

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2017/CLE/gen/00079

BETWEEN

(1) ERICA P. MORRIS

(2) ERICA P. MORRIS

(In her capacity as Guardian ad litem of Jonathan Morris, an infant)

Plaintiffs

AND

(1) RSGT 340 JOHNSON

(2) PC 3644 WHYMS

(3) COMMISSIONER OF POLICE OF THE ROYAL BAHAMAS POLICE FORCE

(4) THE ATTORNEY GENERAL OF THE BAHAMAS

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: Avrom Thompson and Crystal Rolle for the Plaintiffs

Sharon Rose-Hutchinson for the Defendants

17 and 18 March 2020; Submissions

JUDGMENT

## **WINDER, J**

This is the plaintiffs' claim for damages for assault and battery, and violation of their constitutional rights by the first and second defendants, as servants or agents of the Royal Bahamas Police Force.

### *Background*

1. On or about 24 January 2016 the first plaintiff (Morris) along with her minor son (the second plaintiff) drove to the Lynden Pindling International Airport (LPIA) in her Nissan March motor vehicle, to collect an arriving passenger.
2. On arrival at the LPIA she attempted to park in front of the international terminal to await the arrival of the passenger. She was advised by the first defendant (Johnson), who was directing traffic in the area, that she could not park her vehicle but had to circle the area until she saw her passenger.
3. On Morris' third approach to the area, she proceeded to park in front of the terminal contrary to Johnson's instructions. Morris says that an unnamed airport security guard permitted her to park in the V.I.P. zone whilst she quickly went into the airport to locate her guest. On Morris' return to the vehicle a confrontation ensued between her and Johnson who purported to arrest her as a result. Morris refused to exit her vehicle, following the purported arrest by Johnson. Johnson then called in the second defendant (Whyms) to assist with effecting the arrest of Morris.
4. Whyms also attempted to get Morris to leave the vehicle when he arrived at the scene. During the attempt to remove Morris from the vehicle she attempted to drive off whilst Whyms was partially in the vehicle. During the encounter Whyms withdrew his service weapon from an ankle holster. Morris says that weapon was pointed at her head whilst Whyms says that he merely held it to his side.
5. The airport was busy and the vehicular traffic was heavy. Whilst Morris pulled out of the parking space she could not leave the scene. Morris eventually exited her

vehicle and was taken into custody by the officers. Morris was charged and subsequently taken before the Magistrates Court.

6. Morris entered a plea arrangement with the prosecution where she pled guilty to using obscene language. She was placed on probation for a year by the Learned Magistrate.
7. Morris claims in this action for assault and battery, and false arrest with use of excessive force by Johnson and Whyms.

### *The Pleadings*

8. The action was commenced by generally endorsed Writ of Summons filed on 23 January 2017. The Statement of Claim sets out her claim in the following terms:

...

6. That on or about the 24<sup>th</sup> day of January, 2016, by way of a Nissan March, the First Plaintiff drove to Lynden Pindling International Airport with the Second Plaintiff to collect a guest.
7. That upon the First Plaintiff's arrival to the airport she stopped the said vehicle behind an unoccupied vehicle. Within moments of stopping her vehicle the First Defendant demanded that she move and "circle" the premises because she was not permitted to stay thereto, despite other vehicles being parked in close proximity.
8. That the First Plaintiff upon the request of the First Defendant "circled" the premises two times. Thereafter, an airport security guard permitted the First [Plaintiff] to park in the V.I.P. zone whilst she quickly went into the airport to locate her guest. That the First Plaintiff was unable to locate her guest. As a result of this, the First Plaintiff exited the airport and proceeded to her vehicle.
9. That whilst in her vehicle the First Defendant directed the First Plaintiff to reverse her vehicle out of the V.I.P. zone; the First Plaintiff reversed out of the said zone after being directed by the First Defendant to do so. That the First Defendant then followed the First Plaintiff and unlawfully touched her person in an attempt to remove her out of her vehicle.
10. That the First Plaintiff removed the First Defendant's hand from her person after which the First Defendant shouted to her, "You lock up! You lock up!"
11. That in the circumstance the First Plaintiff did not understand that she was purportedly under arrest due to the negligence of the First Defendant.

