

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

We are pleased to share with you this special Crop Over themed issue of the e-Newsletter and take this opportunity to wish all those taking part in the festivities a safe and enjoyable climax to the 2016 Crop Over festival.

In our first article we explore the statutory and common law principles governing occupiers' liability which are particularly relevant to the owners of premises used for entertainment purposes. The article discusses: (i) the legal definition of an occupier of premises; (ii) the duty of care which is owed by an occupier of premises to visitors; and (iii) the steps which occupiers can take to protect themselves from liability.

As you travel around for the final weekend of the 2016 Crop Over season there will definitely be plenty of wonderful scenes that you may wish to photograph. The second article focuses on the considerations that a person should bear in mind when taking and publishing a photograph of another person, the intellectual property rights that apply to photographs and the attitude of the courts of a few Commonwealth jurisdictions and the United States of America with respect to the right to privacy as it relates to photographs and a person's image.

Our third article focuses on some of the keys considerations for a venue owner and an event promoter when entering into an agreement for the use of the owner's property to host an event.

We hope you enjoy this issue's offerings! Happy Crop Over!

• The e-Newsletter Committee



Mr. Kevin J. Boyce

✦ Liability of an Occupier of Premises: Promoters and Hosts Beware ✦

By Mr. Kevin J. Boyce, Partner

(Mr. Graeme Stoute, an intern with the firm, contributed to the article)

Introduction

Crop Over 2016 is upon us and Barbadians and visitors alike will be participating in several aspects of our annual festival across the island. Unfortunately, during this period both lawful visitors and trespassers to premises may suffer injuries. In an attempt to forearm occupiers, this article offers a review of the statutory provisions and the common law principles governing occupiers' liability in Barbados.

In Barbados the liability of occupiers of premises to visitors is governed by the *Occupiers Liability Act*, Cap 208 of the Laws of Barbados (the "**Occupiers Liability Act**"). Section 4 (1) of the Occupiers Liability Act states that an occupier of premises owes a common duty of care to all his visitors by agreement or otherwise. While the Occupiers Liability Act does not offer a definition as to who constitutes an "occupier", the case law offers some guidance. In the case of *Walrond v National Assistance Board*,¹ the Barbados Court of Appeal held that an occupier is an individual who has possession or exercises control over property. The test is one of control and is a question of fact. Property includes premises and structures. Section 2 of the Occupiers Liability Act provides that "premises" include land and "structures" include any vessel, vehicle or aircraft.

Based on the definitions provided this means that a natural person or company who has possession or exercises control over any land, building, vessel, vehicle or aircraft is under a common duty of care to all his visitors. Hence an occupier who is hosting a party at a given location or on a vessel, as is quite popular, or even an aircraft which seems to be the next logical progression, is under a common duty of care to ensure that visitors are safe from suffering any injuries. Failure to take reasonable steps to provide reasonably safe premises can result in a breach of the duty of care.

An analysis of Barbadian authorities is helpful in demonstrating the common duty of care associated with occupiers' liability. In *Watson v Arawak Cement Co Ltd*², a general worker was working on a motor vessel cleaning a hatch when he fell into an empty

hatch. The court held that an occupier of premises owes a common duty of care to his lawful visitors.

The evidence disclosed that on the day of the accident there were no lights on the walkway nor were there any signs prohibiting access via the walkway used by the general worker.

Further, the general worker did not contribute to the injuries which he sustained when he fell into the empty hatch. Consequently, the occupier was held liable for the injuries suffered by the general worker.

Moreover, in *Morris v Airline Freight Services*³ the claimant tripped and fell on BRC wire which was laid out flat on a ramp in front of premises at Terminal 2 of the Grantley Adams International Airport. The BRC was placed there by an independent contractor who was carrying out work for the Grantley Adams International Airport. The court was persuaded by evidence that the wire was not easily seen as it was substantially the same colour as the ramp. The concrete would have weathered over the years, and during that time, forklift trucks, as the claimant said, were continuously driving over the BRC wire. As a result, the defendants, the Grantley Adams International Airport and the independent contractor, were held to be jointly liable for the injuries sustained by the claimant. The defendants owed a common duty of care to their lawful visitors and failed to execute this duty.

The case of *Morris v Airline Freight Services* is also instructive in assessing who will be liable where an employer and independent contractor relationship exists. The court was of the view that both defendants should be jointly liable as they both exercised control over the premises. Further, both defendants contributed to the injuries sustained by the claimant

¹ (2011) Court of Appeal, Barbados, Civ Appeal No.16 of 2008 (Unreported).

