



TRAVEL LAW BULLETIN

SUMMER 2007

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Welcome to the latest 'Travel Law' bulletin from 3 Hare Court.

Our Travel Law practice group has flourished since its launch at the end of 2004 and we continue to undertake a substantial amount of work arising out of overseas accidents. Chambers is once again rated in leading guides for expertise in this field. Members of the group are engaged to speak at this year's Pan-European Organisation of Personal Injury Lawyers (PEOPIL) in Prague. We are active members of a number of specialist European law groups, and our ability to accept instructions in the main European languages is a significant asset.

We have extensive experience at all levels dealing with accidents that occur overseas. Members of chambers have been involved in claims ranging from minor bouts of food poisoning to extensive group actions, road accidents and air crashes, swimming pool accidents and defective showers. We act for and against insurers, tour operators, travel agents, shipowners, airlines and hoteliers. Claims frequently involve issues of jurisdiction and conflicts of laws, and we have a great deal of experience in these areas.

We have considerable experience of litigation in Commonwealth jurisdictions through our long association with the work of the Privy Council. Members of chambers frequently appear in overseas courts and tribunals.

In this Bulletin:

- Andrew Young considers whether it is time for re-appraisal of the Package Travel Regulations;
- Howard Stevens provides an overview of the considerations facing lawyers when litigating group claims in 'The More the Merrier: Managing Group Claims';
- Pierre Janusz looks at limitation periods in 'Running out of Time'
- Sarah Crowther looks at the impact of *Clough v First Choice Holidays*, in 'Slipping Up: the Limits of Fairchild'
- Dan Saxby, in 'Holden out for a Hero' examines how *First Choice Holidays v Holden* has brought into focus how a claimant bringing a claim for breach of a holiday contract establishes breach of applicable local standards;
- Katherine Deal, the Editor of this Bulletin, looks at air passengers' rights, in 'Come Fly With Me'.

We hope that you find this bulletin both interesting and informative.

James Dingemans QC, Head of Travel Law Group

Katherine Deal, Editor

THE PACKAGE TRAVEL REGULATIONS: TIME FOR A RE-APPRAISAL?

By Andrew Young



All practitioners in the field of travel law are familiar with the interpretation placed by the Court of Appeal of the Package Travel Etc Regulations 1992 in *Hone v. Going Places* [2001] EWCA Civ 947 and in particular Longmore LJ's conclusion that, unless the tour operator had assumed an absolute obligation in relation to any aspect of the holiday contract, Regulation 15 required only that a term should be implied into the contract that reasonable skill and care would be used in the rendering of any services by a third party supplier. Longmore LJ reached this conclusion on the basis that it was only possible to determine what Regulation 15 meant by 'proper performance' of the package holiday contract by reference to the terms of the contract that was being performed and he then employed the English law concept of implied terms to establish that meaning. Broadly speaking, all later decisions on the Package Travel Regulations have followed the guidance provided in *Hone* (although see Dan Saxby's article in this bulletin on the recent case of *First Choice Holidays v. Holden*).

What is striking about all the reported cases in which the Package Travel Regulations have been considered by English courts is that, save for a half-hearted attempt by counsel for the claimant to refer to ministerial statements as to the effect of regulation 15 in *Hone*, which Longmore LJ dismissed, there has not been an attempt to construe the meaning of the Package Travel Directive according to normal European law canons of construction.

It is a fundamental principle of European law that, when applying provisions of national law (like the Package Travel Regulations), a national court is required to interpret them as far as possible in the light of the wording and purpose of the directive that they were purporting to implement so as to achieve its intended result (*Faccini Dori v. Recreb Srl* [1995] All ER 1). The intended purpose of the Package Travel Directive was to provide protection to consumers and, as stated in the second and third recitals in the preamble, to eliminate the disparities between the national laws and practices of the

various member states in the area of package holidays which are liable to give rise to distortions of competition between operators established in different member states. According to the ECJ, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community having regard to its context and intended aim, see *R (re: Yiadom) v. Secretary of State for the Home Department* [2001] All ER (EC) at p.286. Therefore, reliance on individual national laws is precluded because the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect', see *R v. Customs & Excise ex parte EMU Tabac SARI* [1998] All ER (EC) at p.423. In other words, with all due respect, Longmore LJ in *Hone* was doing precisely that which he is prohibiting from doing when interpreting European law.

