



TRAVEL LAW BULLETIN

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This is the latest 'Travel Law' bulletin from 3 Hare Court. The Travel Law practice group continues to grow and we continue to undertake a substantial amount of work arising out of overseas accidents. Chambers and individual members of the group are once again rated in leading guides for expertise in this field.

In this bulletin:

- * Pierre Janusz has considered the recent decision of the ECJ in *Freeport* and its relevance to issues of jurisdiction in 'What's on with Watson';
- * Andrew Young has provided a summary of the recent decision on food poisoning overseas in *Kempson v First Choice* in 'Has Kempson changed everything?';
- * Katherine Deal (editor of this bulletin) has considered the issue of local standards post-*Holden* in 'Local standards: not just for local people';
- * Sarah Crowther has examined the importance of the ECJ ruling in *Odenbreit* in 'A call for direct action';
- * Dan Saxby has covered issues arising from accidents on board aeroplanes in 'An accident waiting to happen';
- * Tom Poole has considered points arising out of the judgment on service out of the jurisdiction in *Cooley v Ramsey* in 'Service with a smile';
- * Clara Johnson has provided an update of recent decisions concerning awards of damages for loss of enjoyment and diminution in value arising out of unsatisfactory holidays in 'A rotten time was had by all...'

We have extensive experience at all levels dealing with accidents that occur overseas. Members of chambers have been involved in claims ranging from extensive group actions to minor bouts of food poisoning, road accidents, plane and helicopter crashes, fatal accidents, swimming pool accidents, capsizing boats and even camel bites. We act for and against insurers, tour operators, travel agents, ship owners, 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 also 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.

Members of the practice group regularly publish articles and provide talks and seminars on various areas of relevance to travel lawyers. As ever, please do not hesitate to contact Liz Heathfield (marketing director), James Donovan (our senior clerk) or any member of the clerking team if you would like further information on any aspect of the work undertaken by Chambers.

Several members of Chambers have fluency in the main European languages and are able to accept instructions in these languages.

We hope that you find this bulletin both useful and entertaining.

James Dingemans QC



WHAT'S ON WITH WATSON? A HAPPY RÉUNION OF COMMON SENSE AND THE LAW

By **Pierre Janusz**



When a holidaymaker suffers an accident abroad while on a package holiday there are often good reasons why, in addition to suing the provider of the package under the Package Travel Etc Regulations 1992, one may also want to sue the person who was actually responsible for the accident, such as the hotel or the taxi or coach company responsible for transfers. If one is concerned with a holiday in a country within the EU or one of the countries to which the Lugano Convention applies, a brief reference to article 6 of Council Regulation (EC) 44/2001, 'the Judgments Regulation' or article 6 of the Convention in order to see whether there is jurisdiction over the proposed defendant domiciled abroad might lead one to think that there is no problem with establishing jurisdiction over the foreign-domiciled defendant.

However, until the decision of the ECJ in *Freeport plc v. Olle Arnoldsson* Case C-98/06 on 11 October 2007, an earlier decision of the ECJ, *Réunion Européenne S.A. v Spliethoff's Bevrachtungskantoor B.V.* Case C-51/97 [2000] QB 690, seemed to present a potentially insuperable obstacle in the way of this common sense reading of the relevant Article if, as will often be the case, the claim against the package company is contractual and the claim against the foreign-domiciled defendant is in tort. Although its observations in *Réunion Européenne* about article 6(1) of the Brussels Convention were strictly speaking *obiter*, at paragraph 50 of the judgment, having pointed out that the ECJ had held in *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co* [1988] ECR 5565 that in order for article 6(1) to apply it was necessary for there to be a connection between the actions against the various defendants of such a kind that it was expedient to determine the actions together in order to avoid the risk of irreconcilable judgments (and now words expressly incorporated into the text of the Judgments Regulation), the ECJ said at paragraph 50 that two claims in one action for compensation, directed at different defendants and based in one instance on contractual liability and in the other on liability in tort or delict, could not be regarded as connected.

There was support for the conclusion that the *Réunion Européenne* case presented a real problem for the type of case with which we are concerned in the form of the Court of Appeal case of *Watson v First Choice Holidays and Flights Ltd* [2001] EWCA Civ 972. Although the Court of Appeal was clearly of the view that what was said in paragraph 50 of *Réunion Européenne* was unsatisfactory, it was not prepared to rule that there was jurisdiction over a Spanish domiciled defendant who was being sued in tort when the English domiciled package tour operator was being sued in contract, and therefore made a reference to the ECJ when it gave its judgment on 25 June 2001. This reference was withdrawn when the parties came to a settlement before the ECJ was able to hear it.

