

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00389

BETWEEN

MERVIN MCKINNEY

Plaintiff

AND

R/INSPECTOR 117 PERTIN MOSS

First Defendant

AND

THE COMMISSIONER OF POLICE

Second Defendant

AND

THE ATTORNEY GENERAL

Third Defendant

Before Hon. Chief Justice Sir Ian Winder

Appearances: Byron Woodside for the Plaintiff
Randolph Dames for the Defendants

8 May 2023, 10 May 2023 and 20 June 2023

JUDGMENT

WINDER, CJ

In this action, the Plaintiff (McKinney) claims injury and damage arising from an alleged assault which is said to have occurred on 29 August 2019.

Background

[1.] The nature of the McKinney's complaint is set out in paragraphs 1-11 of his Statement of Claim, which provides as follows:

1. The Plaintiff was born on the 11th day of May, A.D., 2004 and at the material time, was an active 15 year old student attending the Government High School. He was physically fit and exercised regularly.
2. The 1st Defendant is a Reserved Inspector of Police in the Royal Bahamas Police Force, the Agency of the Government of The Bahamas responsible for the enforcement of law and order.
3. The 2nd Defendant is the Commissioner of Police who is charged with the superintendence, direction, control and discipline of the Royal Bahamas Police Force for The Commonwealth of The Bahamas of which the 1st Defendant is a member.
4. The 3rd Defendant is the Attorney General for The Commonwealth of The Bahamas.
5. On the 29th day of August, A.D. 2019, the Plaintiff was walking with his friends on Reeves Street, Montell Heights on their way home. They were not interfering with anyone nor were they an annoyance to, hindrance to, hostile towards or walking in a manner to raise suspicion.
6. Without provocation, the 1st Defendant who was about thirty (30) feet away from the Plaintiff and his friends charged towards them shouting "get from around here!"
7. The Plaintiff, believing that the 1st Defendant was referring to someone else, did not respond or run away from the 1st Defendant.
8. The Plaintiff subsequently realized that the 1st Defendant was charging at him and tried to get away.

9. However, it was too late and the 1st Defendant withdrew his police baton and struck the Plaintiff to his left side with full force. The Plaintiff heard something crack and ran a short distance away but was unable to go no further.
10. The Plaintiff felt excruciating pain below his waist and leaned against a nearby building. His friends helped him and he called his mother who immediately took him to the Princess Margaret Hospital. By this time, the pain had gotten much worst and the Plaintiff began to cry for immediate help and relief.
11. The Plaintiff was seen by doctor who ordered an x-ray of the area. The x-ray revealed that the Plaintiff suffered a broken Pelvis.

[2.] The Second Defendant is said to be vicariously responsible for the actions of the First Defendant (Moss). The Third Defendant is joined pursuant to the Crown Proceeding Act.

[3.] The kernel of the Defence is to be found in paragraphs 7 thereof:

7. The First Defendant vehemently denies the assertions contained in Paragraph 6 of the Statement of Claim and say further in reply that:-
 - a) There is no police officer named "Pertin Moss" employed with the Royal Bahamas Police Force.
 - b) That there is however a Pertlin Moss employed with the Royal Bahamas Police Force.
 - c) That at the time of the alleged incident the First Defendant was an Assistant Superintendent of Police with the Royal Bahamas Police Force.
 - d) That at the time of the alleged incident the First Defendant was 71 years old and in no physical condition to charge at anybody.
 - e) At the time of the alleged incident Pertlin Moss was stationed at the Elizabeth Estates Police Station and therefore had no reason to be in the Montell Heights area which is not within the parameters of his

station. That further the Montell Heights area is under the remit of the Grove Police Station.

- f) The First Defendant was never, nor did he ever have any reason to be engaged in foot patrol in the Montell Heights area. That in fact the First Defendant has not engaged in foot patrol duties for many years.
- g) That the First Defendant does not carry a baton neither did he carry a baton on the date of the alleged incident. That further the First Defendant has not carried a baton since 1971 to present date.
- h) The First Defendant vehemently denies being involved in the alleged incident and is shocked that the Plaintiff would name him in this action. That further he is totally unfamiliar with the Montell Heights area and can not (sic) recall ever being in the Montell Heights area, certainly not for police duties.

Evidence

[4.] At trial, McKinney gave evidence and called Johnathan Gardiner (Johnathan) and Latoya McKinney (Latoya) as witnesses in his case. Moss gave evidence on behalf of the Defendants.