That the English courts' interpretation is in error is put beyond doubt by the ECJ decision in the Austrian case of *Leitner v. TUI Deutschland GmbH* [2002] All ER (EC) 561. The Austrian claimant contracted salmonella on a package holiday in Turkey and sought damages from the tour operator, not only for his physical injuries but also for loss of enjoyment of the holiday. The latter claim was rejected by the Austrian courts on the basis that Austrian law did not recognise a right to compensation for non-material damage of this kind. However, the ECJ held that Article 5 of the Package Travel Directive conferred on consumers the right to compensation for non-material loss of enjoyment as a result of improper performance of the contract, even if national laws did not recognise this type of claim, on the basis that it was recognised in some European national laws and to deny the Austrian claimant his remedy would cause a significant distortion of competition, which it was an objective of the Directive to avoid. Therefore, just as the ECJ held that the Austrian courts were in error in rejecting Frau Leitner's claim based on Austrian law, it must follow that the English courts were wrong to interpret the same Article in the same Directive exclusively by reference to the principles of English contract law.

Once the interpretative gloss put on Article 5 by the English courts has been removed, it is easy to construe it (and Regulation 15 which purports to implement it) as imposing on the tour operator strict liability, subject only to the defences expressly provided for in the Directive itself (namely, cases where the non-performance or improper performance of the

contract is not the fault either of the tour operator or of any of its suppliers for the reasons stated in the Directive). Improper performance can then be given its natural meaning, which must surely include any incident which results in illness or injury to the holidaymaker while staying in the accommodation provided by the tour operator, subject only to the statutory defences. It is submitted that this would much more consistent with the intended purpose of the Directive. It would also accord with the little noticed guidance given in the Explanatory Note to the Package Travel Regulations, which states that: 'They provide that the other party to the contract...should be strictly liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be provided by that other party or by other suppliers of services.' Finally, it is in keeping with another principle of European law that, in the event of any doubt, the provisions of a directive must be interpreted in the manner most favourable to the person whom they are intended to protect, in this case the consumer.

Unfortunately, in the English courts this re-interpretation can only now be brought about by a successful appeal, either to the House of Lords or to the European Court of Justice.

THE MORE THE MERRIER? MANAGING GROUP CLAIMS

By Howard Stevens



Recent years have seen an increase in the number of group claims: mostly conventional claims brought by groups of holiday makers but also several actions made the subject of Group Litigation Orders. This article aims to provide an overview of the more important considerations facing lawyers on both sides of the fence when litigating such claims.

The increase in group claims is hardly surprising given the obvious benefits to claimants: pooled evidence, shared resources, greater clout and sometimes (but not always) costs savings. For tour operators and their insurers the benefits are more dubious since a significant number of modest claims would probably never be brought were it not for the group

vehicle. On the other hand, a successful outcome on the trial of a common issue can avoid the need to litigate countless individual cases on similar facts. Other party-neutral benefits include the better use of the court's resources and the reduction in the risk of irreconcilable judgments.

How best to prosecute or defend group claims offers a considerable challenge, quite different from that presented by conventional litigation. Above all, group claims require a proactive approach. Getting things right from the outset is essential since orders made in the early stages shape the litigation and provide the key to cost-effective resolution. Time and money spent getting the basics right will usually result in savings in the long run.

Particulars of Claim

The Particulars of Claim must serve two purposes: first they must give a coherent overview of the claim as a whole, drawing together the common facts and allegations which connect the individual claims; secondly, they must give particulars of the individual claims which comprise the group. If they do not do both these things the defendant will be unable to respond satisfactorily and constructive case management will be impossible.

In the case of a claim subject to a GLO, the Practice Direction under CPR 19 provides that the management court may direct Group Particulars of Claim. These will usually contain (i) general allegations relating to all claims and (ii) a schedule specifying in relation to each individual claim (a) which of the general allegations are relied on and (b) any specific facts relevant to individual claimants. Such an approach or a variant of it works equally well in group claims not subject to a GLO. Whether individual particulars should be given in the body of the statement of case or by way of a schedule is likely to be dictated by the number of claimants and the extent to which their allegations differ.

Insufficient details

If insufficient details are provided of individual claims a number of problems arise. First, it may not be possible to discern which of the generic allegations are the most important. Even in group claims, the outcome will usually turn on a few central allegations. Unless and until these are identified, resources are likely to be wasted. Secondly, it may not be possible to identify any preliminary issues which ought to be tried. Thirdly, it will be impossible to select lead cases for trial. Fourthly, the defendant may be prevented from making settlement proposals.

Getting further information

Depending on the circumstances, there are a number of ways in which a defendant can tackle deficiencies in Particulars of Claim. An application to strike out is unlikely to be worthwhile other than in the most extreme case. A Part 18 Request will usually be more productive but care is needed to ensure that the request is not so oppressive as to subvert the purpose of a group claim: the aim should be to obtain sufficient relevant information in order to identify the issues and select lead cases but no more. In cases subject to a GLO questionnaires are sometimes used by claimants' solicitors (and can be annexed to the Particulars of Claim in place of a schedule) but there is no reason why, in an appropriate case, a defendant might not serve a questionnaire under the guise of a Part 18 Request. Timing of the request or questionnaire is also important. In an appropriate case it may be justified before putting in a defence.