#### PARTICULARS

- i. That the First Defendant did not say in clear words to the First Plaintiff to understand that she was purportedly under arrest;

- ii. That the First Defendant failed to inform the First Plaintiff what she was purportedly under arrest;
  - iii. That the First Defendant failed to caution the First Plaintiff; and
  - iv. That the First Defendant failed to inform the First Plaintiff of her right to an attorney.
12. That the First Defendant radioed the Second Defendant for assistance. That when the Second Defendant came to the assistance of the First Defendant he opened the First Plaintiff's vehicle door and attempted to remove her from her vehicle without caution and cause. After an unsuccessful attempt, the Second Defendant then retrieved a revolver from his socks and pointed it toward the First Plaintiff's head.
13. That in reaction to the Second Defendant holding the First Plaintiff at gunpoint the First Plaintiff used obscene language and drove off in fear of her and the Second Plaintiff's life.
14. That in all the circumstances of the case where the First Plaintiff was purportedly being detained in relation to a traffic violation, the Second Defendant's actions were callous and/or arbitrary and/or excessive and/or unreasonable and/or without just cause.
15. That the Plaintiffs were assaulted and battered on the 24<sup>th</sup> day of January, 2016 by the First and Second Defendants.
- ...
18. That the Plaintiff was treated in an inhuman and/or degrading manner by the First and Second Defendants on the 24<sup>th</sup> of January, 2016.
19. That as a result of the incident the First Plaintiff has suffered injury and loss and damage.

#### PARTICULARS OF INJURY

- i. Acute Stress Disorder;
- ii. Anxiety; and
- iii. Nervousness.

...

9. The Defence was filed on 8 June 2018 and provided, in part, as follows:

- ...
2. By way of preliminary objection, the Defendants contend that the claim for Constitutional redress for alleged breaches of the Constitution is an abuse of the process of the Court and in violation of the proviso to Article 28(2), as other means of redress were (and are) available to the Plaintiff, and the Constitutional claims should be dismissed by the Honourable Court.
- ...
9. The Defendants admit to the contents of paragraph 6 of the Statement of Claim.
- ...
14. The Defendants deny their alleged negligence particularized in paragraph 11 of the Statement of Claim and in reply say as follows:

- a) On the 24<sup>th</sup> January, 2016, sometime around 1:40pm, while on foot patrol duty at the Lynden Pindling International Airport, the First Defendant observed five to six vehicles parked in a no parking zone directly in front of the Bahamas Customs Arrival area including the Plaintiff's Nissan March license plate #306063;
- b) That the First Defendant approached all the drivers of the vehicles and requested that they leave, circle around or park in the airport parking lot;
- c) That the Plaintiff pulled off along with the other vehicles and the Plaintiff returned twice, the second time the Plaintiff parked on the pedestrian line. The First Defendant approached the Plaintiff and requested that she leave. The Plaintiff informed the First Defendant that she is picking up a handicapped person;
- d) The Plaintiff began to use obscene language towards the First Defendant and begun screaming at the First Defendant when requested to leave;
- e) The First Defendant warned the Plaintiff to desist from using obscene language which is to his annoyance. The Plaintiff continued to use obscene language and shouted louder where a large crowd of people and tourists were gathered. The alleged person who the Plaintiff came to pick up came out of the building and stood there;
- f) The First Defendant informed the Plaintiff that she was under arrest for Obscene Language and Disorderly Behaviour, and the Plaintiff was cautioned;
- g) The First Defendant requested that the Plaintiff exit the vehicle. The Plaintiff ignored the First Defendant and screwed up her window. The First Defendant asked the Plaintiff for her identification. The Plaintiff then went into her bag and put her American driver's license onto the car window and shouted, "I am an American citizen and I will sue yall."
- h) Consequently, the First Defendant called the Airport Police Station via cell phone for assistance. About four to five minutes later the Second Defendant arrived on the scene to assist the First Defendant;
- i) Eventually, the Second Defendant was successful in taking the Plaintiff out of the vehicle and the Plaintiff was subsequently escorted to the Airport Police Station;
- j) At all material times the Defendant acted in accordance with the laws of The Bahamas.

...

