

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2007-04273

BETWEEN

JILLIAN FRANCIS

CLAIMANT

AND

XTATIC LIMITED

FIRST DEFENDANT

AND

RANDY GLASGOW PRODUCTIONS LIMITED

SECOND DEFENDANT

AND

CHAGUARAMAS DEVELOPMENT AUTHORITY

THIRD DEFENDANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

FOURTH DEFENDANT

AND

SAFEWAY ACCESS AND SUPPORT SYSTEMS LIMITED

THIRD PARTY



JUDGMENT

Before the Honourable Madam Justice C. Pemberton

Appearances:

For the Claimant: Mrs L. Maharaj, S.C. leading Mr D. Rambally, and Ms K. Khan
and Ms S. Allahar.

For the First and Second Defendants: Mr B. Reid instructed by Ms. P.Chankardyal

For the Third Defendant: Mr. G. Armorer instructed by Ms. D. Mohan

For the Fourth Defendant: Mr. N. Byam instructed by Ms. D. Dilraj

For the Third Party: Mr. E. Koylass S.C. instructed by Ms. D. Roopchand

BACKGROUND AND INTRODUCTION

[1] The constituents of the tort of Negligence throughout time are:

- **Existence of a duty of care – whether imposed by the terms of a statute or as one recognised by the Common Law;**
- **The duty of care must be owed to the party bringing suit – best explained by the “neighbour” analogy by Lord Atkin in DONOGHUE STEPHENSON;**
- **There must be a breach of the duty owed to the party bringing suit;**
- **Such breach resulting in or causing damage to the party bringing suit in the measure/kind of damage being immaterial.**

Other criteria have been grafted onto these constituents, some of them relevant to this case, are as follows:

- **Causation – the act complained of must be the cause of the damage;**
- **The act, the cause of the harm (causation) must be proximate to the damage and must not be too remote;**

- **The harm must have been reasonably foreseeable by the doer of the unfortunate act.**

[2] All of these criteria must be established on the evidence. Having said that, I reiterate that the burden of bringing to trial the relevant and admissible evidence to prove that the act complained of satisfies all the requirements of the tort of negligence lies on the Claimant. He who asserts must prove¹. It is only on credible evidence that a finding of negligence in favour of the Claimant can be made. That finding is made after the court's careful examination of the evidence to ascertain if every essential ingredient of the tort has been proved, the standard to be applied being on a balance of probabilities².

[3] I think that it is important to set out the law as I have done especially when dealing with a case such as this in which novel issues have arisen for determination.

[4] **FACTS**

On 25th November 2000 most of Mr Machel Montano's fans journeyed to the North West peninsular, Chaguaramas in Trinidad to witness what promised to be a

¹ See "**MURPHY on EVIDENCE**" Peter Murphy 7th ed. 2000 Blackstone Press p. 101-130; 103. "If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim..."

² See **MURPHY on EVIDENCE** f.n.1. "The Standard of Proof required of any party to civil proceedings for the discharge of the legal burden of proof is proof on the balance of probabilities. This means no more than that the tribunal of fact must be able to say, on the whole of the evidence, that the case for the asserting party has been shown to be more probable than not. If the probabilities are equal, i.e. the tribunal of fact is wholly undecided the party bearing the burden of proof will fail".

stellar performance. A large percentage of the patrons who entered the venue were ticketed. Approximately 3000 of those persons were VIP patrons.

[5] As part of the preparations for this event, the concert promoter Randy Glasgow Productions Limited (RGPL) arranged for the venue – the property of the Chaguaramas Development Authority (CDA); he arranged for safety accommodation – a platform was constructed, upon which 3000 seats were to be placed for the comfort of the viewing VIP patrons; he arranged ticket sales successfully as the event attracted 25,000 patrons; he arranged for security for the patrons – CDA and members of the Trinidad and Tobago Police Service (TTPS) and organised emergency from any outbreak of fire through the members of the Trinidad and Tobago Fire Services (TTFS).

[6] All seemed on track. At about 4:55p.m. the Claimant, Ms Jillian Francis, a ticketed patron made her way to the VIP stand looking forward to a fantastic performance from Mr Montano and no doubt a memorable evening. But the type of memorable evening anticipated was not to be.

[7] During the course of the evening, in fact before Mr Montano arrived on stage to deliver his numbers, the constructed VIP area was teeming with bodies, pulsating and rocking to the beat of the music.

[8] When Mr Montano came on stage something went wrong. The structure supporting those patrons collapsed. Many were injured, some seriously. Ms Francis was among those seriously injured.

[9] Ms Francis brings this action to recover damages for the injuries she sustained. It is not disputed and I accept as fact that the nature and extent of her injuries were as follows:

- (a) Severe Pott's fracture with posterior subluxation of the talus.
- (b) Scar over the medial malleolar area 11.7cm in length.
- (c) Scar over the lateral malleolus 7.8cm in length.
- (d) Anterior scar 2.9cm by 1.8cm.
- (e) Narrowing of the right ankle joint space indicative of accelerated cartilage wear resulting in moderate degenerative arthritis.

[10] Ms Francis claims and is asking the court to award her damages, Special Damages as contained in her Statement of Claim amounting to \$36,705.40 in addition to General Damages including aggravated and exemplary damages. As against the Attorney General Ms Francis seeks:

- (a) A declaration that an order that the Fourth Defendant do pay to the Plaintiff compensatory damages including aggravated and/or exemplary damages and/or vindictory damages;
- (b) Such further or other orders, writs, directions as may be appropriate for the purpose of enforcing or securing the enforcement of the

aforementioned rights and/or any of them as this Honourable Court shall deem just.

[11] I must state that the 1st and 2nd Defendants have compromised and settled this action. The Order reads in part and in relation to the CDA.

1.1 That there be judgment for the Claimant against the 1st and 2nd Defendants for damages, interest and costs assessed in the sum of \$450,000.00.

1.2 That the sum of \$450,000.00 is being accepted in full and final satisfaction of the 1st and 2nd Defendants' liability to the Claimant in respect of their negligence.

1.3 That the 3rd Party shall indemnify the 1st and 2nd Defendants against the Claimant's damages, interest and costs to the extent of 1/3 of the damages assessed together with interest thereon.

1.4 That there be a stay of execution of 90 days.

[12] The claim I must now address is that of Ms Francis against the CDA and the Attorney General.