Identifying the issues

It is crucial to identify the legal and factual issues at an early stage. One or more of the issues, e.g. the existence or scope of a relevant duty, an issue of foreign law or a discrete issue of fact, may be appropriate for determination as a preliminary issue. More generally, the broader factual issues will inform the choice of lead cases and direct the evidential process. Identifying the issues from the statements of case ought to be simple enough. If it is not, clarification or further information is probably required!

Selecting lead cases

In many group claims lead cases are selected for trial. In a claim subject to a GLO, CPR 19.3 enables the management court to direct that one or more claims on the group register proceed as test claims. The court's case management powers under CPR 3.1(1)(m) however amply justify ordering the trial of lead cases in any group claim where such an order will further the overriding objective.

In the case of a cruise, on which a large number of claimants contract the same viral or bacterial infection but with a range of outcomes, the exercise may be relatively simple. But suppose the complaints relate to a hotel, span a large part of the season and concern the standards of hygiene in the kitchen, the restaurant, the common parts and the swimming pool... Nevertheless, provided it is borne in mind that it is in neither party's interest if the lead cases are not representative, agreement should be possible. Objectivity and a degree of give and take provide the key. But if agreement cannot be reached the court can always be asked to rule on the selection of cases.

Disclosure and evidence

Once the issues are identified and any lead cases selected, disclosure and the preparation of witness statements and experts' reports can follow in the ordinary way – limited to the issues and cases to be tried.

RUNNING OUT OF TIME

By Pierre Janusz



When dealing with a claim which arises out of events abroad it is crucial not to forget that the limitation period applicable to any intended proceedings in an English court may, because of the provisions of the Foreign Limitation Periods Act 1984, not be one governed by the Limitation Act 1980. In the case of a claim founded on tort unless, as an exception to the general rule under Part III of the Private International Law (Miscellaneous Provisions) Act 1995, English law is held to be the applicable law, the law of limitation of the country where the events occurred will apply. Equally, a foreign law of limitation will also apply if the claim is based on a breach of contract and the applicable law of the relevant contract is not English law.

This would not be so much of a problem if foreign jurisdictions did not display such a bewildering variety of limitation periods and ancillary provisions. The basic limitation period can be as short as 1 year and as long as 30 years. Some jurisdictions have no special rules for minors. Many have no provision for a discretionary extension of limitation. There may even be ways in which a claimant can unilaterally interrupt the running of time. There is now however reason to anticipate that, at some point in the future, many of the problems arising from these divergences will be eliminated. With the aim of avoiding these potential headaches for lawyers dealing with personal injury and fatal accident claims with a cross-border element and, more importantly, reducing the potential for injustices to claimants in such cases, a call for the harmonisation of limitation law in this area has been taken up by the European Parliament.

On 31st January 2007 the European Parliament voted by a substantial majority in favour of a proposal originally conceived

by the Pan European Organisation of Personal Injury Lawyers (PEOPIL) that there should be uniformity throughout the European Union with regard to limitation law in its application to particular classes of claims for damages. The specifics of the proposal as set out in the detailed recommendations reflect an attempt to achieve a compromise between the extremes which are now evident with regard to limitation periods within the European Union and also to extend the application of a number of features of the laws of individual states which are considered to be beneficial to all Member States. The principal features of the recommendations are as follows:

- There should be uniform limitation principles applicable to claims for damages brought in a Member State which arise or result from personal injury, are brought by a victim's heirs or are brought by another person where the victim suffered personal injuries or had a fatal accident if the claim involves parties residing or domiciled in different Member States, a party residing or domiciled in a non-Member State or a choice between the laws of different countries.
- The general limitation period should be 4 years, irrespective of the nature of the obligation, the cause of action or the identity of the defendant.
- The general rule may be displaced if the proper law of the claim provides a longer period, the burden to be on the claimant to prove the existence of that longer period.
- There should be a 10 year limitation period for enforcing a claim established by final judgment or arbitral award.
- No limitation period should apply to damages arising out of terrorist acts, torture or slavery (one hopes that that at least the last two of these will not come up very frequently in practice when dealing with travel and holiday claims).
- The limitation period should be calculated by excluding the day on which the cause of action accrues and including the whole of the last day of the period.
- The limitation period should run:
 - (i) from the date on which the cause of action accrues or, if later, from the date on which the person injured acquires actual or constructive knowledge of the injury;
 - (ii) in the case of claims by heirs, from the date of death or, if later, the date on which the heirs or the estate acquire actual or constructive knowledge;
 - (iii) in the case of claims by secondary victims, from the date of death or the date of the secondary victim's actual or constructive knowledge if it is a fatal accident, or from the date on which the cause of action accrues or, if later, the date of the injured person's actual or constructive notice if it is a non-fatal accident.