18. The Defendants deny their alleged Assault and Battery particularized in paragraph 15 of the Statement of Claim and in reply say as follows:
  - a) That the Second Defendant after being informed of the arrest of the Plaintiff by the First Defendant, approached the Plaintiff's vehicle and requested that she exit the vehicle;

- b) The Plaintiff refused to exit the vehicle and the Second Defendant opened the rear right passenger door and gained entry into the Plaintiff's vehicle;
- c) The Plaintiff as a result put the vehicle in drive while half of the Second Defendant's body was still inside of the vehicle. Acting in fear of his life the Second Defendant shouted at the Plaintiff to stop the vehicle which the Plaintiff ignored. The Second Defendant retrieved his police issued revolver and demanded that the Plaintiff stop the vehicle which the Plaintiff did;
- d) The Second Defendant stood outside of the vehicle with his revolver in his right hand and pointed his left finger at the Plaintiff demanding her to turn off the vehicle and to exit;
- e) The Plaintiff turned off the vehicle and exited the vehicle where the Plaintiff was placed under arrest under caution and escorted to the traffic Police Station;
- f) At no time did the Defendants pull out a revolver and aim it at the Plaintiff's head;
- g) At all time the Defendants acted without excessive force and acted within reason given the particular circumstances;
- h) Further, the Defendant will rely on the video footage of the entire incident at the trial;

- ...
21. The Defendants deny the contents particularized at paragraph 18 of the Statement of Claim and in reply say as follows:
- a) that at all material time the Plaintiff was treated fairly and with dignity;
  - b) that the Defendants arrested the Plaintiff without injury or harm to the person;

...

#### *Evidence at trial*

10. The sole witness for the plaintiffs' case was Morris, who was subject to cross examination on her witness statement filed 31 January 2020. Johnson, Whyms and Inspector Achara James gave evidence for the defendants. The evidence in the case also included agreed video surveillance footage of the incident on the day in question.
11. On cross examination, Morris confirmed that she was aware of the no parking areas having on a prior occasion, a week earlier, had her vehicle towed away. She said that she was aware of designated parking areas but on the day of the incident she was late and expected her guest to have arrived already. She admitted seeing Johnson, a uniformed police officer, on her first approach to the LPIA on the day in question. She was told to move the car and advised Johnson

that she had just pulled up but did not see her guests. The officer in turn told her to circle around, which she did twice.

12. On her third approach to LPIA Morris says that she was permitted to park in the VIP parking section by an airport security officer. She says that she went into the terminal to look for her guest. Morris says that following her return to her car she was approached by Johnson again. She indicated that she asked Johnson why she was not allowed to park. She says she pointed out to Johnson that there was an unoccupied vehicle parked in the area that she had seen earlier, as well as two other vehicles behind her car. The officer she says told her that that was not her concern and that she should move. She did not move.
13. Morris admitted that she knowingly disobeyed the orders given her by Johnson to move her vehicle. She maintained that she questioned the police officer as to why she should not be allowed to park there after numerous requests by him for her to move the car. She says she did not move because she felt 'targeted' by the officer.
14. It was following this Morris says that the officer told her that she was 'lock up'. Morris says she then asked the officer why she was 'locked up' and got no response from him. She says she got out of her car but did not do anything but stand there along with the officer. She told the court that she also took photos of the cars that she had complained of being parked when she was not allowed to park.
15. Morris stated that she had seen the officer before and knew him well but on that day he would not allow her to park as he had done on previous occasions.
16. Johnson called for assistance and by that time Morris says she was sitting in her vehicle. She says she understood what Johnson meant when he told her that she was 'lock up', as her being placed under arrest.
17. After being advised of her arrest Morris says another uniformed officer came 'barrelling towards' her car and started banging on the car and told her to get out of the car. At this point Morris says she was in fear for her life, she locked her door and advised her son to lock his door as well. She says she believed that the officer could kill her and it would be 'justifiable homicide'.

18. The officer (whom she identified as Christopher Whyms (Whyms)) the second defendant herein reached his hand through the right rear window of the car, where her son was and unlocked the door. She stated that her son was crying at this point. After the door was unlocked he began to pull her out of the car. Whyms, she testified then knelt down and pulled his service revolver from his shoes and pointed it at her face. She said that in fear she drove off.
19. Morris says that she asked Whyms, 'Did you pull a fucking gun on me?' According to her, Whyms' only response was to attempt to pull her out of the car, to which she told him not to touch her and she got out on her own.
20. When questioned as to whether any of the police officers touched her, Morris replied 'yes', both officers did. When asked if upon being touched she obeyed the command that she was under arrest she admitted that she did not.
21. Morris accepted that prior to Whyms' arrival on the scene Johnson asked her for identification. She says she showed him her United States drivers licence, however he told her that he did not want it. It was put to Morris that her resisting arrest is what led to Whyms attempt to remove her from her car. Morris agreed with this suggestion.
22. Morris averred that her car was already engaged in the drive position with her foot on the brake during the altercation with Whyms. She says that it wasn't until after she had attempted to drive off and Whyms had caught up to her car - because she had not gotten very far - that she asked him about pulling the gun on her. She accepted that the car door was open when she pulled off.
23. Johnson's evidence in chief was contained in his witness statement filed on 20 February 2020. He was subject to cross examination on his evidence. Johnson says that one of his duties was to assist with the flow of traffic at the LPIA. He told the Court that he could give permission for people to idle and park if they were picking someone up from the area.
24. Johnson agreed when questioned that on 24 January 2016 Morris circled twice before the incident in question took place. He says he listened to what Morris had to say about parking and told her she was not allowed to park. He advised her to