It was perhaps unfortunate that the Court of Appeal in *Watson* did not have the benefit of the slightly earlier decision of a differently constituted Court of Appeal in *Casio Computer Co. Ltd v Sayo and Others* [2001] EWCA Civ 661 which had been handed down on 11 April 2001. In that case the Court upheld the first instance judge who had taken a "broad common sense view" when determining whether there was a sufficient connection for the purposes of article 6(1) of the Brussels Convention between claims against, on the one hand, a defendant within the jurisdiction and, on the other hand, a defendant domiciled in Spain when the causes of action against each were different. The Judge had found there was a sufficient connection and his approach was based on a recognition of the fact that the formulation of the requirement under article 6(1) that the claims should be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings was derived almost word for word from article 22 of the Convention (which concerned related actions in different Contracting States). He expressly relied on a decision of the House of Lords on article 22, *Sarrjo v Kuwait Investment Authority* [1999] 1 AC 32, and see in particular Lord Saville at page 41. The argument that paragraph 50 of *Réunion Européenne* presented an obstacle to what the Judge had done was dismissed by Tuckey LJ, who then applied the "broad common sense approach advocated by Lord Saville", an approach then specifically endorsed by Arden LJ in paragraph 42.

In *Freeport* the ECJ had the opportunity to re-visit the question of whether claims could be sufficiently connected for the purposes of article 6(1) of the Regulation if they did not involve the same causes of action. In August 1999 Mr Arnoldsson had been promised by *Freeport plc*, a company domiciled in England, that he would be paid a success fee of £500,000



upon the opening of a “factory shop” which was going to be opened in Kungsbacka, Sweden. The terms of the agreement between Mr Arnoldsson and Freeport plc with regard to the payment of the success fee were that, rather than it being paid by Freeport plc itself, it would be paid by a company (not then in existence) which was to become the owner of the Kungsbacka site. In due course a company called Freeport Leisure (Sweden) AB (“Freeport AB”) was incorporated in Sweden, and it became the owner of the Kungsbacka site. The factory shop in Kungsbacka was opened in November 2001, and Mr Arnoldsson asked for payment of the agreed success fee. Freeport AB refused to pay on the grounds that it was not a party to the agreement and that it had not been in existence when the agreement had been made. Mr Arnoldsson commenced an action in Sweden against both Freeport AB and Freeport plc, relying on article 6(1) in order to establish jurisdiction over Freeport plc. Freeport plc challenged the court’s jurisdiction on the grounds that the claims were not sufficiently connected for the purposes of article 6(1) because the claim against it was contractual, but the claim against Freeport AB was based in tort, delict or quasi-delict. Freeport plc’s challenge to the jurisdiction was rejected at first instance and an appeal against that decision was dismissed. On a further appeal to the Supreme Court a reference to the ECJ was made, asking for the court’s ruling on three questions. It is the answer to the first question which is of particular interest. The court referred to the proviso in article 6(1) of the Judgments Regulation (derived from the decision in *Kalfelis*) and went on to say that it is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which may (without being necessary for the assessment) lead it to take into consideration the legal bases of the actions brought before that court e.g. a tortious or contractual basis for the claim. Thus, the fact that claims brought against a number of defendants had different legal bases did not mean they could not fall within article 6(1), and see further paragraphs 41, 42 and 47.

In passing it is worth noting the Court’s response to the two other referred questions. On the second question it ruled that for article 6(1) to apply there was no further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the Defendants is domiciled. This answer it in itself not very surprising, given that imposing such a requirement would arguably be going further than reading in words which are used in article 6(2) but which the Member

States specifically refused to include as a proviso to article 6(1) when the Brussels Convention was amended. However, it could perhaps be seen by some lawyers acting on behalf of Claimants as an encouragement to relying on article 6(1) when the claim against the defendant domiciled in the jurisdiction is bordering on being unarguable (or may even be quite unarguable).

This possible consequence is if anything reinforced by the Court declining to answer the third referred question, namely whether the likelihood of success for the claim against the anchor defendant is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of article 6(1).

The result so far as the English Courts are concerned is therefore that any doubts created by what happened in *Watson* as to the applicability of article 6(1) when there are different causes of action relied on have been removed, and that the correct approach to the question of whether the proviso in article 6(1) of the Judgments Regulation applies is a broad common sense one. It is satisfying to be able to observe that in the end common sense, which as Lord Reid said in *R v. Smith* [1975] 1 AC 475 at 500 is “the life blood of the law”, has prevailed and that once again it goes hand in hand with the law.

HAS KEMPSON CHANGED EVERYTHING?

By Andrew Young



The case of *Kempson v. First Choice Holidays & Flights Ltd*, an unreported decision of His Honour Judge Stephen Davies in which judgment was given in Birmingham County Court on 7 June 2007, has excited concern among those who practise holiday law as to whether it has further limited the scope of Goldring J.’s earlier decision in *First Choice Holidays & Flights Ltd v. Holden* (also unreported but available on Lawtel - 22 May 2006), and see further Katherine Deal’s article in this bulletin. Those who represent defendants were encouraged by the decision in *Holden*, whereas those who represent claimants have been reassured by the later decision in *Kempson*.