- The limitation period should be suspended where:
 - (i) the defendant has deliberately, dishonestly, unreasonably or as a result of a mistake concealed the existence of facts or matters giving rise to his liability;
 - (ii) there are related criminal proceedings or investigations;
 - (iii) there is an outstanding request or claim under the Fourth Motor Insurance Directive.
- The limitation period should be interrupted not only by the commencement of judicial proceedings but also by any act of the claimant notified to the defendant:
 - (i) having the purpose of commencing extra-judicial proceedings;
 - (ii) having the purpose of initiating negotiations; or
 - (iii) informing the defendant of the fact of the claimant's claim for damages.
- There should be appropriate provisions relating to the pleading of limitation, the discretion of the court in applying the limitation period, the effect of a successful plea of limitation and multiple claimants or defendants.

A concrete result in the form of EU legislation is a long way off as this is only the beginning of a long process, the next stage of which is the consideration of the matter by the Commission. If there is resulting legislation it will inevitably differ significantly from the recommendations in the proposal. However the process has begun, and there is therefore now a real possibility that harmonisation of limitation law will occur, at least in this area, before too long. But in the meantime, the advice must be to keep clearly in mind the possible complications which may arise in the context of travel and holiday claims as a result of a foreign limitation period being applicable.

SLIPPING UP: THE LIMITS OF FAIRCHILD

By Sarah Crowther



The Court of Appeal in *Clough v First Choice Holidays and Flights Ltd* [2006] EWCA Civ 15 has limited the application of the Fairchild exception to the general rule requiring a claimant to prove 'but for' causation in a negligence claim. There are



questions marks over whether this limitation is in fact principled and if so, on what basis.

Mr Clough spent the afternoon of 13 November 1999 watching football and drinking lager with a friend at an apartment in Lanzarote provided as part of his package holiday contract with the defendant. Following the match they went for a swim in the apartment complex pool. The judge rejected the defendant's case that Mr Clough dived from a wall into the pool below, but found that he slipped. He also found that the claimant's feet would have been wet whilst standing on the wall and that, due to his intoxication he would have been less steady on his feet than usual, but that he did not topple due to drunkenness.

The wall was not coated with non-slip paint. This was a breach of local standards and accordingly of the duty owed by the apartment owners (and therefore vicariously by the defendant through Regulation 15 of the Package Travel Etc Regulations 1992) to the claimant to take reasonable care for his safety whilst using the pool.

However, Mr Clough's claim failed. The judge held, that despite unopposed expert evidence called on behalf of Mr Clough that the surface of the wall was slippery, it was virtually 'inevitable' that given a mixture of water and suntan oil the wall would have been slippery even had it been coated in non-slip paint. Therefore Mr Clough had failed to persuade him that the defendant's breach of duty had *caused or materially contributed* to his slipping and falling.

Prior to the decision in *Fairchild v Glenhaven Funeral Services [2003] 1 AC 32*, this decision would have been wholly unremarkable. It is trite law that the Claimant must prove that a breach of duty either *caused or materially contributed* to his damage and that proving that a breach of duty merely *increased the risk* of the damage occurring would not suffice.

Fairchild involved claimants who had developed mesothelioma, a lung cancer which can be caused if a single asbestos fibre in the lungs becomes malignant. The difficulty faced by the claimants was that over the course of their working lives they had been negligently exposed to asbestos dust by more than one employer. Current scientific knowledge could not assist them to prove which period of negligent exposure led to the malignancy and ultimately the disease. On a 'but for' basis of causation, an employer in breach of duty would be able to escape liability merely by pointing to the existence of other wrongdoers. The House of Lords overcame this obvious injustice

by creating an exception to 'but for' causation rule. In such circumstances an employer would be liable.

The reasoning adopted by their Lordships was in reliance on a previous decision of the House in *McGhee v National Coal Board [1973] 1 WLR 1*. Mr McGhee had developed dermatitis as a result of some negligent and some non-negligent exposure to brick dust as a result of working in the defendant's kiln. Mr McGhee could not prove whether the 'innocent' exposure or the 'negligent' exposure had caused his disease to develop. The House of Lords concluded that on the facts of this case the *material increase in risk was to be treated as if it were a material contribution to the damage*.