go to the parking lot. When Morris drove around the third time she proceeded to park in the VIP parking zone and he instructed her to move her car.

25. After Morris circled around the second time she became irate, parked in the VIP zone and when he asked her to remove the car she reversed into the no parking zone says Johnson. He says that Morris started cursing at him at this point. He asked her to refrain from cursing and advised her that this was an offence. Johnson says that even though he told Morris that she was under arrest she never came out of her car.
26. When questioned about the alleged arrest of Morris on the day, Johnson averred that he effected the arrest of Morris, in the way which he believed was proper, in that, he gave oral warnings and touched her and arrested her. Counsel for the Defence contended that this was not the proper means to effect an arrest and that an arrest could be effected without touching a person.
27. Johnson's evidence was that when he placed his hands on Morris to arrest her, she responded by hitting him. He then called in Whyms for assistance. When Whyms arrived Johnson says he briefed him that he had placed Morris under arrest for disorderly behaviour and resisting arrest. He says that Whyms then approached Morris' car, told her she was under arrest and ordered her to step out of the car.
28. Johnson said that he did not see Whyms withdraw his service weapon or point a gun at Morris. He did however, witness Morris place her car in drive and attempt to drive off while Whyms was partially in the car trying to get her out. However, she only managed to get about 25 feet from them due to other cars and pedestrians in the area. He says Morris stopped the car, exited it and said that she would go to the police station, after which she brought her son and walked to the police station.
29. Whyms' evidence was contained in his witness statement filed on 24 February 2020 to which he was subject to cross-examination. Whyms acknowledged seeing Morris and her son at LPIA after being called to attend the scene by Johnson. Whyms says that when he arrived on the scene Morris was already under arrest. Morris, he says, was sitting in the driver's seat with her seat belt

fastened, with her son sitting directly in the center of the rear passenger seat. Morris was asking Johnson "Why?" she was under arrest when he met them.

30. Whyms said that he proceeded to ask Morris to exit her car but she did not. He then entered the car through the right rear door and unlocked the driver's door. While in the rear of the car he says he tried to unbuckle Morris' seatbelt. During his attempt to unfasten Morris seatbelt he says he felt a jolt when Morris shifted the car from park into drive. This he says prompted him to exit the car as quickly as he possibly could.
31. Immediately following his exit from the car he says he withdrew his weapon from his leg holster but kept it at his side, never aiming it at Morris, anyone or anything else. Counsel for Morris suggested that Morris never shifted the car and that the car was already in drive as per Morris' evidence. It was put to Whyms that there was no mention of him feeling "a jolt" in the evidence in chief that he had given to the Court. It was further suggested that the video footage of the scene showed that Morris brake lights were already engaged when Whyms entered the car.
32. Whyms testified that after he exited the car he ran to the front of the car with his weapon held at his side. He says that Morris then sped off toward a pedestrian crossing. Counsel for the defence contended that it was the act of Whyms pointing his weapon at Morris that caused her to speed off and to yell "Did you just pull a fucking gun on me?" Whyms denied this assertion, saying that Morris came to a stop at the pedestrian crossing only feet away because of the high pedestrian traffic at the time.
33. Inspector James witness statement was filed on 24 February 2020 and he was subject to cross-examination thereon. Inspector James says that he was the shift supervisor on duty at the LPIA Police Station when Morris was brought in. He did not personally witness the events in question but took a written statement from Morris on her arrival at the station. He says that Morris was charged with Disorderly Behaviour, Obscene Language and Resisting Arrest at the time.
34. The evidence included video footage of the scene of LPIA on the day in question. The video which had no accompanying audio was captured two different angles. The first angle showed the front of vehicles as they approach the international

terminal. The second angle was taken from the opposite viewpoint, which showed the rear of the vehicles as they exited the area. The footage captures a relatively busy LPIA for both motor vehicle and pedestrian traffic.