McKinney's evidence

[5.] The witness statement of McKinney was filed on 13 September 2022 and admitted as his evidence-in-chief. He was subject to cross-examination.

[6.] McKinney said in his witness statement *inter alia* that:

- i) at the material time he was an active 15 year old student enrolled at the Government High School participating in track and field.
- ii) on 29 August 2019 he was walking with friends Joshua Charlton, Martin Burrows and Jonathan Gardiner on Reeves Street, Montel Heights.

iii) while walking he heard Joshua tell him to "watch out". When he looked around a police officer in khaki uniform was right upon him. He had his hand raised with a baton in his hand.

iv) before he could get away the officer yelled "you all get from around here" and he forcefully hit him on his left side with the baton. He heard something crack and he tried to run. He felt tremendous pain which began to get worse and worse.

v) he called his mother and caught the bus to her to her work at Naomi Christie Center, Zion Blvd. He was taken to the hospital and seen by a doctor, who diagnosed him with a broken pelvis. He eventually underwent surgery to repair his broken pelvis.

vi) he was released from hospital after a month but was unable to complete school. He continues to feel pain as a result of the injury and is unable to perform activities which he enjoyed prior to the incident.

vi) the police officer who hit him was 5' 10", average built, brown complexion and appeared to be 50 years of age. After he hit him, he saw him get into a white Nissan Murano four door jeep. While he was waiting on the bus the policeman came at them again. He wrote the license plate number down of his car which was AL5174 which he gave to his mother.

vii) on 6 January 2020 whilst he was headed towards the Princess Margaret Hospital he saw the same police officer in a black Nissan Murano with the same licence plate number and coming out of the police barracks on East Street.

[7.] In cross-examination, McKinney said or accepted *inter alia* that he was not on East Street when he saw the Moss on the 6th January 2020 but on the corner of Shirley and Elizabeth Avenue.

Johnathan's evidence

[8.] Johnathan's witness statement was filed on 22 September 2022 and was admitted as his evidence-in-chief. He was subject to cross-examination.

[9.] Johnathan stated in his witness statement *inter alia* that:

- i) at the material time he was a 15 year old student enrolled at R. M. Bailey High School.
- ii) on 29 August 2019 he was walking with friends including McKinney on Reeves Street, Montel Heights.
- iii) while walking he heard Joshua tell Mervin to "watch out". When he looked around a police officer in khaki uniform was right upon them, back on. The police officer had his hand raised with a baton in his hand. The police officer hit Joshua, who ran off.
- iv) before McKinney could get away from the police officer, he was forcefully and repeatedly hit on his body with the baton on the left side. They along with McKinney ran away. McKinney went on the #16 bus to go to his mother.
- v) the police officer who hit McKinney was about 5'10" average built and brown complexion.

[10.] In cross-examination, Johnathan said or accepted *inter alia* that:

- i) he never saw McKinney being hit.
- ii) he didn't see where the police officer came from and he only saw a glimpse of a uniform and a baton.

Latoya's evidence

[11.] Latoya's witness statement was filed on 13 September 2022 and was admitted as her evidence-in-chief. She was subject to cross-examination.

[12.] Latoya stated in her witness statement *inter alia* that:

- i) She is the mother of McKinney.
- ii) At the material time, McKinney was an active 15 year old student enrolled to attend the Government High School. He completed in track and field by performing in the 100 metre and 200 metre dash as well as the long jump events. He was physically fit and exercised regularly.
- iii) On the 29th day of August, 2019, McKinney came to her place of employment of the Naomi Christie Homes for the Aged. He advised her that

while walking with his friends on Reeves Street, Montell Heights, he was hit with a baton by a police officer in Khaki for no reason.

- iv) She took McKinney to the Princess Margaret Hospital where he was seen by doctors. It was discovered that his pelvis was broken. The doctors had to wait until some of the swelling went down before they performed surgery on him.
- v) McKinney gave me the license plate number of the vehicle of the Police Officer that hit him. The license plate number was AL 5174.
- vi) On the 6th January, A.D., 2020, while heading towards the Princess Margaret Hospital, McKinney saw the same Police Officer in a black Nissan Murano with the same license plate number. The Officer was coming out of the Police Barracks situate on East Street. McKinney pointed him out to her. The only difference at the time was that the Nissan Murano was black and not white as it was previously.

[13.] Under cross-examination Latoya said or accepted *inter alia* that she did not witness the incident.

Moss' evidence

[14.] Moss' witness statement was filed on 30 September 2022 was admitted as his evidence-in-chief. He was subject to cross-examination.