McGhee's case was subsequently doubted by Lord Bridge in *Wilsher v Essex AHA [1998] AC 1074*. Baby Wilsher developed RLF after a birth in which he was subjected to negligent medical treatment. According to the expert evidence this could have been caused by any one of 5 factors, for only one of which the defendant would be liable. The claim was dismissed on the basis that Wilsher had failed to prove 'but for' causation and *McGhee's* case was explained as a 'robust' decision on the facts.

The House in *Fairchild* expressly disavowed the comments made in Wilsher regarding the reasons for the decision in *McGhee* and affirmed that *McGhee* laid down a proposition of law.

So where did that leave Mr Clough's claim in relation to causation? He had proved that the defendant was in breach of duty to provide non-slip paint on the wall and that he had slipped when standing on the wall. On the other hand he could not prove that he would not have slipped had the non-slip paint been provided. It was surely defying common sense to suggest that the failure to provide non-slip paint did not increase Mr Clough's risk of slipping. How could a claimant ever prove exactly what caused him to slip?

The Court of Appeal concluded that the question in the appeal in *Clough* was, 'whether *Fairchild* and the series of decision developing the law of which it represented the culmination...have any application here.' It concluded that they did not; 'Even if [*Fairchild*] may have some application in different situations, the distinction sought to be drawn...between material contribution to damage and material contribution to the risk of damage has no application to cases where the claimant's injuries arose from a single incident.'

It is suggested that this distinction is without principle and not correct. No further reasoning, policy or authority is provided by the Court of Appeal in support of its proposition. Why should a claimant in a one-off incident precluded from establishing causation due to the limits of human knowledge be in a worse position than one whose injuries were caused by a long period of exposure? What is more, to some extent *Fairchild* itself is a 'single incident' case – it only takes one asbestos fibre to imbed itself and become malignant to cause mesothelioma. The disease is not cumulative.

Perhaps a better approach is to distinguish between *Fairchild* and *Wilsher*. In the case of *Barker v Corus UK plc* [2006] 2 WLR 1027 one issue for the House of Lords was whether the *Fairchild* exception applied to cases where instead of the claimant not being able to prove which of 2 wrongdoers had caused her loss, a claimant could point to one tortious potential cause and one 'non-tortious' (e.g. exposure whilst self-employed or where the employer was not in breach). In reliance on *McGhee* their Lordships concluded that such a claimant could succeed even though 'but for' causation could not be made out. Lord Hoffman explained that this was compatible with the decision in *Wilsher* on the basis that it was an essential condition for the operation of the *Fairchild* exception that the impossibility of proving that the defendant caused the damage arose out of the existence of another potential causative agent which operated in the same way.

The decision in *Barker* was not available to the Court of Appeal in *Clough* which poses the question whether the two decisions are in fact compatible. It is perhaps artificially complex to talk of 'causative agents' in a slipping case but, if one adopts this terminology, the presence of water or suntan oil work in exactly the same way as the absence of non-slip paint – they reduce the available friction and increase the risk of slipping. Toppling off the wall because of unsteadiness due to intoxication would not have operated in the same way, but this causative agent was ruled out by the trial judge in *Clough*. It seems that had the *Barker* approach been applied, Mr Clough could well have succeeded in his claim.

Alternatively the Court of Appeal could have upheld the decision in *Clough* by distinguishing *Fairchild*. Lord Bingham in *Fairchild* made it plain that the exception only applied where proof of causation was impossible due to the limits of current science. David Foskett QC at first instance had made it plain in his judgment that there need not have been an evidential lacuna in relation to causation. The effect on slipperiness of the

absence of non-slip paint could be measured and proved using relatively simple techniques or lay witness evidence. The fact that the claimant had failed to do so on the facts did not make such proof impossible and therefore the *Fairchild* exception need not have been available as a back-up argument.

So it may be that the *Clough* does not in reality amount to any change in the law. It is, however, a welcome reminder of the need for proof of causation.

HOLDEN OUT FOR A HERO (IN THE COURT OF APPEAL)

By Dan Saxby



The recent case of *First Choice Holidays v Holden*, Lawtel 14/9/2006 (unreported elsewhere), has brought into focus how a claimant bringing a claim for breach of a holiday contract establishes breach of applicable local standards, and throws up queries as to what form of evidence will be required to establish the same.

It is by now well known that a claimant suing for an accident in the course of a package holiday brings his claim for breach of contract and not for breach of the Package Travel Etc Regulations 1992. Regulation 15 (generally incorporated in terms into domestic tour operators' standard booking conditions) imposes liability on the other party to the contract (usually the domestic tour operator) for the defaults of the hotel or other supplier abroad, in their performance of the obligations arising under the package holiday contract. It is worth emphasising that the first step must always be to identify precisely what the other party to the contract has agreed to provide.