In assessing the possible scope of these two cases, it is



important to keep in mind that *Kempson* was a food poisoning case, whereas *Holden* was not. The claim in *Holden* was a conventional personal injury claim. In *Holden*, Goldring J. overturned on appeal the first instance decision of the trial judge, who had found the tour operator liable for the claimant's accident, when she fell down a staircase leading to a restaurant at the hotel where she was staying, after slipping on liquid which had probably been spilled by a fellow guest carrying a drink on the stairs. It was common ground that, in order to establish liability, the claimant had to prove that the hotel had been at fault in the system that it operated for dealing with possible spillages. The trial judge held that it should have been part of the job of the employee who was stationed at the restaurant door anyway to check on the state of the stairs periodically and in particular whenever a guest entered the restaurant carrying a drink. Goldring J. held that this was imposing too high a standard of care, in the absence of any evidence of previous similar accidents, and that it was anyway incumbent on the claimant to prove that the system actually operated by the hotel fell short of local standards and the claimant had adduced no evidence on this issue. Therefore, the claim must fail.

The important point of distinction to be made about *Kempson* is that the claimant in that case was able to rely on implied terms relating to the supply of food, which arguably gave rise to strict liability on the part of the tour operator and which have no counterpart in relation to the supply of other services. As HHJ Stephen Davies said in *Kempson* (at paragraph 60 of his judgment): '*there can be no automatic assumption that the obligation undertaken by the tour operator in relation to the supply of....food will necessarily be the same as the obligation undertaken in relation to the supply of other services.*' Counsel for the Defendant in *Kempson* argued, in reliance on *Hone v. Going Places Ltd* [2001] EWCA Civ. 947 and *Holden*, that the obligation under the package holiday contract was only to exercise reasonable skill and care in providing food for the claimant, but this was rejected by the trial judge. Although his reasoning is not perhaps a model of clarity, he does state in terms that the tour operator's obligation in relation to the supply of food is strict and not fault-based. This is surely a correct statement of the law. Most English tour operators include an express term in their terms and conditions stating that the contract is governed by English law. It is therefore subject to the quality and fitness for purpose requirements of either section 14 of the Sale of Goods Act 1979 or section 4 of the Supply of Goods and Services Act 1982. Those requirements, of course, impose strict liability on the seller or transferor, subject to limited exceptions not relevant in this context. As HHJ Davies noted, it is an extraordinary fact that there seems to be no reported

authority containing an analysis of the legal position of a food supplier in a UK restaurant setting, still less an authority analysing the position on a package travel holiday, where the supply of meals is only part of the purpose of the contract. However, it cannot be disputed that, insofar as it provides for the supply of meals as part of the inclusive price of the holiday, a package holiday contract is either a contract for the sale of goods or a contract 'under which one person transfers or agrees to transfer to another the property in goods' (which is the definition of a supply of goods contract under section 1(1) of the Supply of Goods and Services Act 1982). So, the statutory terms as to quality and fitness for purpose must be implied into a package holiday contract and *Kempson* was rightly decided on the basis that it was a case where strict liability applied. The judge did also go on to decide, in the alternative, that the case was also made out as a claim in negligence.

It is submitted that the decision in *Kempson* is a welcome clarification of the law relating to food poisoning claims in package holiday cases. There is a perfectly valid reason for drawing a distinction between the obligations of a tour operator as regards the provision of services generally on the one hand, where a duty to exercise reasonable skill and care is the appropriate standard of care, and as regards the provision of food and drink on the other, where it is appropriate to impose a higher standard. This higher standard does not impose an excessive burden on hoteliers or tour operators, because hoteliers are already subject to the same standard under the terms of the European Food Safety Directive and tour operators can protect themselves by means of an indemnity from hoteliers or through suitable insurance arrangements.

LOCAL STANDARDS: NOT JUST FOR LOCAL PEOPLE?

By Katherine Deal



For 13 years after *Wilson v Best Travel* [1993] 1 All ER 353, there was little confusion about the approach a court determining the case of an accident overseas should adopt. Just as an English hotelier would be horrified to be told that his hotel has to comply with the higher standards than might be expected of a comparable hotel in a different country, so a Greek hotelier was not to be criticised just because the glass doors at his hotel fail to comply with British standards, as was



the case for Mr Wilson. It was only if those doors failed in some relevant way to comply with the standards expected of them in that locale that criticism could fairly be levelled.

This criticism may be of particular relevance where an English holiday maker is injured whilst on a package holiday booked with an English tour operator and is looking to that tour operator for compensation. In cases where it is said that some structural failing was behind the accident (the defective glass door, an unreasonably slippery pool surround, a faulty lift, for example) it is familiar territory that the claimant needs to show that this amounted to a failure to comply with local standards. Prior to the now infamous case of *Holden v First Choice Holidays & Flights Ltd* (unreported, Goldring J, 22 May 2006) it was usually the case that a claimant in a claim arising out of negligent provision of services (such as slipping on liquids left on the floor, or being injured in a road accident whilst being driven by the hotel's minibus driver) would not require any form of evidence as to what might constitute reasonableness by local standards. The court tended simply to approach the claim on normal negligence principles. It was often considered that evidence of this nature might lead to trial as though the claim was proceeding in a foreign court.

Then came *Holden* and, as most travel law practitioners will be aware, Goldring J appeared to condemn claimants to the time consuming, costly and often wholly disproportionate task of obtaining 'expert' evidence to deal with any issue that might touch on whether the local supplier had complied with its obligations. Suddenly, defendants were offered a compelling argument (frequently successful) that a claimant could not rely on common sense or English notions of reasonableness. A claimant who slipped, for example, was supposed to adduce evidence regarding local standards of cleaning (more often than not from a local lawyer, with care needed to make sure he did not cross into impermissible opinion as to whether the claim would succeed in a local court) to permit the court then to determine if there had been proper performance of the holiday contract.