[13] **MS FRANCIS'S PARTICULARS OF CLAIM**

As against all of the Defendants, Ms Francis claims that due to the collapse of the stand all of the Defendants owed her a common duty of care. Ms Francis further complains that the happening was "*caused by the negligence and/breach of statutory duty of the Defendants, their servants and/or agents and/or of each or any of them.*" Ms Francis then particularizes the incidents of negligence as follows:

1. Failure to take any or any adequate precautions for Ms Francis's safety whilst she was on the premises;
2. Failure to take any or any reasonable care to ensure that Ms Francis would be reasonably safe in using the VIP stand whilst she was on the premises as a spectator;
3. Exposing Ms Francis to risk of damage or injury of which (they) knew or ought to have known;
4. Permitting the VIP stand to be or to become or to remain in an unsafe and dangerous state and a danger and a trap to persons lawfully using the same;
5. Causing or permitting Ms Francis to sit in a stand which they knew or ought to have known was unsafe or dangerous;
6. Failure to take any or any reasonable timely or effective measures to make the VIP stand safe or reasonably safe for Ms Francis to use;
7. Failure to provide or maintain a safe sitting place for Ms Francis and/or take sufficient or any steps to ensure her safety whilst she was seated on the premises;
8. Failure to discharge the common duty or care to Ms Francis.

Let me say that I have searched but have found no duty of care prefaced by "common". I shall therefore read the sentence as if the Defendants, it is alleged owed Ms Francis a "common law" duty of care in the circumstances outlined above.

[14] With respect to the CDA and The AG, Ms Francis particularized additional features of their alleged negligence as follows:

1. The Chief Fire Officer acting as servant/or agent of the AG failed to take proper and/or adequate steps to regulate and/or control the number of entrants to the Real Unity concert.
2. The AG, its servants and/or agents failed to take any steps to control the number of persons occupying the VIP stand or to ensure that the stand could accommodate safely the number of persons permitted thereon.

3. The executive arm of the State failed to exercise its duty of care to Ms Francis in failing to take the necessary precautions to ensure that whilst Ms Francis was using the said stand it did not collapse and injure her.
4. The executive arm of the State failed to take reasonable care to ensure the Ms Francis would have been reasonably safe on the said stand and that she was not exposed to the risk of injury of being accommodated on an unsafe and/or dangerous stand.
5. The executive arm of the State failed to take or cause to be taken timely and/or effective checks and/or measures to ensure that stand on which Ms Francis was accommodated did not collapse.

[15] **THE ATTORNEY GENERAL'S DEFENCE**

The Attorney General denied Ms Francis's claims save that the "Real Unity" Concert took place at the stated venue and that spectators were admitted to a VIP stand and provided with seats. The AG's case is that during the week preceding the event, site visits and discussions took place between the Police officers in charge of the Western Division (TTPS) and the Officer in Charge of Fire Prevention, Northern Division (TTFS). Discussions at the first site visit surrounded the layout plan of the venue to secure two points of access and egress, the site of the stage and other adjoining structures. At that visit it was agreed that both the Fire Service and the Police Service would have maintained a presence. Both the TTPS and the TTFS visited the site the day before the show to conduct a further inspection. They saw that emergency exits were being put in and works were still in progress.

[16] On the day of the show, both the TTPS and the TTFS assembled its forces. From early afternoon there was a police presence – one Assistant Commissioner of Police, 1 Senior Superintendent, 2 Inspectors, 8 Sergeants, 23 Corporals and 104 Constables charged with **general security, traffic and crowd control**. (Emphasis mine). In addition, the TTFS fielded a team of 18 fire officers under the command of the Acting Divisional Fire Officer. Two TTFS ambulances were in attendance.

Prior to the commencement of the event, the TTFS conducted a general review and noted the access and egress points, ensured that adequate provision was made for emergency exiting. An examination of the VIP area revealed that **there was adequate aisle space between the rows of seats and easy access to the 3 access stairs servicing the area.**

[17] It may be instructive to set out the following recitation of the facts relied on by the AG. The Defence continued as follows:

vii) During the concert it was noted that a large cross section of the crowd occupying the VIP area converged towards the north-eastern area of the stand. There were also patrons overflowing into the aisle spaces. Attempts by fire and police officers to have patrons take their seats and clear the aisles were unsuccessful. Two to three separate announcements were made via the PA system pleading with patrons on the VIP stand to be seated and for persons converging at the north-eastern end of the stand to remove themselves. The patrons did not adhere to the requests.

viii) Another announcement was made threatening not to allow the concert to continue if patrons on the VIP stand did not take their seats and clear the aisles. Machel Montano then took the stage and pleaded with the patrons to be seated and for persons without seats to remove themselves from the stand because the Fire Officers were threatening to stop the show. Shortly thereafter, the VIP stand collapsed. All security and emergency personnel mobilized into action in an effort to rescue the injured.

[18] In answer to a request for Further and Better Particulars of the Defence, the AG stated that the convergence to the north-eastern end of the VIP stand was noted by the Acting Divisional Fire Officer, one of the Fire Station Officers and one of the Fire Sub Station Officers. Their observations were that a large cross section of the crowd occupying the VIP area had abandoned their seats and began accumulating

towards the front of the seating area including the aisles. They were dancing and jumping in that area. They noted that not all of the patrons in the VIP stand wore the same colour hand bands and they concluded that the VIP stand was overcrowded.

[19] In further answer to the attempts made by the TTPS and the TTFS to have patrons take their seats, it was stated that both officers from the TTPS and the TTFS approached the patrons and asked them to take their seats and that persons who were not ticketed to the VIP stand should vacate it. They were informed of the dangers of converging on the north eastern side of the stand. Further efforts were made by the Master of Ceremonies who was requested by the Acting Divisional Fire Officer to make such announcements including one which threatened to stop the show if the situation prevailed. The Acting Senior Superintendent of Police further instructed that an announcement be made for the patrons in the VIP stand to take their seats and that those persons who were not ticketed were to remove themselves from the stand. The Officer further informed of the TTFS's threat to stop the show if the situation on the VIP stand was not controlled. After a time, there was another announcement repeating the information and this time the musicians were asked to stop playing. There were five (5) announcements in all. The last announcement effectively stopped the show. There was some semblance of compliance and the show restarted. Shortly thereafter, the stand collapsed.