The next step is to consider whether there has been a breach causative of the accident. In improper performance type cases, absent any more onerous term the court will imply a term requiring the tour operator and its supplies to exercise reasonable skill and care in the provision of services under the contract, *Wilson v Best Travel Limited* [1993] 1 All ER 353 and

Hone v Going Places Leisure Travel Limited [2001] EWCA Civ 947. However the standards against which performance is measured are local standards and not English standards. It is in this context that the court is able and required to consider local safety standards and regulations.

In *Wilson* (a pre-Regulations case), the claimant tripped and fell through a glass balcony door sustaining serious injuries in the course of his holiday in Greece. The door, although complying with local Greek standards, did not comply with those applicable in this country. The claimant brought a claim against the tour operator, contending that the characteristics of the glass door were such that the same was not reasonably safe for his or other customers' use.

In dismissing the claimant's claim, Phillips J held that the duty of care of a tour operator extends to checking that local safety standards are complied with. Provided that they are, a tour operator owes no duty to boycott a hotel because of the absence of a safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question.

Whilst *Wilson* was decided prior to the advent of the Package Travel Regulations, the comments expressed by Phillips J on this point remain good law and have been cited with approval in a number of subsequent cases including *Codd v Thompson Tour Operators Limited, Lawtel 7/7/2000*. The Court of Appeal affirmed the principle set out in *Wilson*, and, in rejecting the submission that British standards ought to have applied, stated that:

'That is not the correct approach to a case such as this where an accident occurred in a foreign country. The law of this country is applied as to the establishing of negligence, but there is no requirement that a hotel, for example, in Majorca, is obliged to comply with British safety standards.'

If the applicability of local standards is clear, the question remains, what type of evidence is needed for the claimant, on whom the burden of proving breach of local standards falls, to establish that breach?

In *Wilson*, the court had the benefit of an expert chemist, called by the claimant, with long experience in the glass industry. His evidence was that in Britain, a pane of glass, such as the one that the claimant fell through, would have been required to have

been constructed of either toughened, or laminated, safety glass. The claimant's expert does not appear to have been asked (and was almost certainly not able) to comment upon applicable safety standards or practice in Greece. The court also heard from the manager of the hotel. His evidence was that local hotels were required to comply with two sets of regulations, one imposed by the building authority and the other by the Greek tourist board and his hotel had been inspected post-construction and approved. He was described by the court as 'surprised and bewildered' when it was put to him that the hotel should have been fitted with safety glass. On any view, such evidence, which was accepted by the court, could not be described as expert in nature.

In *Codd*, the court had before it documentation, namely certificated inspection records, which showed that the lifts had been examined on a monthly basis by managers, in accordance with what was said to be Spanish law. In addition, the defendant's representative confirmed that the lifts had been observed to be working satisfactorily both before and after the accident. On the basis of that evidence, the judge at first instance, whose decision the Court of Appeal upheld, found that there had been no breach by reference to local Spanish standards. The claimant, by contrast, who was represented at trial and on appeal by his uncle, relied upon the then current domestic regulations governing the installation and use of lifts. These suggested non-compliance with domestic standards on the facts of the case.

Interesting, in neither *Wilson* nor *Codd* did the court suggest that the failure of the claimant to adduce expert evidence as to the relevant local standard (and breach of the same) was, of itself, sufficient to defeat the claim.

This is not to suggest that the proposition that it is for the claimant to prove its case in relation to breach is controversial. It is not. In both *Codd* and *Hone* the court expressly rejected the submission that Regulation 15 reversed the burden of proof so that the defendant had to prove that the hotel or other supplier had not been negligent. Neither case, however, addressed the key issue of what type of evidence was required in relation to local standards and who was to adduce the same.

The potential significance of the decision in *Holden* is that Goldring J, in allowing the tour operator's appeal from the first instance decision of Mr Recorder Gibbons QC giving judgment for the claimant, seems to have gone significantly beyond the authorities set out above, with potentially wide ranging

consequences for claimant holidaymakers and defendant tour operators alike.

The claimant was on a holiday in Tunisia when she injured herself falling down some stairs situated between the ground floor and the restaurant of her hotel. The trial judge found as a fact that she had fallen because of a spillage of some colourless or odourless liquid. He found the hotel to have been negligent for its failure to have somebody stationed at the restaurant entrance instructed to check the stairs periodically and, in particular, after anybody arrived carrying a drink in an open container.