Holden has been a thorn in travel practitioners' side for 2 years now, and it is perhaps not surprising that practitioners and judges are becoming more creative at getting round it until it is overruled. Andrew Young in this bulletin considers the case of *Kempson v First Choice Holidays & Flights Ltd*, which declined to apply it in the case of food poisoning claims (and made some fairly trenchant comments on its limitations). In *Phillips v Kosmar Villa Holidays plc* (Birmingham County Court 12 December 2007) HHJ Harris QC was entirely unpersuaded that a claimant would need 'expert' evidence to show that it offended local

standards for a coach driver to pull away with a sudden jerk and unbalance a passenger, particularly where there was evidence from the claimant's husband that the driver pulled away more violently than he would normally expect.

The case of *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003 is perhaps further support that Holden is not the be all and end all. Mr Evans dived into his hotel pool one night, hit his head and rendered himself tetraplegic. The pool was quite unsuitable for diving. The signage did not comply with the guidance issued by the Federation of Tour Operators. There was evidence that Kosmar used FTO guidance internally, but no evidence that it laid down internationally recognised or uniform standards. The particulars of claim included an allegation that the pool and its surrounds would comply with local regulation and safety standards. There was no evidence to support an allegation of non-compliance and this seems to have played no part in the trial at first instance. If *Holden* were the last word, one might think this automatically prevented the claimant from succeeding. Neither HHJ Thorn QC at first instance nor the Court of Appeal agreed, Richards LJ confirming that it was still open to the claimant to pursue a claim based on the more general basis that reasonable skill and care would be exercised. The question of what was reasonable by local standards does not appear to have been considered at all - a major departure from the situation many have thought is necessitated by *Holden*. It was however suggested that the FTO guidelines 'informed' the standard of care that was reasonable in all the circumstances. This does not appear to have formed any relevant part of the judgment in either court and the claim eventually failed essentially on the same grounds as *Tomlinson v Congleton* [2004] 1 AC 46 that adults should accept responsibility for the risks they freely run. The risk to Mr Evans was an obvious one whether the pool had signage, whether it was in Corfu or England and whether he was drunk or not. His momentary thoughtlessness was not enough to impose a duty on Kosmar which it would not otherwise have owed him. The 'foreignness' of the accident was a matter of little if any relevance to his claim.

One way of marrying up *Evans* and *Holden* was suggested at County Court level by Mr Recorder Green sitting in Canterbury on 15 January 2008 in *Brown v Thomas Cook Tour Operations Ltd*. Mrs Brown slipped on water on an external flight of steps which had not been cleared up after a rainstorm in Cuba. The Judge found that such evidence as there was did not assist her to establish that local standards required the water to be mopped up. He went on to consider that if there were no relevant local regulations (ignoring completely issues of local reasonableness such as might be accepted in a local court,



which is surely correct), it was open to him to consider in the light of *Evans* what standards would be expected. He considered how the case would be viewed in England and then considered if the same or higher could be expected of a Cuban hotel. The locality of the hotel imposed a 'gloss' on English standards of reasonableness. He was not satisfied that there was any obligation on the hotel to clear up all of the water on the external staircases within an hour of the rain stopping and so the claim failed.

It therefore seems that, in different ways, courts are gradually rejecting *Holden* and the approach it appears to mandate. It is suggested that this is entirely appropriate. Surely the Regulations were never intended to involve every claimant suing a tour operator in a complex evidence-gathering exercise as to reasonable standards of service overseas. It has assisted defendants for a couple of years. But it purported to extend the need for evidence from the locale far too far and it is high time that common sense made a comeback

A CALL FOR DIRECT ACTION?

By Sarah Crowther



The ECJ has signalled a choice of jurisdiction for claimants who sue the insurers of wrongdoers. How far-reaching is the impact of this decision likely to be?

The problem for claimants

A claimant domiciled in the UK who suffers an accident outside the UK (other than under the protection of a regulated package holiday) very often has a jurisdictional problem. He understandably wants to bring proceedings at home: it's cheaper, easier to understand and prosecute the claim and generally in the UK the rules as to recovery of costs and levels of damages are more favourable to claimants. However, in most cases the claimant's home courts simply do not have jurisdiction.

Within the EU the general rule is that domicile of the defendant determines jurisdiction, see article 2 of Council Regulation 44/2001, 'the Judgments Regulation', and he is entitled to be sued in the courts of his home country. Unless the claimant is 'fortunate' enough to have suffered his injury

at the hands of an English domiciled defendant (as does often happen) he cannot sue at home. Commonly the cause of action is tortious and whilst there is special provision in article 5(3) for such action to be brought in the courts of the state where an accident took place this is cold comfort, say, for the English claimant seriously injured by an Italian domiciliary skiing on the Italian Alps.

Reasons for change?