[20] **CDA's DEFENCE**

The Defence did not change even though there was an amendment. The material portions of this Defence stated that the First Defendant (RGPL) were licencees under a written agreement titled "Events Agreements" which would have been relied upon "for its full terms meaning and effect". By virtue of this Agreement, RGPL had "exclusive occupation and the control and management of the Concert Site. On the day of the concert, CDA denied that it was an occupier of the Concert Site. The rest of the Defence denied Ms Francis's claims that the "happening" was

caused by CDA's its servants' and/or agents' negligence and further denied that CDA, its servants and/or agents were in breach of any duty, statutory or otherwise.

[21] Neither of these Defences changed with Ms Francis's Re-Amended Claim Form and Statement of Case. They therefore stand as the factual bases of both the AG's and the CDA's cases.

[22] **THE EVIDENCE**

The AG filed no witness statements so as to lead any evidence in its defence. The AG did not cross-examine any of the witnesses presented. Mr. Byam stood by his defence that he had no case to answer. CDA led evidence and cross examined Ms Francis's witnesses. That was the stage set for this trial.

[23] What is a court to do when a Defendant has put in no evidence or has engaged in miniscule cross examination? The reality is that the facts are therefore unchallenged and it lies in the power of the court to assess the evidence, to determine its weight, relevance and its overall credibility in order to determine whether Ms Francis has made out her case against the AG and CDA.³ It is against that background that I shall examine the evidence led by Ms Francis.

[24] **CLAIMANT**

MS JILLIAN FRANCIS

Ms Francis's testimony is summarized. At the time of her injuries she was twenty-eight years of age. On or before the 25th November 2000, she purchased a ticket to admit entrance for the VIP stand at the "Real Unity" Concert, whose star performer was Machel Montano. The cost of that ticket was a handsome \$300.00TT. On the said 25th November, 2000, she journeyed to the venue in Chaguaramas where she gained admission to the event. As she presented her

³ See H.C.A. No. 950 of 2005 **DERECK HAMILTON v THE COMMISSIONER OF PRISONS AND THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO** per Jones J on the residual power of the court to determine the weight to be attached to evidence in cases where a defendant offers no evidence contradicting a claimant's case. See further f.n. 1 and f.n. 2 *infra*.

ticket, it was taken by the gate personnel and in exchange, she received a band for her hand, her ticket stub and chits for food and drink. She described the VIP stand as “a wooden platform” about six (6) feet high located right in front of the stage to the right. She was directed to be seated to the centre of the platform. The left side of the platform was already filled with patrons. At various times during the evening, she left that area to patronize the various food and beverage refreshment stalls within the VIP area.

[25] At about 8:30 p.m. an announcement was made, heralding Mr. Montano’s arrival to deliver his performance. At that time, she noticed that the stand was crowded and she heard a further announcement that patrons of the VIP stand “*should refrain from jumping on the platform structure as it was not constructed for that purpose*”. Towards the end of the singing of the National Anthem, she felt the stand “*wobbled*”. At first she thought that it was an earthquake but then attributed the “wobble” to the vibrations of the music. She remained there. Immediately after, she directed her attention to the stage. In fact she stood up to get a better view of the stage. Shortly thereafter, Mr. Montano appeared on stage and started his performance. After about three (3) lines, Ms Francis testified that she felt herself dropping downwards. She was on the ground when she realized that the stand had collapsed.

[26] **CROSS EXAMINATION**

The AG did not cross examine Ms Francis, but the CDA exercised its option to do so.

[27] Ms Francis’s cross examination was uneventful. She admitted that the CDA was not the Promoter of the event but agreed with Counsel that the CDA was the landlord. She admitted that she could not say if the CDA had exercised any control over the concert or in fact anything over the concert. She admitted that she did not know who was there from the CDA.

[28] **MERVYN WHITE**

Mr Mervyn White accompanied Ms Francis and another female friend to the event. Mr. White's evidence mirrored Ms Francis's in terms of their entrance to the concert area. In describing the VIP stand, he stated that the stand *was a stand constructed about ten (10) feet high off the ground to the right of the stage... The stand is made of wood with metal scaffolding...*. Mr White gave more details of the stand namely the seating and where his party was seated *"...at about the centre about three quarters way to the back of the platform..."*. He further testified that when they arrived *"the platform was not filled to capacity..."*. At about 8:30 p.m. the stand was *"full to capacity and there were no empty seats that I could recall..."*. Announcements were made requesting that the patrons of the VIP stand *"... refrain from jumping on the structure..."*. He stated that just before Mr. Montano came on stage, *"everyone stood up and I felt a little movement of the platform..."*. He stated that when he felt the movement, he turned to Ms Francis to warn her but by that time the stand collapsed. He spoke to the fact that he was not injured as he landed on his feet and to Ms Francis's unfortunate circumstances.

[29] **CROSS EXAMINATION**

The AG did not cross examine Mr. White, but the CDA exercised its option to do so. Like Ms Francis, this witness could not say that the CDA *"put on"* the concert and agreed with Mr. Armorner that the CDA was not involved in *"putting on"* the concert.

[30] **THE DEFENDANT**

THE CDA

MR STANISLAUS STEELE

Mr Stanislaus Steele deposed that at that time he was the Tenancy Manager with the CDA and as such he had access to its files and records; he was responsible for *inter alia* interviewing applicants for leases. The CDA granted leases to successful applicants through executing an "Events Agreement". Mr Steele pointed to what can be described as an Indemnity Clause in the Agreement by

which Xtatic Limited (XL) and Randy Glasgow Productions Limited (RGPL) agreed *inter alia* that they shall keep the CDA “*indemnified against any claim, loss, damage, injury or expense of every description arising directly or indirectly out of the performance of Xtatic Limited and Randy Glasgow Productions Limited under the Agreement (to)... or to any guest or patron of or invitee to the Event or of the Authority.* Mr Steele continued that the CDA was not involved in the construction or erection of the VIP stand and that for the period 13 November 2000 until 27 November 2000 XL and RGPL had the exclusive occupation, control and management of the concert site. Mr Steele pointed out as well that the “Real Unity” Concert was “*not a project of the*” CDA. It played no part in the management, promotion or execution of the event.