On appeal, Goldring J accepted the submission that the trial judge had set the standard of care too high, even by reference to English law standards. On the Recorder's findings, it is hard to criticise this conclusion. More significantly, Goldring J also rejected the finding that the hotel had fallen below local Tunisian standards, as well as the reasoning adopted by the Recorder in coming to such a conclusion. In essence, the trial judge had relied upon the fact that (in his view) the system adopted would plainly amount to a breach under English law; this was a four star hotel; medical care in Tunisia appeared to be of a high standard; and, the defendant appeared to attach great importance to matters of health and safety.

In rejecting this approach, Goldring J expressed the view that:

'It does not seem to me that one can infer a local standard from what may well be a higher standard in a particular hotel or by a particular company in particular circumstances. It is no substitute for evidence of what is local custom and what may be local regulations ... it is for the claimant to prove that the defendant fell short of the standards applicable in Tunisia. As I have said, no evidence in that regard was adduced by the claimant. The matters relied upon by the Recorder do not substantively help in that regard.'

On a strict interpretation, the decision in *Holden* suggests that the claimant's failure to adduce evidence as to the applicable local standards (and breach thereof) was, of itself, fatal to the claim.

The difficulty with this approach is that it departs from the practice that has developed in this area and ignores some very real financial and theoretical problems that arise as a consequence.

In many cases the question of what the local standard is may not be readily ascertainable. Save where strict compliance with local regulations, drafted in the clearest terms, is required, there is likely to be a genuine dispute as to whether any given system or structure meets local requirements. Following *Holden*, it would be an unwise claimant's solicitor who did not obtain some form of expert evidence as to local standards and breach and, conversely, an unwise defendant's solicitor who did not obtain the same in response. Could any claimant sensibly obtain evidence as to local standards of cleaning, as appears to be suggested by *Holden*? In such cases, often the most appropriate expert will be a local lawyer

The practical and financial difficulty is obvious. Lawyers regularly disagree as to the principles applicable to, and likely outcome of, any given legal scenario. It is tempting to suggest that, in all but the most clear cut case, if solicitors in this country cannot find two lawyers abroad who disagree on any given point, they are not looking hard enough. On costs grounds alone, and it must be remembered that many Regulations cases are comparatively low value, this is unsatisfactory.

As a matter of principle, too, it will be seen to be plainly unsatisfactory that an English judge be routinely asked to determine which of two competing foreign legal opinions they prefer, whilst nominally considering breach of an English contract and applying the English law of negligence.

It will not be every package holiday claim that requires a *Holden* type approach to obtaining expert evidence. There will still be instances where the court can assume with confidence that the matter complained of amounts to a breach of local standards without expert assistance. This might be seen as no more than a reflection of the contractual nature of the claim and the fact that there will be cases, as envisaged in *Wilson*, where the tour operator is in breach because of a feature of the package which might lead a reasonable holiday maker to decline the holiday. Experience suggests that this scenario will arise rarely.

It is to be hoped that the Court of Appeal has the opportunity to resolve the rather unsatisfactory position described above sooner rather than later; and, that when asked to do so, it adopts a practical approach to the problem. The decision in *Holden* plainly gives rise to some real practical difficulties (most notably for those representing the claimant). Perhaps, however, the decision has done no more than expose and reflect previously unresolved tension in the case law.

COME FLY WITH ME? CLAIMS AGAINST AIRLINES

Katherine Deal



Carbon footprints notwithstanding, air travel is only becoming more popular. Recent statistics released by the Department for Transport & the Regions record some 203 million arrivals and departures at UK airports in 2005 alone. But, as recent events such as staff strikes, poor weather and security alerts have shown, not every journey by air runs smoothly. What rights do passengers have when things go wrong?

This article assumes that the aggrieved passenger travelled with an air carrier operating under a licence from a state bound by the Montreal Convention. This successor to the Warsaw Convention was finally ratified by the USA in September 2003, bringing the Convention into force for all contracting states. The EU jointly ratified the Convention in April 2004 and it came into effect in all member states on 28 June 2004. EC Regulation 889/2002, amending Regulation 2027/97, aligned EU law with the Convention and provides for the Convention to cover air travel within a single member state as well as international travel. Where the Convention applies it applies exclusively and no residual common law remedies remain.

Rights in case of death or injury

Under article 17, a passenger who sustains death or bodily injury in an accident on board the aircraft or in the course of any of the operations of embarking or disembarking is entitled to compensation from the air carrier. The carrier is strictly liable for damages up to 100,000 Special Drawing Rights, 'SDRs', (currently around £76,000). For damages above this limit the carrier is liable unless it can prove that such damage was not due to its negligence or that it was otherwise not at fault— or unless it chooses to stipulate that its contract of carriage is subject to higher limits or indeed no limit at all. Under article 20 of the Convention the carrier can reduce its liability to the extent that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, and it would seem that contributory negligence can be complete defence leading to the total exoneration of the carrier.