[15.] Moss stated in his witness statement *inter alia* that:

- i) he is 74 years of age and 6' 2". He is a Reservist Superintendent Police Officer. He joined the Royal Bahamas Police Force on 18 June 1969 and graduated from the Police Training College on 20 February 1970.
- ii) in 1986 he received a commendation medal for outstanding service at Government House.
- iii) he retired from the police force in 2006 and was requested by former Commissioner of Police Paul Farquharson to establish the Court Marshall Division where he served until 24 December 2018.
- iv) in July 2017 he purchased a black Nissan Dualis which is his mode of transportation.

v) on 29 August 2019, he reported for duty at 5 am at the Elizabeth Estates Police Station where he worked until 1 am. After work he went home and at no time was he present in the area or vicinity of Reeves Street, Montell Heights. At no time did he hit or hurt McKinney. In the 36 years of service as a police officer or the years as a reservist, he has never been accused of an allegation like this.

vi) he vehemently denies the accusations of McKinney.

[16.] Under cross-examination by Counsel for the Plaintiffs, Moss said or accepted *inter alia* that:

i) he was not present in Montell Heights on the 29th August 2019. On that day he worked as a Reserve Police Officer at the Elizabeth Estates Police Station from 5:00 a.m. to 1:00 a.m.

ii) his duties are that of a supervisor and after his shift, he went home by 1:35 p.m. for the remainder of the day.

iii) Montell Heights is not included in the district/perimeter of the Elizabeth Estates Police Station so there is no need for him to go in Montell Heights.

iv) he has not seen a baton since 1989 because he surrendered his issued baton to the Police Force Training College.

v) he never owned a white Nissan Moreno but a black Nissan Dualis since July 2017.

Issues

[17.] The principal issue for determination in this case is whether it was Moss who assaulted McKinney. The principal issue is that of identification and ultimately a question of fact as to whose evidence I accept.

Discussion and analysis

[18.] The general rule is that the burden of proof lies upon the Plaintiff, in that he must prove the existence of facts which he asserts and he must prove that those facts exist.

Evidence Act, Chapter 65 at section 83 provides:

“The burden of proof in any proceeding at the commencement thereof lies on that person who would fail if no evidence at all were given on either side, regard being had to the pleadings and other documents filed therein; but at any time in the course of any proceeding the burden of proof may be shifted to the person who would fail, if no further evidence were given on either side.”

[19.] McKinney submitted that whilst he bore the burden of proof in the first instance, given the denials of Moss, the burden shifts to Moss proving that he did not strike McKinney thereby causing harm, as alleged by McKinney. This proposition is untenable. It would mean that once a defendant denies a claim, as invariable they will do, the burden would shift and require the Defendant to prove their innocence.

[20.] As indicated, the action rises and falls on the question of the visual identification by McKinney. Visual identification has long been recognised as potentially unreliable. Honest and convincing mistakes can be made by witnesses who entertain no doubt that they are right, and even by witnesses who purport to identify persons already known to them. (See Blackstone's commentaries).

[21.] Having seen and heard the evidence of the witnesses and observed their demeanor as they gave their evidence, I have no hesitation in indicating that I preferred the evidence of Moss to that of McKinney.

[22.] McKinney, nor the persons responsible for him, reported the incident to the authorities at the time, or at any time prior to commencing proceedings. I do accept that McKinney was injured on 29 August 2019 but I am not satisfied, on balance, that it was Moss who was the person responsible for his injuries. McKinney was the only witness to see the person who he says hit him with the baton. McKinney's evidence contained many

inconsistencies which undermined its reliability. He described the perpetrator which chased, caught and hit him repeatedly as a 50-year-old medium built man, a description which could hardly be said to describe the 70-year-old Moss. Additionally, McKinney's evidence also contained discrepancies as to the description of the vehicle driven by the perpetrator, both in its model and colour. More importantly, I found Moss to be a truthful witness and I accept that he did not hit McKinney or was in the area of Montell Heights at the date and time of the incident.

Conclusion

[23.] For the foregoing reasons, McKinney's claim is dismissed. Counsel are to settle a suitable draft order giving effect to this decision. As costs ought to follow the event I order that the Defendants are entitled to their reasonable costs. I propose to summarily assess these costs and therefore invite the Defendants to provide any representations they wish as to the time that was reasonably spent in defending the action. These representations, extending no more than 4 pages, must be submitted within the next 14 days.

Dated this 21st day of July 2023

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

Sir Ian Winder
Chief Justice