[31] Mr Steele continued that CDA did not supervise and control XL or RGPL during the course of the promotion or pre-concert preparations at the concert site or did no such activity on the day of the concert. It was not the duty of the CDA to do so. The contract contained no provisions stipulating, nor did Mr Steele believe that it was CDA’s duty or responsibility to do the following:

- stipulate that all erections and platforms brought on to the site had to be designed, constructed or erected in accordance with best engineering practice and be in compliance with existing safety regulations, laws, by laws and in any event fit for intended use by the public;
- ensure that the plans for public seating accommodation was safe and free from defects capable of causing physical injury and harm to the public;
- ensure that at the time of construction and erection of the VIP stand and the seating that the structure was safe and free from defects capable of causing physical injury and harm to the public.

According to Mr Steele, the effect of the Indemnity Clause was to transfer that responsibility to XL and RGPL.

[32] In any event, CDA was not part of the construction crew and did not expose Ms Francis or any other patron to any risk of injury which could have been avoided by reasonable care being exercised by the CDA. In fact, Mr Steele contends that the CDA can only “...go on external appearances and will only take action if the external appearances warrant action being taken...”.

[33] **CROSS EXAMINATION**

I shall deal only with the cross examination by Mrs Maharaj S.C. Ms Francis’s Counsel.

Mr Steele stuck to his position that it was the responsibility of XL and RGPL to obtain the necessary approvals for structures to be constructed and erected and all activities associated with the event, such as obtaining Liquor Licences and to take all reasonable steps to ensure that patrons to the event, in this case Ms Francis will be safe from injury. CDA was protected by the Indemnity Clause in the Events Agreement so that Ms Francis had no claim against it.

[34] **OTHER WITNESSES**

Mr Bethelmy, Senior Superintendent Julius and Mr Lloyd Joseph responded to Witness Summonses issued by Ms Francis.

MR KENRICK M BETHELMY

Mr Bethelmy stated that he was on duty at the “Real Unity” Concert on 25 November 2000. Some weeks before the actual date of the event, he was made aware of an application made by RGPL for permission to hold an entertainment event at Chaguaramas. Based on that application, he held discussions with the promoters, and they were held one week before the carded date. At the time of the visit to the venue, he saw a fenced area and three sections one of which contained a temporary structure which he described as “bleachers”. His job was to determine whether the location provided reasonably for the patrons attending the event. Mr Bethelmy stated that his duties were performed in accordance with the **FIRE SERVICES ACT**⁴. In accordance with the Act he looked for points of access

⁴ Chap. 35:50 of the LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO

and egress, means of escape and other measures to provide for emergencies, that is, to successfully get persons out of the area. The witness stated that he is trained to examine structures from a "Fire" aspect but that he has no training in engineering itself. At that visit he made certain recommendations with respect to the number of access ways required to provide for travel of persons into and out of the premises and to the seated areas; signage and lighting.

[35] Mr Bethelmy made a second visit to the premises on the day before the event. He noticed that provision had been made for access as was requested. He observed that work was continuing on the structure and that no seating had been placed on it. On the day of the event, Mr Bethelmy reported for duty. He held discussions with members of the TTPS and his other officers. When he arrived at the venue, the seating was in place on the VIP stand, but it was difficult to determine the exact number of seats on the stand. As time went on, additional seats were being placed on the stand. He made a general inspection with respect to aisle spacing, general access ways, the western exist, which was the major exit for those patrons making use of the General Admission and at the eastern exit which serviced the VIP area. Access was provided, lighting in place and electrical connections were inspected. At the south eastern section, he made an inspection of the food and refreshment booths and asserted that generally speaking the site layout was in keeping with the Plan presented to him.

[36] Mr Bethelmy observed a constant flow of persons to the VIP area and a number of the patrons congregated towards the area of the main stage. Additional seating was brought onto the platform and they were being moved closer to the main stage. Fire Officers moved in an attempt to curtail that activity saying that it would cause problems. The crowd jeered. The Master of Ceremonies made announcements appealing to the crows to cooperate. Eventually, the Fire Officers were accosted by several patrons. A confrontational situation developed and the police joined in the appeal for quiet and order. Even Mr Montano appealed to the crows to no avail. It was in the melee that the stand collapsed.

[37] **CROSS EXAMINATION**

Mr Armorer did not elicit any dramatic testimony from this witness. Mr Bethelmy was clear that from his observations he saw nothing wrong with the platform since it looked as if it could have accommodated the number of persons they were told it should have accommodated.

[38] **EULYNA JULIUS**

At the date of the event, this witness is a Senior Superintendent of Police, Western Division. Senior Supt. recalled the “Real Unity” concert and the fact that she was one of the Inspectors on duty at the event. The witness stated that she performed her duties in accordance with the **POLICE SERVICE ACT**⁵. As part of her duties at the event, Senior Supt. was charged with the general supervision of security. There were several other officers who worked that day. Senior Supt. basically affirmed the facts and so I would not recite the numbers mentioned in the AG’s Defence. Upon arrival at the venue, the officers held a briefing. This witness had no specific station as she roved the entire premises checking out persons. Prior to the stand collapsing, there was interaction with the patrons – several appeals were made by the TTPS, TTFS personally and through public announcements to persons who were standing blocking the view of other patrons. This happened in the very VIP stand which collapsed. At one point, the music was turned off and another appeal was made which was ignored by the crowd. Senior Supt. could not say if anyone was arrested in the VIP stand as that was not her specific area of operation. There was no cross examination.

[39] **LLOYD JOSEPH**

On the relevant date, Mr Joseph was the Senior Supt. in charge of the team who worked the security at the event. He did two pre-event visits and noticed that what he saw being constructed and erected was in accordance with the plans that were given to him. He was given information on the number of patrons expected, which

⁵ Chap. 15:01 of THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO

was necessary for him to determine a detail of the officers to work at the function. This witness confirmed the numbers set out in the AG's Defence.

[40] On the day in question, the witness was informed that there was unruly behaviour on the VIP stand. He immediately went across and urged the patrons to evacuate because of what was told to him. When he realized that he was being ignored, he informed Mr Montano of the problem and requested that an announcement be made for patrons in the VIP area to evacuate. That was done. The patrons remained dancing and prancing on the platform. When Mr Joseph realized that the patrons were unresponsive to the pleas, he took charge. He stated: "*I took the mike from the MC and I told the other patrons that we would have to stop the show if I was not getting co-operation from that area. In order to avoid chaos, I asked other patrons to co-operate. I took the authority to stop the show. After the announcement, I got the full co-operation of other patrons at the concert. I did this to avoid chaos if we had to have an evacuation*".