² (1998) BB 1998 HC 30.

³ BB 1997 HC 38.

⊕ Liability of an Occupier of Premises: Promoters and Hosts Beware Cont'd ... ⊕

By Mr. Kevin J. Boyce, Partner

(Mr. Graeme Stoute, an intern with the firm, contributed to the article)

based on the evidence adduced. However, had the employer not retained control over the premises then no liability would have been found.

Occupiers can take steps to protect themselves from these liabilities. Section 4(1) of the Occupiers Liability Act allows an occupier to absolve himself from liability by giving a lawful visitors adequate warning of a danger. The effect of this provision was illustrated in the Barbadian case of *Weekes v Attorney General*,⁴ where the claimant slipped and fell on a wet floor at the Grantley Adams International Airport.

The defendant contended that there were adequate notices warning of the wet floor and that the injuries suffered were as a result of the negligence of the claimant to observe the notices. It was held that the warnings given by the defendant were sufficient to enable the claimant to be reasonably safe and the defendant was not liable. This case highlights the fact that occupiers can seek to absolve liability by placing warning signs or notices on their premises. The warning signs or notices should be clearly displayed and legible. A warning sign or notice can also be displayed at the entrance of the premises thus giving notice of a potential danger. However, whether the occupier will be successful in absolving liability is a question of fact dependent on the adequacy of the warning, signs or notices. Thus, the mere presence of warning, signs or notices may not always be adequate.



Occupiers also have a responsibility to trespassers which is governed by common law principles.

In the leading case of *British Railways Board v Herrington*⁵ it was held that whereas an occupier does not owe a duty of care to trespassers, he does owe a duty of "common humanity", or a duty to act "in accordance with common standards of civilised behaviour". In this case, the occupiers were held to be liable for the injuries sustained by a six year old child who had trespassed onto an electrified railway line.

Further, in the Barbadian case of *Kirton v Rogers*⁶ an eight year old boy was struck on the forehead by a stone expelled from the defendant's land, where explosives were being used for the purpose of quarrying. The evidence suggested that the child was trespassing on the defendant's premises. It was held that the defendant was liable for the injuries to the child as he was owed a duty of "common humanity", or a duty to act "in accordance with common standards of civilised behaviour". The occupier ought to have posted someone to warn persons to keep out of the range of the blasting until the danger had passed.

Based on the legal authorities discussed, where an occupier has failed to carry out his legal obligations the injured party, whether a lawful visitor or trespasser, can bring an action to claim damages. It is therefore advisable that occupiers consider acquiring public liability insurance and take reasonable steps to ensure that the areas they occupy are safe.

Have a great Crop Over and our wish is that no one will have to rely on the legal principles set out in this article. ⊕

⁴ (1986) 21 Barb LR 249.

⁵ (1972) 1 All ER 749.

⁶ (1972) 19 WIR 191 (High Court of Barbados).



Mrs. Rosalind K. Smith Millar

✦ Selfie: The Legal Side of Capturing the Best of Crop Over for All the World to See! ✦

By Mrs. Rosalind K. Smith Millar, Partner

Introduction

It's party time! Crop Over is here, and many of us will be out and about enjoying the sights and sounds of the festival season, snapping our selfies and cool "pics", with the latest smartphone technology, and posting great shots to all forms of social media.

So, how careful must we be about including other people and images in the great masterpiece, the hottest shot of the season? Is it okay to post identifiable images of others (including children) in photographs taken in public places?

The short answer is that you can post your photos, but remember:

- If the photograph could infringe on a third party's intellectual property rights, you will need the consent of the rights owner.
- A photograph which could be interpreted as being an invasion of the reasonable expectation of privacy, or highly offensive in some way, should not be published without the subject's consent.
- If the effect of the photograph is to focus attention on the person depicted rather than on the scene generally, it is advisable to obtain a release from the subject of the photograph (but see comments below on the right to privacy).
- The photographer's right to freedom of expression may outweigh the subject's right to privacy if the nature and context of the image indicate a legitimate public concern.
- The position regarding children is the same as for adults.

Look at each photograph and ask yourself:

- a. Does the nature and context of the photograph indicate that a person would have reasonably expected to have some privacy?; and

- b. Would a reasonable person feel offended or humiliated by the publication of the photograph?

