. In the civil action, Mr. Penner seeks compensation for the actions of the officers. I agree with Mr. Penner that the legislature did not intend to foreclose his civil action simply because he filed a complaint under the *Police Services Act*.

[43] No financial stake. A related consideration is that Mr. Penner cannot benefit financially in the disciplinary proceedings. The *Police Service Act* does not provide for compensation for a complainant, even for one whose complaint leads to a finding of misconduct. This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

[44] Moreover, these two considerations – the different purposes of the two proceedings and the unavailability (or limited availability) of compensation in the administrative proceeding – will often be present when a party asks the court to exercise its discretion not to apply issue estoppel for findings made in an administrative hearing. By themselves these considerations do not ordinarily resolve how the court should exercise its discretion. Typically, other considerations come into play. In this case, four considerations favour applying issue estoppel: the expertise of the decision maker, the procedures in the disciplinary proceedings, Mr. Penner's active participation in those proceedings, and the right of appeal.

[45] Expertise of the decision maker. The hearing officer was not legally trained; he was a retired police superintendent. If the issues claimed to give rise to issue estoppel turned on, for example, a question of contract interpretation, then his lack of legal training would favour not applying issue estoppel. But the findings for which issue estoppel is sought are reasonable and probable grounds for arrest and the use of excessive or unnecessary force. For making these findings, a senior and experienced police officer has as much expertise as a court would have. The one issue on which the hearing officer could claim no expertise – the legal authority of an officer to arrest a person in a courtroom – was resolved by the Divisional Court.

[46] Procedures in the disciplinary proceedings. In some of the cases where the court exercises its discretion not to apply issue estoppel, the administrative proceeding was intended as a quick and inexpensive way to obtain a decision and was often heard with a measure of urgency. In those cases, many if not all of the procedural guarantees associated with a civil trial are not present. Two examples are *Minott* and *Danyluk*. That is not the case here.

[47] A disciplinary proceeding against a police officer is an administrative proceeding with potential civil consequences, the loss of a job. In this sense it bears some resemblance to an employer/employee grievance. See *Trumbley v. Toronto (Metro) Police Force* (1986), 55 O.R. (2d) 570 (C.A.); aff'd [1987] 2 S.C.R. 572.

[48] This disciplinary proceeding against the two officers had all the hallmarks of an ordinary civil trial. The Niagara Regional Police Service and the two officers had counsel, and Mr. Penner could have had counsel had he wanted one. Numerous witnesses testified over several days, and numerous exhibits were filed. The witnesses were extensively cross-examined. At the end of the hearing the parties made oral submissions in support of their positions. Thus, the hearing thoroughly explored Mr. Penner's claims.

[49] Still, Mr. Penner submits that the procedures in the disciplinary proceeding and his civil action differ on a fundamental point: the standard of proof. He points out that s. 61(1) of the *Police Services Act* requires that a finding of misconduct against a police officer be proved by "clear and convincing evidence." That is a higher standard of proof than the standard of proof in a civil action, which is, of course, on a balance of probabilities. Mr. Penner argues that these two different standards provide a basis not to apply issue estoppel. I disagree.

[50] As I have said, the exercise of discretion not to apply issue estoppel is case specific. In *Porter v. York Regional Police*, 2001 CarswellOnt 2030 the different standards of proof were decisive. In that case, Hermiston J. relied on these different standards in exercising discretion not to apply issue estoppel. In *Porter*, however, the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower standard."

[51] In the present case, the different standards of proof in police disciplinary proceedings and an ordinary civil action are immaterial on the hearing officer's assessment of the evidence. He found "nothing to indicate that the arrest [of Mr. Penner] was unlawful," and was "unable to see any evidence whatsoever" that the officers used unnecessary or excessive force on Mr. Penner. Instead, he found that their use of force was "totally justified." These comments on the evidence show that the hearing officer would have made the same findings of fact even if the standard of proof had been on a balance of probabilities.

[52] Mr. Penner's active participation. Although not required to do so, Mr. Penner took full advantage of his standing as a party in the disciplinary proceedings. He participated throughout, giving evidence, cross-examining other witnesses, and making oral submissions in support of his complaint.

[53] Right of appeal. The *Police Services Act* gives an aggrieved party the right to appeal to the Commission. Mr. Penner exercised that right and was partly successful on appeal. The Commission's ruling was then judicially reviewed in the Divisional Court. Thus, Mr. Penner's claims were fully assessed at a hearing, on appeal and in the Divisional Court.

[54] Having set out the competing considerations for and against applying issue estoppel, I return to the ultimate question: would applying issue estoppel be unfair or unjust? The answer to this question requires a qualitative assessment of the relevant

considerations, not a mathematical calculation. That four considerations favour applying issue estoppel and only two favour not applying it does not resolve the question. The court must examine the importance and strength of each consideration. There may be a case where a single consideration is so important that it will control the result.

[55] In the case before us, applying issue estoppel would not be unfair or unjust. The cumulative strength of the considerations in favour of applying issue estoppel outweigh the strength of those against applying it.

[56] Accordingly, I would dismiss the appeal. The respondents are entitled to their costs of the appeal in the agreed-upon amount of $7,500 plus applicable taxes.

RELEASED: SEP 27 2010

"D.B. Laskin J.A."

"I agree. M. Rosenberg J.A."

"I agree Robert P. Armstrong J.A."