In the *Deep Vein Thrombosis litigation [2005] UKHL 72*, the House of Lords confirmed that an 'accident' means an unexpected or unusual event or happening that was external to the passenger (flexibly applied after assessment of all the surrounding circumstances). That event must be other than the normal operation of the plane. As such, damage to ears caused by normal cabin pressurisation or deep vein thromboses caused in the normal course of a flight do not count as damage sustained in an accident, and in *Chaudhari v British Airways, The Times 7 May 1997*, a passenger falling over solely as a result of his own partial paralysis was unable to point to an external event that could be called an accident.

'Bodily injury' does not cover psychiatric injury in the sense of mere shock or fright, see *Morris v KLM Royal Dutch Airways [2002] 2 WLR 578* in the context of the old Warsaw Convention. But if an incident caused injury to the brain that manifests itself in psychiatric symptoms, that might be sufficient to ground a claim.

Once a right to compensation is established, the airline must make an advance payment sufficient to meet the claimant's immediate economic needs on a basis proportional to the hardship suffered within 15 days. This is not to be viewed as an admission of liability on the part of the airline and may be offset against subsequent sums paid, but is not returnable to the airline unless the airline is eventually exonerated under article 20 of the Convention or unless it is shown that the recipient was not in fact the person entitled to compensation.

Under article 35 of the Convention, any right to compensation is extinguished 2 years from the date on which the aircraft arrived or ought to have arrived. There are no exceptions and the courts have no discretion to extend time.

Rights in case of loss or damage to baggage

Under articles 17 and 22 of the Convention the air carrier is liable for baggage delays up to a limit of 1,000 SDRs (currently approximately £760) unless it took all reasonable measures to avoid them or it was impossible to avoid them.

If baggage was checked in and is destroyed, lost or damaged the carrier is liable up to the same limit irrespective of fault (unless it can show that the baggage was defective). If it was checked in, the carrier is only liable if it is shown to be at fault. These limits do not apply if the damage resulted from an act or omission of the carrier its servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result – a very high threshold to cross.

In all cases, a complaint must be made promptly to the airline (within 7 days in case of damage or 21 days for delay). Once again, any court proceedings must be commenced within 2 years of arrival of the aircraft or the right to claim is extinguished.

Rights in case of cancellation or delay

Rights for passengers travelling with any carrier on domestic and international flights leaving from any airport in the EU, plus those travelling into the EU on a European airline, took a big step forward in February 2005 (in theory at least) with the coming into force of Regulation EC No. 261 of 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

In cases of delays of more than 2 to 4 hours (depending on the distance of the booked flight), airlines must offer assistance in the form of free meals and refreshment in reasonable relation to the waiting time, hotel accommodation if the delay is overnight and transport to and from the hotel, plus two free phone calls, emails, telexes or faxes (see article 9). For delays of more than 5 hours, passengers must be offered the choice between full reimbursement, a flight back to their original point of departure or re-routing on a different flight 'under comparable transport conditions' being 'adequately cared for' whilst awaiting the later flight.

Flight cancellations must lead to the provision of similar assistance, together with financial compensation under article 7. This is between 250 and 600 (currently £165-£400) depending on the distance of the original flight. These sums can be reduced by 50% in certain circumstances in the event of re-routing. However, if the airline has given two weeks' notice, or has provided a suitable alternative flight under article 5(c), no compensation is payable.

Where the airline has oversold its flight, it should first seek volunteers to stay behind in the first instance, in exchange for benefits. Once again, one should be offered the choice between reimbursement, a flight back or re-routing. If the alternative flight leaves from a different airport, the airline bears the cost of the transfer. There is no entitlement to an upgrade on a later flight (although it never hurts to ask!) and the financial sweetener most airlines offer is small (although sometimes open to negotiation). If the airline does offer an upgrade, it cannot demand the additional fare. And if it downgrades passengers, compensation of between 30% and 75% of the price of the ticket must follow within 7 days.

If the airline denies you boarding against your will, the same right to financial compensation arises as if the flight had been cancelled. And passengers cannot be required to accept any reimbursement in the form of travel vouchers unless they agree in writing.

However, as thousands of aggrieved passengers found out to their cost at the end of January when British Airways cancelled 1,300 flights in anticipation of the cabin crew strike, the extensive list of exclusions in paragraph 14 of the preamble to the Regulation includes strikes. Strikes, like bad weather, security risks and flight safety issues, are classified as 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.' Given the cost consequences of delays and cancellations, it is perhaps not surprising that airlines are so anxious to avoid paying compensation in such situations. Since these various circumstances must together account for the overwhelming majority of reasons why flights do not take off on time, an airline will frequently be able to avoid paying compensation for even the most prolonged delays.

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