[41] There was no cross-examination.

[42] **SUBMISSIONS**

Both Mrs. Maharaj and Mr. Armorer produced very informative and well analysed submissions which I shall not rehearse in great detail. Suffice it to say that the court was deeply grateful to receive them and assure Counsel that they were considered in coming to my decision. I thank Counsel.

MS FRANCIS'S SUBMISSIONS

JOINT AND SEVERAL TORTFEASORS

Attorney-at-Law for JF, Mrs Maharaj, submitted that JF's damage was the result of "*several tortfeasors causing the same damage*". *Those tortfeasors are each independently responsible for separate torts which combine to produce the same*

damage”, in this case Jillian Francis’s injuries⁶. The cases of **THOMPSON** and **THE KOURSK** are comparable to the matter at bar in that both cases demonstrate the practical application of assigning liability to several tortfeasors⁷.

“It was the combined effect of those two separate acts of negligence which in my view, produced the one damage, and in my view, this is not one but two torts”.

The CDA and the AG are liable as two of several tortfeasors.

[43] **BREACH OF STATUTORY DUTIES:**

The relevant statutes prayed in aid were in relation to CDA, **Section 5(f)** of the **TOWN AND COUNTRY PLANNING CHAGUARAMAS DEVELOPMENT ORDER OF THE TOWN AND COUNTRY PLANNING ACT** which required CDA to apply for Town and Country Planning Approval for the construction of the VIP Stand and **Section 161** of the **MUNICIPAL CORPORATION ACT** which required the engineer of the Corporation to inspect and certify the integrity of the structure in accordance with the Act. CDA had statutory duties under the **THEATRE AND DANCEHALL ACT** and to procure Legal Licences. Mrs Maharaj’s submissions read as follows:

*In relation to the Attorney General, the Attorney General acted in breach of its statutory duties pursuant to Section 4(1) of the **FIRE SERVICE ACT** (Chapter 35:50) and Section 45 of the **POLICE SERVICE ACT** (Chapter 15:01) and in breach of a specific statutory duty under Section 6 of the **THEATRE AND DANCE HALL ACT** to ensure that a dance hall license had been obtained in compliance with the provisions of the Act for the use of the said premises as a Dance Hall. In addition the Attorney General was fixed with the duty to ensure that the necessary liquor license was obtained for the sale of alcohol.*

⁶ See **THOMPSON V. LCC (1899) 1 QB 840** and **THE KOURSK (1923) P 206**, **JAMESON V. CENTRAL ELECTRICAL GENERATING BOARD (2000) 1 AC 455** and **HEATON V. AXA EQUITY LAW LIFE ASSURANCE SOCIETY (2002) 2 AC 329**.

⁷ See **THE KOURSK** per Hill J.

[44] **CONSENT ORDER:**

Further, the action was not concluded as a result of the consent order between XL, RGPL and SASS. In **JAMESON and HEATON** their Lordships maintained the view that where, *“a claim is compromised, it need not necessarily be in full and final satisfaction for all the damage claimed...In such a case a claimant is not precluded from making a claim against a concurrent tortfeasor”*. In fact Jillian Francis had:

“Expressly reserved her right to maintain the Claim against the Third and Fourth Defendants in that:

- (a) the Order was made “WITHOUT PREJUDICE to the Claimant’s claim against the Third and Fourth Defendants.”*
- (b) that the sum of \$450,000.00 was accepted in full and final satisfaction of the First and Second Defendant’s liability to the Claimant in respect of their liability.*
- (c) that the proceedings against the Third and Fourth Defendants were adjourned to other dates.*

[45] **LIABILITY OF THE CDA**

In this regard, Mrs Maharaj SC submitted that based on the Events Agreement, and relying on a statement of law in **CHARLESWORTH & PERCY on Negligence 11th Ed. Chapter 7**, the occupier of premises is liable to visitors *“for dangerous or defective premises”*. The fact that the occupier may not be the owner of the premises does not bar liability. The cross examination of the Tenancy Manager of the CDA, Mr. Stanislaus Seale revealed that he admitted that, *“the CDA retained control of certain aspects of the perimeter, fencing and security personnel*. Mr. Seale admitted that, *“the CDA reserved the power to suspend the concert”*.

[46] Mrs Maharaj SC submitted that in breach its Common Law duty of care and statutory duty under the **TOWN AND COUNTRY PLANNING CHAGUARAMAS DEVELOPMENT ORDER OF THE TOWN AND COUNTRY PLANNING ACT** and

the **MUNICIPAL CORPORATIONS ACT**, the CDA did not seek the required approval from the Minister. CDA breached its statutory duty under Section 3(1) of the **THEATRES AND DANCE HALLS ACT** by failing to ensure that the relevant Dance Hall Licence had been obtained. This is borne out in Mr Seales's cross examination where he, "*admitted that he was unsure as to whether or not the CDA was aware that a Dance Hall Licence was obtained*". Mrs Maharaj concluded that:

"As a result of the omissions on the part of the CDA no approval was sought from any qualified professional as [to] the suitability of the VIP stand for the purposes for which it was built.

[47] **LIABILITY OF THE AG**

Mrs. Maharaj SC relied on Section 41(1) of the **FIRE SERVICE ACT** in her submissions regarding the liability of the AG in this matter.

This Act states:

The officer may do all such things as he deems necessary for extinguishing the fire or for protecting the premises or place from fire, or from acts done aforesaid, or for rescuing any person or property in the premises or place...

[48] According to Counsel, Counsel pointed the court to Officer Bethelmy's testimony in which he stated that,

After requesting that patrons comply and receiving a negative response Officer Bethelmy took no further steps.

It was within Officer Bethelmy's authority to stop the show until some order was enforced on the VIP stand or deal with it any other wa[y] as he saw fit, in accordance with the Fire Services Act.