35. Morris' car can be seen in the video in what appears to be a VIP parking space. Her car then reverses across another space and onto part of the pedestrian crossing. After which Johnson, walks over to the car and he can be seen speaking to Morris who remained in her car. Morris then steps out of the vehicle without closing her door, she stands closely to Johnson as he is situate on the edge of the sidewalk, she says something to him before getting back into the parked car. Moments later Johnson can be seen tapping on Morris' door. Morris proceeds to reverse the car once more, this time she fully leaves the pedestrian and parks in a space across it. Johnson can be seen walking toward the car. The car then goes out of camera view as Morris continued to reverse. As Johnson walks toward the car he too ends up out of the view of the camera.
36. Whyms can be seen shortly afterward coming from within the terminal and walking toward the area that Morris was seen to reverse into. The next time Morris' car is seen it is driving forward at a high rate of speed back toward the pedestrian crossing. Morris brings the car to an abrupt stop as there was a car to her right and another car in front of her. The cars blocking Morris path stopped to allow pedestrians to cross the street. Both Johnson and Whyms can be seen to run up to the car from behind and one of them opens the front passenger door of the car. Morris son is removed from the car and is carried to the sidewalk where he stands next to a group of people. Morris then exits the car, goes over to her son, takes his hand and goes unhandled, with both officers into the terminal to the police station.

### *Analysis and Disposition*

37. The defence submitted that it is trite law that he who asserts must prove, not merely with allegation but with evidence. They say that the plaintiffs have not proven their case. They further submit that excessive force was not used in effecting the arrest of Morris on 24 January 2016. The position was taken early in

the defence and maintained at trial that the Criminal Procedure Code (CPC) section 11A was applicable in the circumstances. They say Morris' arrest was effected lawfully as she was touched by the officers as prescribed in the statute, which reads as follows:

(1) In making an arrest the peace officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If the person to be arrested forcibly resists the endeavour to arrest him or attempts to evade the arrest, the peace officer or other person concerned may use all means necessary to effect the arrest:

Provided that nothing in this section contained shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

38. Counsel for the defence argued that Morris had admitted to being touched by Johnson and that her reaction to him touching her, to affect her arrest, was to use her hands to hit his away. The defence contends that the CPC allows for necessary force to effect an arrest to be used. They point out that according to Morris' oral evidence, by the time Whyms arrived on the scene, she knew she was under arrest but still refused to exit her car in compliance.

39. The defendants also submit that Whyms was within his rights to use force and described his removal of his service weapon as being in 'ready mode' during a lawful arrest. This they say, was a normal reaction from being 'jolted' while in Morris' car.

40. In opposition to the assertions of the defendants, Counsel for the plaintiffs submits that Johnson nor Whyms effected a lawful arrest of Morris. They say that the touching of Morris in an effort to remove her from the car amounts to the tort of assault and battery. They assert that excessive force was used on the plaintiffs, which they say was established by Morris evidence that Whyms pointed his service weapon at her during the incident.

41. The plaintiffs rely on the English Criminal Division, Court of Appeal case of ***R v Inwood*** [1973] 2 All ER 645 to establish their claim that a proper arrest of Morris was not effected by Johnson or Whyms. In ***Inwood*** the appellant voluntarily went

to a police station to help police with enquiries into theft. While there the police informed him that they proposed to charge him in the matter. They began the necessary paperwork and fingerprinted the appellant. The appellant decided to leave after waiting a while and was prevented from doing so by two police officers. A struggle ensued and both officers were injured. The Court held the following:

“In order to establish that the police were entitled to use force to restrain the appellant from leaving the police station it was necessary to show that it had been made clear to the appellant that he was under arrest.”

42. In *Inwood* the Court declined to set out as a matter of law whether it had been made clear to the appellant that he had been arrested; that was a question of fact. The Court concluded the following:

“There is no magic formula; only the obligation to make it plain to the subject by what is said and done that he is no longer a free man.”