It is easy to see a justification for more generous rules in favour of claimants where defendants have the benefit of an indemnity under an insurance contract. Interposing the insurer between claimant and defendant limits the exposure of an individual defendant and assists the latter in defending an action. This was clearly the policy underlying the special rules laid down in the 4th Motor Insurance Directive as to causes of action for road accidents. A claimant has a cause of action directly against the defendant's insurer. By similar reasoning it could be argued that jurisdictional rules should also be widened in favour of claimants as insurers operating within the EU market can be taken to accept differences in Member States' legal systems and to set premiums accordingly. But even in the field of road accidents where third party liability insurance is compulsory jurisdictional rules were not relaxed (e.g. the European Union (Rights Against Insurers) Regulations 2002 (SI 2002/3061) which only apply to accidents which occur in the U.K.

For some time it has been mooted that the special jurisdictional rules in articles 9 to 14 of the Judgments Regulation governing insurance contracts could allow a claimant to sue in the courts of his own domicile. One theory was that a claimant could properly be considered a 'beneficiary' of an insurance contract entered into by the defendant to indemnify the latter against negligently causing injury to the former. This approach is artificial and it is suggested places a strain on the wording of Article 9(1)(b) which the ordinary meaning cannot bear. Indeed, this argument was expressly rejected by the ECJ in its recent decision in *FBTO v Odenbreit* Case C-463/06, paragraph 27.

Claimants to sue insurers direct

The Court, however, did affirm that claimants have a choice of jurisdiction in relation to a claim against an insurer. When articles 9(1)(b) and 11(2) are read together it allows a claimant to elect to sue an insurer in the courts of the claimant's domicile.

This is a significant decision broadening the rights of



claimants. The only limitations are that the insurer must be domiciled in an EU Member State and that a cause of action against the insurer in accordance with the relevant applicable law must exist.

Most obviously this development will allow those injured in road accidents to bring proceedings directly against the insurer, even if there is no jurisdiction to proceed against the driver at fault. However, as the ECJ made explicit at paragraph 30, it is irrelevant how or in what form a cause of action directly against an insurer arises. In those systems of national law where an injured party is routinely provided with the option of proceeding directly against the insurer, e.g. France and Spain, an English claimant can now bring such proceedings at home in reliance on the relevant local law. To take my earlier example, the injured English skier could sue in the UK against the Italian defendant's public liability insurers invoking any relevant provision of Italian law that permitted such a course.

Not a complete answer

The German government argued in *Odenbreit* that the nature of the cause of action against the insurer is relevant. The ECJ dismissed this point as not bearing on the question of jurisdiction. However, this answer is not entirely satisfactory as is demonstrated by changing the nationality of the defendant in the skiing accident example to German (here with a German insurance policy from a German insurer). In German law the direct cause of action against the insurer is seen as tortious in nature. However, the law of the tort would be presumed to be Italian, not German, law in English proceedings to which section 11 of the Private International Law (Miscellaneous Provision) Act 1995 applied. If Italian law saw the right to proceed against the insurer as incidental to the contract, this would defeat the claimant as it is likely that the law applicable to the contract would be German law (which would not recognise the cause of action!). The claimant has no cause of action against the insurer and on the face of things is left to pursue what action he can against the wrongdoer himself either in Germany or Italy. This leaves the law of jurisdiction unpredictable and divorced from principle.

The way ahead

Ultimately practical considerations such as costs, damages, limitation and applicable law will dictate where claimants choose to initiate proceedings. With the advent of Rome II on 11 January 2009 it is likely to be all change again in respect of many of these areas. For example, it would appear from article 15(c) that damages in future will be assessed in

accordance with the substantive applicable law of the action: removing a major incentive for claimants to sue in the UK. Whilst at this stage the ECJ appears to have greatly strengthened the hand of claimants, only time will tell whether in fact claimants will rush to take advantage of these new possibilities.

AN ACCIDENT WAITING TO HAPPEN?

By Dan Saxby



The Montreal Convention ('the Convention'), which superseded the Warsaw Convention and has the force of law in England and Wales by virtue of Schedule 1B to the Carriage by Air Act 1961 as amended, provides an exclusive remedy for passengers suffering loss and damage during the course of international air travel. Pursuant to article 17.1 of the Convention, the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Convention does not require that the claimant passenger prove negligence or fault on the part of the carrier, only that '*the accident which caused the death or injury*' took place at the prescribed stage of their journey. One could be forgiven for thinking that the threshold for recovery under the Convention is therefore low and that the question of liability would be capable of straightforward resolution; the only relevant question being essentially a factual one in each case. Indeed, it is not unusual for people to describe the Convention as fixing the carrier with 'strict liability'. The adoption of such terminology is at best unhelpful and at worst incorrect.

The difficulty arises in determining what constitutes an 'accident' within the meaning of the Convention. That such an exercise can be both complex and lead to a surprising result, is evident from the decision of Mr Recorder West-Knights QC in *Beverley Anne Barclay v British Airways, Lawtel*, 4 March 2008.