Counsel noted that in addition to site visits by the Fire Services, Police officers also visited the concert venue prior to the night of the event.⁸ Counsel submitted

⁸ Id. at para. 46.

that even though there were police officers present on the night of the concert, they were not trained in crowd control. Mrs. Maharaj SC submitted that:

The Fourth Defendant through the police had a statutory duty pursuant to Section 6 of the Theatres and Dance Halls Act to ensure that the said premises was licensed under Section 3 of the said Act to be used as a dance hall. Section 6 of the said Act makes it clear that the police have a duty to see 'whether the provisions of this Act or any Regulations made thereunder or the conditions of any licence, are being or have been complied with'. There is no evidence to show that the Fourth Defendant complied with its duty.

The failure by the CDA, Xtatik Limited and Randy Glasgow Productions to get Town and Country Planning approvals for the structure or have the city engineer inspect same led to the fact that there was no approval from any qualified professional as the suitability of the VIP stand for the purposes for which it was built. Further the Police and Fire Officers failed to keep the peace on the VIP stand or take steps necessary to protect the patrons in accordance with the respective Acts. It is clear from the evidence that the State representatives did not take any steps to ensure that as required by law the structures to hold people were properly constructed and approved to hold people. As a result of the failure and/omissions the Claimant has suffered injuries, loss and damage.

[49] **CDA' SUBMISSIONS**

Counsel for the CDA, Mr. Armorer, spoke vehemently against JF's continuation of the action. JF's claim has been fully satisfied through the consent order dated June 9, 2009 for the sum of \$450,000.00. Mr. Armorer discussed three points:

1. *Whether the Claimant's case is that the Claimant suffered more than one 'set of' damage;*
2. *Whether the payment in full of the sum awarded in the consent order that the Claimant entered into with the First and Second Defendants bars the Claimant from proceeding against the Third Defendant;*
3. *What order should be made with respect to the costs in this court matter?*

[50] Counsel submitted that JF is barred from pursuing this action as against the CDA and the AG because *"the Claimant clearly falls within section 26(1) of the **Supreme Court of Judicature Act**".* This section disallows the action because, *"the judgment which the Claimant previously obtained in respect of the same damage has been paid"*. Mr. Armorer submitted:

- (2) *There is only one damage alleged by the Claimant as being caused by all of the Defendants and once that damage is assessed by the court in an ascertained sum, the court cannot assess it at a different sum either in the same or later proceedings because there should only be one assessment of damages against all the Defendants.*
- (3) *Where the same damage is the result of separate and independent tortuous acts of two or more tortfeasors, as the Claimant alleges is the case here, the payment in full of the judgment recovered against the First and Second Defendants has effectively put an end to the cause of action against the Third and Fourth Defendants because upon satisfaction of the judgment the Claimant has*

*received full compensation for her loss. She cannot recover compensation twice.*⁹

[51] Mr. Armorer further submitted to the court that according to Section 26(1) of the **SUPREME COURT OF JUDICATURE ACT**,

the Claimant cannot be awarded and cannot recover (i.e. the Claimant cannot actually collect) money which when added up exceeds what the Claimant has already been awarded by the first court order which in this case is what the Claimant has already received in full (with interest) – see the attached copy of the letter dated 16th April 2010 from Messrs. J.D. Sellier & Co. on which is endorsed a receipt from the Claimant’s attorneys-at-law.

Mr. Armorer also referred the court to the case of **WAH TAT BANK LTD. & ANOR. V. CHAN CHENG KUM**¹⁰ on this issue.

[52] **LAW, ANALYSIS AND ASSESSMENT OF EVIDENCE**

ASSESSMENT OF EVIDENCE

CLAIMANTS

MS FRANCIS AND MR. WHITE

Both Ms Francis and Mr. White essentially gave accounts of how they came to be at the venue. Ms Francis in particular described the scene up to the collapse of the stand. Neither led any evidence of any estimate of the number of patrons in the stand. There was some contradiction as to the extent of the capacity of the stand at the time of arrival, but I do not think that much turns on that. Neither was cross examined along those lines as well, in keeping with both the AG’s and CDA’s stated position that they ought not to have been sued.

⁹ **BRYANSTON FINANCE LTD & ORS. V. DE VRIES & ANOR. [1975] QB 703.**

¹⁰ **[1975] AC 507**

[53] Again, neither Ms Francis nor Mr. White led evidence, nor was it elicited from either of them in cross examination, of their reactions to the announcement made for the VIP patrons to “*refrain from jumping on the platform structure as it was not constructed for that purpose....*”and according to Ms Francis’s testimony, the advice from the Announcer that “*there was an area on the ground in front of the stage for that purpose.*” There was no evidence led at the trial to amplify or in cross examination to elicit Ms Francis’s reaction to her realization that the stand was crowded or that it “*wobbled*” or to explain why she remained on the stand and in fact stood up to get a better view of the stage. The court therefore, was not treated with any indication of whether Ms Francis was cognizant or was not cognizant of any danger to her life or limb or to the security of her person so as to raise an alarm to the responsible authorities of what was likely to be impending danger or to take evasive and protective action for her person from what her Counsel maintained and what in fact turned out to be the dangerous situation presented by the pulsating and crowded VIP stand.

[54] The question is does Ms Francis’s fact pattern and evidence led to support her contention that the AG and the CDA are liable to her in negligence or breach of statutory duty (largely unidentified at the time of pleading but only explained at the trial and in closing submissions)? Can the court make that positive finding without considering the inferences to be drawn from the lacuna in her case and testimony? I think not. To my mind, the considerations posed are material to any positive finding of negligence on the part of the AG and the CDA. I shall return to this later.

[55] Mr Bethelmy was a professional witness who gave his testimony without any drama. He was clear about his duties as a Fire Officer and he was equally clear that he did all that was reasonably possible to address the situation within the confines of his remit. There was no evidence led to counter that.

[56] No evidence led to show that the number of personnel both of the TTFS and the TTPS was inadequate and that would be an indication of a breach of duty under the Act. The evidence did not establish that no person in the VIP stand was arrested for unruly behaviour.