43. In relation to the assault and battery claim Counsel for the plaintiffs rely on **Halsbury’s Laws of England/Tort (Volume 97 (2015))/3. Torts to the Person/(1) Trespass to the Person/ (ii) Assault and Battery/a. Elements of Assault and Battery/528. Definition of ‘assault’ as follows:**

“Assault is an intentional and overt act causing another to apprehend the infliction of immediate and unlawful force. The threat of violence exhibiting an intention to assault will give rise to liability only if there is also a present ability (or perhaps a perceived ability) to carry the threat into execution. An assault may be committed by words or gestures alone, provided they cause an apprehension of immediate and unlawful force. Thus it is an assault for one person to advance towards another in a threatening manner and with his fist clenched, with the intention of striking the other immediately; or to point or brandish a weapon at another with the intention of using it; or to present a firearm at another with a threat of shooting; or to pursue another in a threatening manner so as to compel him to run for shelter to avoid being beaten...”

44. With respect to the use of force, *Halsburys* says the following:

"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. Therefore, as long as the force used is reasonable, there is no assault or battery."

45. This case turns heavily on whose version of the evidence I believe. Having seen and heard the witnesses as they gave their evidence and observed their demeanour, I have no hesitation in indicating that I prefer the evidence of the defendants' witnesses.
46. The evidence, in my view, reveals an irate and belligerent Morris taking on both officers and resisting their lawful orders. Not only did she remain parked where she was advised not, she kept berating Johnson, in an abusive manner, cursing at him asking why she was not allowed to park where she wanted, in the no parking area. This, on the basis that other cars were also parked there. This action was followed by slapping away a police officer's hands in the course of his attempting to place her under arrest. In my view, however, the most egregious act in the resisting of the arrest, was the dangerous situation created by Morris abrupt effort to flee the scene. This, whilst the car door was open and Whyms was attempting to remove the seatbelt. I reject her evidence that she acted the way she did because she feared for her life.
47. Morris admits that she disobeyed the lawful command of Johnson to not park in front of the terminal at LPIA and actively resisted arrest by hitting his hand away when touching her to place her under arrest. I reject her evidence that he touched her without the accompanying words, "you locked up". According to her she knew that Johnson's words, "you locked up", meant she was under arrest. At this time Morris had already been acting, in my view, in a disorderly manner and engaging in the abusive language which she ultimately pleaded guilty to before the Magistrate. I reject the claim that Morris was wrongfully arrested.
48. I also accepted the evidence of Whyms that he did not point the firearm at Morris' head but merely removed it from the ankle holster in response to the real treat created by the sudden attempt by Morris to leave the scene, whilst he was partly in the vehicle with the door open. Contrary to Morris' assertion that the car was

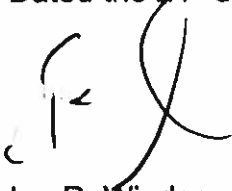
always in the drive gear, I find that she did indeed shift the gears whilst he was partly in the car attempting to remove her. I accept that Whyms merely held the firearm to his side in a ready position having regard to the dangerous situation which was unfolding in front of him. The area at the time was heavily trafficked with pedestrians and other vehicles. But for the presence of other vehicles in her path, Morris, whose car bolted haphazardly from the parking space, would have completely fled the scene. It is fortunate that no one was injured or any vehicular damage.

49. The English decision of *R (Collins) v Secretary of State for Justice* [2016] 2 *WLR* 1303 is instructive. In *Collins*, it was said that when considering the use of force the test is one of reasonable force and it is merely the interpretation of what force is 'not to be regarded as reasonable' which is subject to a different test, one of 'grossly disproportionate' as opposed to 'disproportionate' force in the circumstances.
50. While it is a fact that Whyms withdrew his service weapon on the day in question, it must be determined whether his actions were disproportionate in the circumstances he found himself. What is to be considered excessive force is not hard and fast and is not defined in legislation. Each case must be considered individually. As indicated I accepted Whyms' evidence that he withdrew the firearm but never pointed the weapon at Morris.
51. The actions of Whyms, in my view, would not be considered disproportionate, much less grossly disproportionate, in the situation which he found himself. As a part of their work, police officers are often called on to make split second decisions about the use of force and the proportion of force necessary in any given circumstance. Drawing his weapon and holding it to his side in response to the threat posed by Morris, not pointing it at her, in my view was not a disproportionate response and therefore not the use of excessive force.

*Conclusion*

52. In all the circumstances therefore, the plaintiffs' claims are dismissed. The plaintiffs' are to pay the reasonable costs of the defendants, such costs to be taxed in default of agreement.

Dated the 24<sup>th</sup> day of March 2021

A handwritten signature in black ink, appearing to be 'I. R. Winder', written in a cursive style.

Ian R. Winder

Justice