The agreed facts were that the claimant was allocated one of four seats in the centre aisle of the aircraft. In order to get to her place, she had to pass sideways along the row and to



negotiate two seats in front of her that were set in the reclined position. As she lowered herself into her seat, her right foot slipped on a strip embedded in the floor of the aircraft and went to the left causing ligamentous damage to her right knee. Whilst the judge expressed some scepticism as to the accuracy of the claimant's account (noting, among other matters, that the plastic strip barely stood proud of the surrounding carpet and appeared to him not to be slippery), the case proceeded on the basis of these agreed facts. Accordingly, the fact of the fall and its immediate proximate cause (i.e. the strip) was established. It was common ground that the aircraft interior complied with all applicable aviation regulations and that the same was not defective and in full working order. The judge noted that the claimant's bald allegation that the strip had been defective 'in that it was very slippery' had not been seriously pursued at trial.

The defendant carrier contested the claim solely on the basis that there had been no relevant 'accident' within the meaning of article 17, contending that the claimant had (but had failed) to establish that there was something external to her which had caused the fall, and, that that something was unusual or unexpected. The learned judge accepted the defendant's submissions and dismissed the claim. His reasoning and review of the principles to be applied is instructive.

The Recorder reminded himself of the correct approach to adopt when construing the language of the Convention, as confirmed in *In re Deep Vein Thrombosis Group Litigation [2006] 1 AC 495*. He noted that the Convention was intended to be and is of wide international application. As such, the starting point must always be to consider the natural meaning of the language used in its Articles. The domestic courts should consider the Convention as a whole and give a purposive reading wherever possible, but avoid interpreting the same by reference to domestic law principles. Further assistance can and should be sought from relevant decisions of the courts of other Convention countries, giving due weight to the standing of the court and the quality of the analysis in each case.

Two things will be apparent. First, that a proper analysis of the issues arising under a Convention case may involve researches into, and, at least some understanding of foreign jurisprudence (potentially taking the English common lawyer into unfamiliar and uncomfortable territory). Secondly, that phrases such as 'strict' or 'no fault' liability, which concepts may have different meanings and consequences in each jurisdiction, are of little assistance where domestic courts are striving to achieve international uniformity in the Convention's application.

The Recorder then reviewed the domestic and foreign authorities relevant to tripping and slipping type Convention claims; helpfully (from a practitioner's perspective) attaching a schedule of the same to his judgment. In particular, the learned judge referred to the American case of *Air France v Saks* (1985) 470 US 392 as expressly adopted and approved by the House of Lords in *Morris v KLM* [2002] 2 AC 628 and *In re De Vein Thrombosis* [2005] UKHL 72. In *Saks*, the Claimant had suffered damage to and become permanently deaf in one ear as a result of pressurisation changes while the aircraft was descending to land. The carrier was not liable. Connor J, sitting in the Supreme Court concluded that, 'liability ... arises only if a passenger's injury is caused by an unexpected happening that it external to the passenger'. As Lord Scott emphasised in *Morris*, this formulation, with which he agreed and approved, treated the 'accident' as the pressurisation and not the damage to the passenger's ear, hence the emphasis on 'externality'. On the facts of *Saks*, the attraction of this distinction is obvious, not least because liability under the Convention liability is triggered by a relevant accident, not injury. It is clear that these two events must be factually distinct.

The application of this principle is not as straightforward as it would seem, however. In *Chaudhri v BA* 16 April 1997, CA, unreported, the Court of Appeal considered a claim under the convention where a semi-paralysed man had fallen whilst attempting to get to his feet to go to the lavatory. Again, liability was not established – this did not constitute an 'accident' within the meaning of the convention. In reaching this conclusion, Leggatt LJ (with whom the other members of the Court agreed), adopted the corollary of the formulation in *Saks* referred to above, opining that, 'accident is not be construed as including any injuries caused by the passenger's particular, personal and peculiar reaction to the normal operation of the aircraft ... what befell Mr Chaudhri was not caused by any unexpected or unusual event external to him, but by his own personal and peculiar reaction to the normal operation of the aircraft'. It is perhaps significant that this analysis focuses not only on the immediate cause of the injury (i.e. the fall, which might well be said to be unusual or unexpected) but also on its cause (which, arguably, was not).

Finally, the Recorder returned to the *In re Deep Vein Thrombosis* case and, in particular, to the comments of Lord Steyn that it is an integral part of the test of what amounts to an accident that it must have a cause external to the passenger'.

Having reviewed such authorities (and noting that 'lower' courts here and abroad had sought to apply the same with often



surprising and inconsistent results), the Recorder felt compelled to dismiss Mrs Barclay's claim. What she had suffered had been a 'mere fall' and not an event external to her. Her accident had occurred on the plastic strip, but he could not find that the slipping occurred by reason of something to do with the strip (except its passive and usual presence). Even if the strip had caused the fall, he found nothing unusual or meaningfully unexpected about that cause.

Whilst one can see the attraction of this decision on the merits, particularly given the trial judge's grave doubts as to the claimant's credibility, it is tempting to wonder whether in seeking to apply the principles set out above, the Recorder has moved too far away from the wording of the Convention. It is difficult not to interpret some of his analysis as focusing on whether the strip in question was dangerous, rather than its presence being unexpected or unusual, suggesting a negligence or fault based approach which is not required by the Convention.