For those who are curious about the relevant intellectual property rights provisions:

- Photographs are "artistic works" which are protected by the *Copyright Act*, Cap. 300 of the Laws of Barbados ("**Copyright Act**"). As a general rule, the photographer is the author of his photographs and is usually the owner of all of the intellectual property rights in the photographs he takes. Exceptions to the general rule occur where the photographs are commissioned works or taken in the course of employment; in such cases the commissioner or employer may own the economic rights, while the photographer retains only the "moral rights" (the right to be identified as the author and the right to object to derogatory treatment of his works).
- A photographer who owns all of the intellectual property rights will therefore have the right to use his photographs for private or commercial purposes, as he sees fit i.e. he may make the photographs available to the public electronically and issue copies of the photographs to the public.

From another perspective, the question becomes whether the people whose images are included in such photographs have any right to restrict the taking and publication of their image.

The Copyright Act does not speak to the taking of photographs of people in public places, and we are not aware of any local court cases which have decided the issue.

Case law precedents from other common law jurisdictions where the courts have given guidelines may be of persuasive authority in our courts.

🌟 Selfie: The Legal Side of Capturing the Best of Crop Over for All the World to See! Cont'd... 🌟

By Mrs. Rosalind K. Smith Millar, Partner

United Kingdom

The English courts balance a reasonable expectation of privacy against the right to freedom of expression. Many of the cases deal with publication of celebrity photographs in the press, but the same principles will apply generally to the taking of photographs in public.

A "reasonable expectation of privacy" is construed broadly, and all of the circumstances of the case have to be taken into account. Relevant circumstances may include:

- the attributes of the person who is being photographed;
- the nature of the activity in which the subject was engaged;
- the place at which it was happening;
- the nature and purpose of the intrusion;
- the absence of consent; and whether such absence was known or could be inferred;
- the effect on the subject, the circumstances in which, and the purposes for which the information came into the hands of the publisher;
- what a reasonable person of ordinary sensibilities would feel if placed in the same position as the subject and faced the same publicity; and
- whether the limitation of the freedom of expression is rational, fair and not arbitrary.

Australia

Australia has a Privacy Act which regulates the handling and dissemination of a person's information, but this does not confer the right to privacy regarding a person's image.

The courts of Australia have held that there is no concept of a tort of "invasion of privacy" and no right not to be photographed: "part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people".

New Zealand

There is no statutory right to privacy in New Zealand but a claim may be brought at common law for breach of privacy if the circumstances gave rise to a reasonable expectation of privacy, and the publicity of these private facts would be considered highly offensive to an objective reasonable person.

A reasonable expectation of privacy is attributable to facts that are not known to the world at large, even if they are known to some people. What is highly offensive to a reasonable person would be the dissemination of information that is highly humiliating and distressful or otherwise harmful to the individual. "Information" may include photographs.

The common law right to privacy will be balanced with the legitimate public concern in the information. A photograph that contains the image of a person, in breach of their privacy rights, may be justified if it is used in the public's interest.

United States of America

The United States of America does not provide statutory protection regarding the right to privacy. Case law precedents provide guidance as to the circumstances in which one may claim a right to privacy. With respect to photographs, violation of this right may occur where:

1. the photograph intrudes on a person's seclusion or private affairs;
2. matters of private life are publicised in a manner that is highly offensive to a reasonable person and is not of legitimate concern to the public; or
3. the publicity places a false impression of the person on the public.

This right of privacy is balanced against the constitutional right to freedom of expression. The courts in the United States of America therefore look at the circumstances of each case in order to determine if the public interest aspect of the information outweighs the protection of a person's right to privacy.

So, as you go out and about this Crop Over season, give a thought to what you would or would not want someone to post about you. Be considerate, and beware of over-exposure! 🌟



Mrs. Olivia N. D. Burnett

✿ Before You Agree to Party ... Key Considerations ✿

By Mrs. Olivia N. D. Burnett, Associate

Introduction

Hosting an entertainment event is not all fun and games! Without putting the proper contractual framework in place, the stage is set for misunderstanding and potential litigation.

Where the event promoter is not the owner of the venue where the event is proposed to be hosted, the event promoter will wish to ensure that, among other things, it has freedom to transform the venue into the extravaganza that it has conceptualised. The venue owner, on the other hand, will desire to ensure that its venue can be returned to its normal existence following the event.

This article seeks to highlight a few of the key considerations that should be taken into account before finalising and executing a written agreement with respect to an event.

Who Are You Partying With?