[57] **LAW**

A determination of liability can only be made in light of **prevailing** legal rules – Common Law and Statute at the time of the alleged commission of the tort. Is it open to Ms Francis to treat with the issues as has been done, through cross examination of witnesses and through examination in chief of summoned witnesses? I have read Ms Francis's Counsel's arguments which speak to the correct procedural steps taken by that team and the AG's and the CDA's apparent missteps. I am afraid that I do not share Counsel's views. My view expressed in an earlier decision in this case, is one to which I am wedded. In order to base a case on a breach of a statutory duty, the learning that the Statute must be pleaded so as to notify the Defendant of the case that he has to meet, is consistent with the culture under the CPR of avoiding "trial by ambush" and with the stated responsibility of the Claimant to "**set out a short statement of all facts on which he relies**"¹¹. That to my mind does not obviate the need to set out at least the name of the Statute upon which he relies for his claim.

[58] In case I am wrong, I shall still examine if, on the evidence that either the AG or the CDA breached their statutory duties to Ms Francis in relation to the following Acts:

¹¹ See CPR Part 8.6 (1)

- (1) TOWN AND COUNTRY PLANNING (CHAGUARAMAS) DEVELOPMENT ORDER – Para 5(f);¹²
- (2) THE MUNICIPAL CORPORATIONS ACT¹³;
- (3) THE THEATRE AND DANCE HALLS ACT¹⁴;
- (4) THE FIRE SERVICES ACT¹⁵;
- (5) THE POLICE SERVICE ACT¹⁶

[59] **THE FIRE SERVICES ACT**

Mrs Maharaj sought to buttress her claim by Section 41(1) of the **FIRE SERVICES ACT**. However, that speaks to an officer “*who is on duty*”, meaning, an officer on regular duties within the Fire Services. That section **DOES NOT** cover a fire officer’s presence at a private function. The correct provision lies at Section 3B which provides:

*Subject to the exigencies of the service, the Chief Fire Officer **may make available** to a person upon receipt of the prescribed application and payment of a prescribed fee, the services of an officer **who is not rostered for duty, for the prevention of damage to life and property by fire and other hazards, whether fire related or not...***

[Emphasis mine]

[60] This Section empowers a fire officer at a private function to take such steps as are reasonably necessary to avert or prevent damage to life whether fire, related or not. Does this power extend to assessing whether structures are structurally sound? I think not. My view is that a proper interpretation of the section speaks to

¹² Chap. 35:01

¹³ Chap. 25:04

¹⁴ Chap 21:03

¹⁵ Chap 35:50

¹⁶ Chap 15:01

the role/purpose of the Fire Services when, upon application and payment of the prescribed fee, the officers are deployed to provide services designed “*for the prevention of damage to life... whether fire related or not*”.

[61] Can this section create a duty of care in the TTFS? I would say that if the provision of the service that was paid for and agreed to be supplied was found wanting, then one can say that there **was** a breach of duty. Such breach would have to be established on the evidence.

[62] Mr Bethelmy clearly responded that his training spoke to examination of structures from “*the Fire aspect*”. He was not asked to elaborate on this. He stated categorically that he was not trained in engineering itself. He to my mind was **NOT** called to give expert testimony in the engineering field and he wisely adhered to his expertise. Mr Bethelmy spoke to his activities on the day in question as “*an officer who was not rostered for duty*” but was prepared to give his service “*for the prevention of damage to life ... by ... hazard, whether fire related or not*”. Did he fail in that duty? Was the collapse of the stand within or ought to have been within (his) TTFS’s reasonable contemplation, so that if it did occur Ms Francis would have been injured?

[63] I can find no fault with Mr Bethelmy’s testimony. I can find no evidence to fix TTFS with **any** duty of care with respect to the structural deficiencies of the VIP stand. That was the cause of Ms Francis’s injury, nothing else.

[64] **POLICE SERVICE ACT**

Section 45 was the prevailing section which speaks to the general duties of a police officer. There is no corresponding section in relation to private functions as obtained in the **FIRE SERVICES ACT**. Section 45 places duties on a police officer in the following terms:

A police officer –

(a) Shall preserve the peace and **detect crime and other breaches of the law**;

...

(b) Shall generally do and perform all the duties appertaining to the office of a constable ...

[65] Paragraph (h) is a catch all phrase, and must be read in relation to the other provision preceding it. It is not to be read as a standalone provision. Having said this how would **liability be determined under this section?** This would entail a detailed examination of Mr Joseph's testimony. Mr Joseph's testified about the events of that fateful night. The atmosphere was highly charged. At the time of the collapse, the situation was, in a careful study of the facts, a choice between evacuating the stand, which was done after the announcement for evacuation was made and stopping the show. Much was made of the perceived fact that the show was not stopped. I do not believe that there is anything in the evidence to indicate that the collapse of the stand was reasonably foreseeable if the show had not been stopped.

[66] It was the not within the knowledge and/or contemplation of the TTPS that the stand was not structurally sound, nor can it be said that the service ought to have been fixed with this knowledge or that the outcome be within its reasonable contemplation. TTPS was charged with preservation of the peace, which would have been to my mind crowd control related. That was **NOT** the cause of Ms Francis's injury. Her injury was caused by the collapse of the stand.

[67] **FINDINGS AND CONCLUSION**

ATTORNEY GENERAL

Based on the above, I can find no liability which can find its landing berth at the feet of the AG. The action therefore against the AG is dismissed. I would make no Order as to the AG's costs since as I painstakingly outlined, the Department put in a stringent defence, offered no witnesses, made only courteous appearances at

the hearing dates and times objected on two occasions offered no cross-examination and did not assist the court by way of submissions and authorities.

[68] **CHAGUARAMAS DEVELOPMENT AUTHORITY
THE TOWN AND COUNTRY PLANNING ACT AND THE TOWN AND COUNTRY
PLANNING (CHAGUARAMAS) DEVELOPMENT ORDER**

Mrs Maharaj relied on Section 5(f) of the development Order to mount her claim. This provides that *“the construction of buildings for any of the following purposes, normally recreation, resort, hotel, night club, cinema, dancehall, stadium, a Turkish or other vapour or foam bath shall require the prior approval of the Minister”*. *“Buildings”* in the main Act includes *“any structure or erection”*¹⁷. It does not speak to whether the structure must be permanent or not in order to be covered by the Act. A common sense a reading of the Statute would lead to the conclusion that the types of *“development”* more particularly the nature of the said *“development”* contemplated at paragraph 5(f) is permanent and temporary. The provisions do not apply to this case. There was no need for the CDA or the promoter to fulfil any obligations under this Act. In the premises the issue of breach of statutory duties does not arise.