In granting the claimant permission to appeal, Recorder West-Knights QC accepted that the law remains complicated, uncertain and diffuse and that the slipping and tripping jurisprudence needed to be 'nudged back on track' by the Court of Appeal. For practitioners everywhere, it is to be hoped that in the not too distant future, the Court of Appeal will be given the opportunity to respond to the Recorder's call for aid!

SERVICE WITH A SMILE

By Tom Poole



In *Shane Anthony Cooley (By His Father and Litigation Friend Peter Anthony Cooley) v Ramsey* [2008] EWHC 129 (QB), the High Court was asked to consider the court's discretion under CPR r.6.20 to grant permission for proceedings for personal injury to be served out of the jurisdiction. This involved consideration of the case of *Booth v Phillips* [2004] 1 WLR 3292, which is authority for the proposition that economic loss, in the form of a loss of income, constitutes damage sustained within the jurisdiction for the purposes of CPR r.6.20(8)(a). *Cooley* also highlights the difficulty defendants face in resisting applications for permission to serve out of the jurisdiction in a personal injury case where the claimant is resident in the

England and is suffering a continuing financial loss.

The facts in Cooley

Shane Cooley, a British citizen, was left grossly handicapped after suffering severe injuries when his motorcycle collided with the defendant's car. The collision occurred in New South Wales, Australia. The defendant was domiciled in Australia. There was no dispute that the accident was caused by the negligence of the defendant. At the time of the collision Shane was aged 31 years and was working on a visa in Australia, where he had been for about one year. About six months after the accident he was repatriated to England with his parents. Since then his parents have remained his main carers.

It was agreed that Shane would continue to live in England, in need of lifetime care and support and would have no residual earning capacity. A claim form was issued and served out of the jurisdiction in New South Wales with the permission of Master Yoxall pursuant to CPR rr.6.20 and 6.21. The defendant applied to set aside the order granting permission. The issue was whether the English court had jurisdiction to grant such permission and, if so, whether as a matter of discretion it ought to have been granted.

The law

The accident occurred outside the jurisdiction, and the defendant was domiciled outside the jurisdiction. In the circumstances, the only basis upon which Shane could argue for service out of the jurisdiction was that the damage was sustained within the jurisdiction (CPR r.6.20(8)(a)). In this regard Shane relied on *Booth v Phillips*.

In *Booth*, the claimant's husband, a British citizen, had died whilst working on board a vessel in Egypt. The claimant brought proceedings in her own right claiming the loss of her dependency upon her husband under the Fatal Accidents Act 1976, and in her right as executrix of his estate, his funeral expenses under the Law Reform (Miscellaneous Provisions) Act 1934. The court found that it had the power to permit service out of the jurisdiction on the basis that the claimant had sustained damage within the jurisdiction in her own right. Teare J stated that the words "damage ... sustained within the jurisdiction" should be given their ordinary and natural meaning, namely, harm which has been sustained by the claimant, whether physical or economic.

Argument in Cooley

In *Cooley*, the defendant, while accepting that the result in *Booth* may have been correct, sought to persuade the court that the reasoning was flawed, inconsistent with the cases under



Article 5(3) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and that the judge had incorrectly applied considerations applicable to different jurisdictions within a single state.

Each of the defendant's submissions was rejected. Tugendhat J held that *Booth* was correctly decided and that because Shane was suffering a continuing loss within this country, he would exercise his discretion to allow service out of the jurisdiction.

Exercise of the court's discretion

In *Cooley* the court had little hesitation in finding that Shane had established his case that England was the proper place in which to bring the claim. The court held that the interests of justice for both parties required that the claim be prepared with the benefit of close liaison between each of Shane's legal representatives, his father, and the factual and expert witnesses, and that this would be impractical if the case was pursued in New South Wales due to the distance and time difference. Further, the court's decision seems to have been informed by the following considerations:

- There was no issue on liability, but only damage.
- Shane was brought back to England as a natural consequence of his injuries; he is British and this is where his family live, on whom he depends for support.
- The nature and extent of the damage, the medical and other care that he will need, and the sums that will be required to compensate him for the damage, will all be matters on which the evidence of numerous witnesses, both of fact and expert, will be required, probably by both parties, and those witnesses are all based where Shane is, namely England.
- In assessing the compensation required, the court must have some knowledge of the environment in which a victim is to live out his life, and that environment includes not only the physical conditions in which he lives, but also the availability of funding and services from the state, not only as it is at the time of trial (or settlement agreement) but also in the future. These are matters which a court located in England is better placed to assess than a court in Australia.
- This is not a case in which the court of either jurisdiction would have to apply a law other than its own, as the quantification of damage falls to be determined by the law of the court, which means English law if the case proceeds in England: *Harding v Wealds* [2006] 3 WLR 83.

A key issue between the parties in *Cooling* was whether or not Shane's damages should be assessed under English law or the

law of New South Wales (the former providing by far the more generous regime to Shane). Although the court preferred the submissions made on behalf of Shane, Tugendhat J specifically noted that the court would not grant permission merely because a refusal to do so might deprive a claimant of a higher award of damages.

Practice points

It is now clear that the word "damage" in CPR r.6.20(8)(a) should be interpreted as meaning harm which has been sustained by the claimant in the jurisdiction, whether physical or economic. In the circumstances, defendants face an uphill struggle when resisting applications for permission to serve out of the jurisdiction in personal injury cases where the claimant is resident in the England and is suffering a continuing financial loss.

A ROTTEN TIME WAS HAD BY ALL... (Update on damages for loss of enjoyment) By Clara Johnson



The amount that a claimant can expect to recover by way of damages for loss of enjoyment for a disappointing holiday is often difficult to assess in advance. First, the award is not necessarily referable to the cost of the holiday and secondly, by their very nature, such damages are entirely subjective. However, the cases below give a rough guide as to the types of awards that are currently being made in holiday claims.

In *H (A Child) v First Choice Holidays & Flights Ltd* [2007] CLY 3199 the claimant, a schoolboy, aged six at the date of the accident tripped on a set of unlit concrete steps whilst on holiday in Turkey. He was taken to hospital immediately after the accident and had to keep his leg covered in order to maintain the dressing. He was unable to go swimming, play football or expose the injury site to sand on the beach. The accident occurred on the second day of the holiday. Damages for loss of enjoyment were assessed at £1,000.

In *Crosby v Fleetwood Travel* [2007] CLY 221 the claimant booked a two-week all-inclusive package holiday with the defendant for himself and his family at the cost of £3,620 to go diving in the Red Sea at the resort of Sharm El Sheikh. The day before they were due to fly, Sharm El Sheikh suffered a terrorist



attack. The claimant was told to report to the airport but on arrival was informed his flight had been cancelled. He decided to find an alternative holiday which was arranged through the defendant over the phone whilst he was still at Gatwick. The claimant specified that he wanted to go somewhere where there was diving; the accommodation was of an equivalent standard to the accommodation booked in Sharm El Sheikh, i.e. four star or higher for which he was willing to pay more; and that it was to be all-inclusive. The defendant supplied the claimant with a two-week holiday in Limassol, Cyprus at an additional cost of £1,600 with the assurance that the alternative holiday met the C's express requirements.

It transpired that the hotel was three star; an additional supplement had to be paid for all-inclusive; and the nearest diving was fifteen miles from the hotel. The hotel was oversubscribed and overcrowded leaving the claimant and his family unable to use the facilities. The claimant sued the defendant for breach of contract and/or misrepresentation. Entering judgment for the claimant, damages were assessed at £1,600 for breach of contract and £1,000 for loss of enjoyment (£250 per person).

In *Steward v French Affair Limited* [2006] CLY 1990 the claimant had booked a villa in France for two weeks at the total cost of £3,304. The defendant tour operator made what were found to be misleading statements in its brochure. The villa was not within walking distance of a village, the garden was not "well stocked with Mediterranean trees and flowers" and there were not "many and varied historic sites close by". In fact, the garden was messy and unkempt; the plants were dead and a discarded boat, cement mixer and motorbike had been left in the garden. The villa was dirty and in need of refurbishment and the shower was faulty. The area was not peaceful but was noisy, especially at night. Damages were assessed at £1,850.

Dixon v Direct Holidays Plc [2006] CLY 1991 the claimant booked a package holiday with the defendant tour operator to stay in a self catering apartment in Tenerife for 14 nights at the total cost of £1,025. On arrival the claimant discovered an overpowering stench of sewage coming from a drain in the storage area; severe damp in the bathroom and children's bedroom; dirt had accumulated throughout the apartment; the hot water supply was inadequate; raw sewage bubbled up in the bath; the staff were hostile; there was more extensive maintenance work on the swimming pool than they had been warned about; and heavy duty construction work was being carried out in the concrete stairs near their apartment. As a result of the smell and damp the children slept with their mother in the second bedroom while their father slept in a couch. The

family ate out for all their meals. On the fifth day they were offered alternative accommodation at an extra cost of £165, it was not self-catering and there was no guarantee that the rooms would be on the same floor. The claimant rejected the offer and asked to be taken home. The defendant refused.

The court found breaches of Regulations 15, 14(2) and 14(3). Damages were assessed at £1,615 comprising £615 for difference in value, £400 for the cost of eating out, £200 to compensate the claimant for having to sleep separately and £400 for loss of enjoyment.

In *Stainsby v Balkan Holidays Ltd* [2006] CLY 1992 the claimant sought damages arising out of a spoilt honeymoon. The claimant and her husband had booked a two week package holiday to Bulgaria at the total cost of £718. She had requested a room on the ground floor as she was pregnant at the time. However, she was allocated a room on the fourth floor which was dirty and damp. She was offered an upgrade at an additional cost of £600, however, this was declined as she was unable to afford it. The claimant was eventually moved to a room on the ground floor but it was incredibly noisy such that C and her husband were unable to sleep or relax. The claimant was then offered an alternative hotel at an additional cost of £442 which was accepted. However, construction works were being carried out which were very noisy and disruptive. Further, the food was of such a poor standard they incurred extra expense of eating out. Entering judgment for the claimant the court awarded damages in the sum of £1,000 for loss of bargain and loss of enjoyment.



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