In the entertainment arena, the names associated with certain events may not be registered under the *Registration of Business Names Act*, Cap. 317 of the laws of Barbados or be the name of a company incorporated under the *Companies Act*, Cap. 308 of the laws of Barbados. Care should be taken to ascertain the proper legal person that will be contracting, even if this means that the event promoter enters into the agreement in his personal capacity.

Where and When Will You Party?

The area that constitutes the venue and its access points should be clearly defined in the agreement and it may assist to attach a plan of the area as a schedule to the agreement. The areas where patrons may park, at their own risk, may also be set out therein. The owner may want to ensure that it is clear from the agreement that it gives no warranty that the venue will be physically suitable for the event.

The agreement should expressly set out how the venue should be used and the times within which the event should take place. The agreement should also state the times within which the promoter will be permitted to prepare the venue for the event and the time within which the promoter must remove all rubbish, stock and equipment from the venue and make good the venue to the reasonable satisfaction of the owner.

What's the Price to Party?

The agreement should provide whether a security deposit will be payable and the time when that deposit will be refunded. The deposit is customarily refunded less any amount which the venue owner may have to spend in repairing damage or making good its property following the event.

The licence fee for use of the venue should also be set out in the agreement and the agreement should provide the date(s) on which such fees are payable and the method of payment.

Do You Need Permission to Party?

The parties to the agreement should ensure that provision is made in the agreement for each party, on request, to provide the other party with copies of all necessary licences and approvals (if any). The relevant licences and approvals may include the following:

- (a) the licence for sale, exposure or offer of sale of any intoxicating liquor at the event;
- (b) a licence issued under the *Public Entertainments Act*, Cap. 85A of the laws of Barbados;
- (c) a music licence from the Copyright Society of Composers, Authors and Publishers Incorporated for the use of protected music;
- (d) approval from the Commissioner of Police to play loud music for the duration of the event; and
- (e) food and other relevant health certificates/permits.

✦ Before You Agree to Party ... Key Considerations Cont'd... ✦

By Mrs. Olivia N. D. Burnett, Associate

What Else Matters When You Party?

Generally, the agreement should be as complete as possible and document all of the matters agreed by the parties. It is helpful to ask the following questions prior to finalising the agreement:

(a) Who will be providing what?

Amenities – Will the venue owner be providing electricity and/or water? Will the promoter be required to reimburse the venue owner for this? Will the promoter be required to set up portable bathroom facilities? Is any material required to be installed to protect the venue's environment e.g. covers for the lawn?

What Are The Risks When You Party?

The agreement should specify how liability and risk are apportioned between the parties. It is customary for such agreements to provide that the venue owner will not be responsible for any death, injury or damage to persons or property arising out of the event. The agreement may also go further to provide that the promoter shall indemnify the venue owner against all actions, proceedings, costs, claims and expenses howsoever arising in connection with the event or use of venue. The promoter may, on the other hand, seek to ensure that any death, injury or damage caused by the willful act or negligence of the venue owner is excluded from its liability.



(b) Who will be responsible for what?

Security – Will the promoter, as is customary, be responsible for procuring the immediate removal of anyone in the venue who causes a disturbance or engages in illegal activity?

Please note that such agreements are usually personal to the contracting parties and the agreement should note this.

It is also customary for such agreements to provide that the promoter must insure, and provide written evidence that he has insured, against damage to the venue.

Will the Party Ever End?

The circumstances upon which the agreement will terminate should be set out. For example, if the event is cancelled, if there is a breach of the agreement, if the licence fee or deposit is not paid or if there is a *force majeure* event, i.e. an unforeseen event which will result in the inability of a party to perform the agreement. Dispute resolution should also be provided for in the agreement. ✦

✦ ATTORNEY PROFILE ✦

In this issue we commence our profiles of the firm's associates. In this issue we profile Miss Annette Y. Linton, one of our senior associates in the Property Department.



Miss Annette Y. Linton

Annette Linton was called to the Bar in Barbados in October 2003 and began her practice at Inn Chambers in Barbados where she gained experience in criminal and civil litigation, conveyancing, probate and administration of estates. In 2005 she joined Clarke Gittens Farmer as an associate in the Property Department.

During her eleven years with the firm she has gained extensive knowledge and experience in property law matters relating to conveyancing, residential and commercial leases, share sales, business sales, residential and condominium developments and residential and commercial mortgage transactions. Annette's practice also includes advising local, regional and international clients on Barbadian estate law, preparation of wills, trusts, obtaining grants of administration and probate and the administration of estates.

Annette has published a number of articles on both property and estate matters and is one of the founding members of the e-Newsletter Committee which is responsible for the publication of CGF Point of Law. She is the Chairperson of the e-Newsletter Committee. ✦

✦ CGF NEWS ✦

Appointment of new Managing Partner

The e-Newsletter Committee is pleased to announce that effective May 1, 2016, Mr. Ramon Alleyne, a partner and head of the Litigation Department, assumed the role of the firm's Managing Partner. Mr. T. David Gittens Q.C., a partner in the firm's Property Department and the firm's former Managing Partner, assumed the role as the firm's Senior Partner. The e-Newsletter Committee extends best wishes to Ramon and David in their new roles.

Caribbean Commercial Law Workshop

From July 24 to 26, 2016, members of the legal and business communities in the Caribbean converged at the Hilton Barbados Resort for the 15th Annual Caribbean Commercial Law Workshop ("CCLW") hosted by the Faculty of Law, Cave Hill Campus, Barbados under the theme "Celebrating Caribbean Commercial Law".

The firm was one of the sponsors of the CCLW. The firm was represented at the CCLW by Miss Joanna Austin of the Corporate Department and Ms. Debbie

Fraser, Mrs. Nicola Berry and Mrs. Olivia Burnett of the Commercial Department. Debbie, a partner and head of the Commercial Department, presented a paper entitled "Take-overs and Amalgamations – Recent Methods Used for Mergers and Acquisitions in Barbados".

Further information on the CCLW can be obtained by visiting the Faculty of Law website at: <http://www.cavehill.uwi.edu/Law/cclw/agenda.aspx>. ✦



From left to right: Mrs. Olivia N. D. Burnett, Mrs. Nicola A. Berry and Ms. Debbie A. P. Fraser

RBC Royal Bank Home Fair

On Wednesday July 20, 2016 Mrs. Rosalind Smith Millar, a partner in the Property Department and head of the Intellectual Property Department, and Miss Nicole McKetney, an associate in the Property Department, participated in RBC Royal Bank (Barbados) Limited's Home Fair which was held at the Hilton Barbados Resort.

Young Professionals' Day Seminar

On June 4, 2016, our Miss Melanie Garrett-Bailey and Miss Jaina Colucci, both associates in the Property Department, presented at a seminar held at the Villages, Coverley, Christ Church in celebration of Young Professionals' Day. Melanie's presentation was entitled "What You Should Know When Purchasing Property". Jaina's presentation was entitled "Wills: The Transfer of Property After Death".

Internship

During the period June 1 to August 9, 2016 the firm is hosting Miss Shalisha Samuel, Mr. Graeme Stoute, Mr. Anderson Yearwood and Mr. Christopher Harper, as part of its annual internship programme. Shalisha recently completed her LLB at the University of London and will shortly be commencing the Bar Professional Training Course at the University of Law, Birmingham. Graeme and Anderson are second year students at the Hugh Wooding Law

School in Trinidad and Tobago. Christopher is a second year student at the Norman Manley Law School in Jamaica. The e-Newsletter Committee takes this opportunity to extend a warm welcome to the interns and to wish them continued success in their studies.

Below is a photograph of the interns at an in-house seminar presented by Mrs. Rosalind Smith Millar, partner in the Property Department and head of the Intellectual Property Department. ✦



From left to right: Mr. Anderson Yearwood, Mr. Graeme Stoute, Mrs. Rosalind Smith Millar, Ms. Shalisha Samuel and Mr. Christopher Harper

✦ **CGF POINT OF LAW** published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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Partners: **Managing Partner:** Mr. Ramon O. Alleyne. **Senior Partner:** Mr. T. David Gittens, Q.C. **Other Partners:** Mr. Stephen W. Farmer, Q.C., Miss Gillian M. H. Clarke, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar, Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

Newsletter Team: **Supervising Partner:** Mrs. Nicola A. Berry. **E-Newsletter Committee:** Miss Annette Y. Linton (Chair), Miss Sabrina L. Maynard (Deputy Chair), Miss Nicole S. McKetney, Mrs. Olivia N. D. Burnett, Mr. Dario A. Welch, Miss Janet E. Taylor and Miss Ruth J. Henry. **Technical and Administrative Support:** Miss Stephanie V. Blenman, Mr. John B. Newton and Ms. Erith S. Small.

Disclaimer: IMPORTANT NOTICE: This e-Newsletter does not constitute and should not be construed as legal advice. Should further analysis or explanation of the subjects contained in this e-Newsletter be required, please contact us. Always consult a suitably qualified lawyer on any legal problem or issue.

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