[68] **THE MUNICIPAL CORPORATIONS ACT AND THE THEATRES AND DANE
HALLS ACT.**

(a) **THE MUNICIPAL CORPORATIONS ACT**

Section 161(1) of that Act provides:

No person shall occupy ... any new building ... unless the Engineer certifies in writing that the building complies in every respect with the provisions of this Part.

Subsection (2) reads as follows:

A person who contravenes the provisions of this section is guilty of an offence ...

¹⁷ See Section 2

(b) **THE THEATRES AND DANE HALLS ACT.**

Section 3(1) of that Act states as follows:

After the commencement of this Act a place within a specified area shall not be used as a theatre or dance hall without a licence.

Section 5(1) provides:

If any place is used as a theatre or dancehall without a licence, the owner or occupier thereof ... is liable on summary conviction ...

[69] These are Penal Statutes. The penalties for breach of these provisions are all provided for in the Acts. Do these Act, **create** statutory duties in the CDA? I would proffer that the creation of a statutory duty must be effected by clear and unambiguous language. I have examined these Acts thoroughly and I cannot find any such duty expressly imposed on any functionary let alone the CDA. In any event, the issue is put to rest by the Privy Council when the Learned Court stated *“That section, however, is a penal clause involving penalties for its breach under Section 52 of the Act, and is not material in a case of Civil Liability such as the present; it may accordingly be disregarded for the present purpose”*¹⁸. The issue of a breach of statutory duty does not arise.

[70] **EVIDENCE**

In the event that I am wrong, there is still the matter of evidence. Was there clear and cogent evidence that the failure to exercise these duties (if they existed under

¹⁸ **THE WINNIPEG ELECTRIC COMPANY v JACOB GEEL (CANADA)** [1932] A.C. 690; 692 per Lord Wright.

the statute) affected the structural integrity of the stand and more likely than not without more, would have led to the disastrous events which caused Ms Francis's injury? Even if the answer is yes, can Ms Francis assert that the chain of causation is intact and no question of remoteness can surface for my consideration? I think that is the difficult position in which Ms Francis finds herself in. She has not presented any evidence which I can consider. In fact, if I may borrow the words of Morris L.J. in **HORNAL**¹⁹ to express Ms Francis's responsibility in this case, it would be: "*The more serious the allegation (**breach of statutory duty by the TTPS and TTFS thereby casting burden on the Attorney General**), the more cogent in the evidence required to overcome the unlikelihood of what is alleged and thus to prove it*".

[Emphasis mine]

[71] I pose this question for further consideration? Can this case find comfort in **VAN ROLLE & OSMAN** in which that claimant claimed a breach of right to life?

THE VAN ROLLE CASE

I was supplied with a very informative authority from the United Kingdom **VAN ROLLE**, which sought to explain the right to life, safety *inter alia* now guaranteed in Great Britain as a consequence of the Human Rights Act. Suffice it to say that there are a number of points of distinction between that case and the case at bar so as to make it inapplicable. I do not intend to go through all of them but the most glaring is what I refer to as context. In that case, the officer in **VAN ROLLE** was in clear breach of an existing protocol with respect to witness protection schemes

¹⁹ **HORNAL V NEUBERGER PRODUCTS LIMITED [1951] 1QB266**

and how to react in face of a threat of harm to protected persons. No such factual matrix has been presented in evidence in this case. Can these principles be accommodated therefore within the facts in this case? The answer is No.

[72] **THE COMMON LAW DUTY**

The Law fixes the owner of premises with residual duty to persons who come onto them, to ensure that the premises are safe and that the visitor will not face foreseeable harm. How does this affect CDA? My conclusion on the liability of CDA is this. CDA must take residual liability as occupier of the premises in spite of the Indemnity. How much is a matter to be gleaned from the evidence. In that respect, I agree with Mrs Maharaj that CDA must answer for its part as the owner of the premises.

[73] **THE INDEMNITY**

An indemnity cannot render a finding of liability nugatory. The indemnity simply says if I am found liable you will satisfy any claim in damages on my behalf. Thus if CDA is liable then **XL** and **RGPL** will indemnify the authority for its part of the liability. CDA cannot just sit back and rely solely on the indemnity in these proceedings so as to avoid a finding of liability against them. The evidence points to a somewhat lax approach and attitude to matters of this kind which to say the least is bothersome. It must be remembered that Ms Francis is not a party but a stranger to the contract containing the Indemnity. That is a matter for the parties to the Agreement. Ms Francis cannot bear the burden of **NOT** having her claims satisfied by any of the parties.

[74] **CONSENT ORDER**

The Consent Order was not determinative of Ms Francis's rights in this matter. However, I agree with Mr Armorer that Ms Francis cannot receive an award from CDA which would put her over and above the actual award which her injuries would attract. The only way for this to be resolved is if Ms Francis's damages were assessed. If the assessed award is higher than the amount received by Ms Francis in settlement then CDA may be asked to make up the shortfall, depending upon how much of the liability is attributable to CDA.

[75] If the award received on the settlement is more than the assessed award, Ms Francis **may** be required to return the surplus. Those are the choices open to Ms Francis, should she wish to pursue the claim against CDA.

[76] **COSTS**

Of course, the issue of costs will follow. Should the award issue be favourable to Ms Francis and CDA's liability assessed, then costs to Ms Francis would be based on the amount to be paid. If the converse were the outcome, then Ms Francis may be liable for CDA's costs.

[77] My approach therefore is to have a full ventilation and testing of the assessment of damages before the Master using the guidelines set out below.

[78] **FINDINGS**

1. That there was no breach of duty, statutory or otherwise by TTPS or TTFS;
2. That the Attorney General bears no liability to Ms Francis;
3. That CDA is to bear 10% of the liability representing residual liability as occupier at Common Law for breach of its duty of care to Ms Francis;

ORDER

1. **That the action be dismissed as against the Attorney General with no order as to costs.**
2. **That there be an assessment of damages before the Master in Chambers to ascertain the full nature and extent of Ms Francis's injuries and compensation payable by the CDA based on the finding of 10% liability, if any.**
3. **That the Master be at liberty to make any suitable findings and give any order or direction on damages, interests and costs payable by or to the CDA, if necessary.**

Dated this 18th day of December 2012.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE