



PERSONAL INJURY GROUP BULLETIN



It is to be hoped that this edition finds you well rested after the summer break, but just in case you (or rather your clients) found the hotel room uninhabitable, the swimming pool without water and the beach buffet infected with salmonella, look no further for your post holiday reading than Simon Cheves' article on the Package Travel/Holidays Regulations 1992 and Christopher Bamford's thoughts on food poisoning. I hope you enjoy the read.

Kerstin Boyd, Head of the Personal Injury Team

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POISONOUS FOOD FOR THOUGHT

Having previously found myself grappling with the difficulties of coming up with a suitable topic, writing a draft and then spending much longer reducing the draft to comply with publishing constraints, when first invited to write an article for this edition of our newsletter, I initially pooh-poohed the idea of accepting such a poisoned chalice. In doing so, however, I realised I had unwittingly provided myself with a topic - food poisoning.

Although one food poisoning case has had a profound impact on personal injury practice (do lawyers specialising in other fields realise that personal injury lawyers have to deal with the ongoing consequences of a severe bout of gastro-enteritis on a daily basis?), notwithstanding the passage of time since the decision in *Donoghue -v- Stephenson* [1932] AC 562, when recently working on a case involving ice cream contaminated with bleach it became clear that food poisoning cases were still capable of throwing up difficult issues in respect of liability and also in assessing the appropriate level of general damages. It is impossible here to address those issues in detail but it is hoped to provide some pointers to matters which need to be considered in such cases.

Food poisoning cases fall into two broad categories: those where injury is caused by infection (e.g. salmonella); and, those where damage is not caused by infection but because food has been contaminated (e.g. my recent case where ice cream had been contaminated by bleach).

Establishing causation may not present much difficulty where the Claimant is amongst a group of people who suffer from the same condition at about the same time and where, prior to its onset, they had dined together (at, for example, a wedding) or separately but at the same restaurant within a short period of time. In many such cases liability is likely to be readily admitted, particularly if laboratory tests demonstrate, for example, an infection with a common pathology. In other cases, however, establishing causation may present problems. Where, for example, the Claimant has eaten meals at several different restaurants prior to the onset of the condition, it may be difficult to pinpoint the meal (and, therefore, the restaurant) that gave rise to the condition. To establish causation in these types of case it may be necessary to obtain expert evidence from a gastroenterologist (as to, for example, the

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likely incubation period of the infection) and, if there are any leftovers available, from a toxicologist.

Food poisoning cases may well require consideration of contractual obligations and/or statutory duties in addition to negligence. Where the Claimant has purchased the food (e.g. from a supermarket or at a restaurant), there may be a contractual remedy. Section 14(2) of the Sale of Goods Act 1979 provides that where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of "satisfactory quality". Under the 1979 Act goods are of satisfactory quality if they meet the standard a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances (Section 14(2A)). Further, for the purposes of the 1979 Act the quality of goods includes their state and condition and, amongst other considerations, the fitness of the goods for all purposes for which the goods of that kind are commonly supplied and their safety are, in appropriate cases, aspects of the quality of the goods (Section 14(2B)).

Consideration should also be given to bringing a claim relying on the Supply of Goods and Services Act 1982 which provides for an implied term that where a supplier is acting in the course of a business, the services will be carried out with reasonable care and skill (Section 13).

Under Section 2 of the Consumer Protection Act 1987 strict liability attaches to: the producers of defective products; those holding themselves as the producers (e.g. supermarket brands which have, in fact, been produced by another entity); importers into the European Union; and, where there is a chain of supply of a defective product, suppliers within that chain who fail to state (or fail to state reasonably promptly) from whom they acquired the product. Here "producers" include manufacturers of products, those who win or abstract and those who alter the essential characteristics. Thus in *Bogle -v- McDonalds' Restaurants Ltd [2002] All ER (D) 436*, adding hot water to coffee brought the Defendant within Section 2 of the 1987 Act as a producer. Under Section 3 of the 1987 Act a relevant defect occurs if the safety of a product is not such as persons are entitled to expect, this being determined from all the circumstances including: the manner and purposes of the product; the markings of the product; instructions (e.g. cooking or heating instructions); the likely uses of the product; warnings; and, the time of supply.

A Defendant facing a claim brought in reliance on the Consumer Protection Act 1987 will find a number of potential defences set out under Section 4. Whilst it is doubtful that some of these defences will ever apply in a food poisoning case, others are of more relevance, including: the defence that there was no supply of the product to the Claimant by the Defendant; the defence that the supply was not in the course of a business with a view to profit; and, the defence that the defect did not exist at the time of the supply.

Assessing the appropriate level of general damages can also present some problems since reported quantum cases are relatively rare (perhaps too rare!) and, although the 10th edition of the Judicial Studies Board's "*Guidelines for the Assessment of General Damages in Personal Injury Cases*" deals with illness or damage resulting from non-traumatic injury to the digestive system (in sub-chapter 5(G)(b)), there is in effect a "ghost bracket" (recognised by the editors) between the very severe cases described in bracket (i) – for which the range is £25,250 to £34,500 – and the cases described in bracket (ii) – serious but short-lived food poisoning etc. – for which the range is £6,300 to £12,600. The level of injury meriting an award between £12,600 and £25,250 is, perhaps, well-illustrated by the case of *Willey -v- My Travel UK Ltd [2007] CLY 3209* where the Claimant (a male in his 20s), was awarded damages equivalent to just under £15,000 in the money of August 2010. Although the Claimant suffered a gastrointestinal infection with an acute phase which lasted for only 3 weeks, he was left with irritable bowel syndrome which caused episodes of diarrhoea alternating with periods of constipation. The prognosis was that the irritable bowel syndrome was likely to continue indefinitely but to improve gradually with time.

CHRISTOPHER BAMFORD



PACKAGE HOLIDAY ACCIDENTS

The Package Travel, Package Holidays and Package Tours Regulations 1992 were introduced to ease the difficulties previously encountered by package holiday tourists in bringing claims for damages, including personal injury, suffered whilst on holiday abroad. To a large extent the aim of the Regulations has been achieved. There remains, however, an issue regarding the correct interpretation of the Regulations in respect of the extent of the duty of care owed by the tour operators to their tourists on which the courts have failed to speak with one voice and which the tour operators seek to exploit.

Under Regulation 15, the tour operator is liable to the tourist for damage caused by the improper performance of its obligations under the contract irrespective of whether those obligations were performed by the tour operator or by other suppliers of services. It is an implied term of such contracts that the provision of the services and facilities under the contract will be provided and performed with reasonable skill and care. The issue arises as to by which standards should that duty be measured – the standards applicable within the locality where the damage is occasioned or the standards applicable within the UK jurisdictions.

"Under Regulation 15, the tour operator is liable to the tourist for damage caused by the improper performance of its obligations under the contract irrespective of whether those obligations were performed by the tour operator or by other suppliers of services."

The tour operators assert that it is incumbent on a Claimant, if he/she is to succeed in establishing liability, to prove that the causal factor of the accident amounted to a breach of the local laws, standards or regulations. If that interpretation of the Regulations is correct then it becomes necessary for a claimant to obtain and adduce expert evidence as to what those local laws, standards and regulations are and how they are applicable within the context of the index accident.

The jurisprudence in this area is far from clear and settled. The story begins with the case of *Wilson v Best Travel [1993] 1 AER 353*. In that case the Claimant sustained injury when falling through glass patio doors that were not glazed with safety glass unlike the position that would have pertained in a hotel in the UK. This case, in fact, pre-dated the introduction of the 1992 Regulations but is regarded as the starting point for the construction of them. The following observation was made by the court:

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CHRISTOPHER BAMFORD

Called in 1987, and having briefly tried his hand at the criminal bar, it was a happy day for one area of the law and a sad day for another when Chris switched to personal injury work in 1990. Since joining Tanfield Chambers in 1993, Chris has been a

lynchpin of the personal injury team, primarily because of his role as quiz master at social events (although he now wants to deliver solutions). Celebrated for his written work as well as his advocacy, Chris acts for both Claimants and Defendants – but seldom in the same case – and, when not battling with a Schedule of Special Damage, there is nothing he likes to do more in his spare time than settle a Counter-Schedule. Following a recent street robbery, he now has a special interest in the Criminal Injuries Compensation Scheme.

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“The duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided that they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holiday maker to decline to take a holiday at the hotel in question.”

Subsequently, in the case of *Codd v Thompson Tours* [2000], the Court of Appeal, dealing with the case of a claimant injured in a lift accident in a hotel, stated:

“There was no requirement for the hotel to comply with British Safety Standards; there was no breach of local safety regulations and no negligence by the hotel management either in relation to the maintenance of the lift or in relation to safety procedures.”

What is significant in that observation is that whilst the court made reference to not judging the duty by reference to British safety standards, it went on to consider the question of negligence in relation to maintenance and safety procedures. The inference being that simple adherence to local safety regulations is not the end of the matter so far as determining the extent of the duty of care.

In *First Choice Holidays v Holden* [2006] EWHC 3775 QB, a claim was brought in relation to an accident alleged to have been caused by the Claimant slipping on a spilled drink on a flight of stairs in a Tunisian hotel. Goldring J. held on appeal from the County Court that *“It is for the Claimant to prove that the Defendant fell short of the standards applicable in Tunisia.”*

This case would seem to suggest that in respect of slipping/tripping accidents, it is for the Claimant to prove what the local standards are and that the accident resulted from a failure to adhere to those standards.

This issue next came before the Court of Appeal in the case of *Evans v Kosmar Villa Holidays* [2007] EWCA 1003 where the following observations were made:

“In the present case, there was no evidence to support the pleaded claim of non-compliance with local safety regulations and that way of putting the case was not pressed at trial. In my view, however, it was still open



*to the Claimant to pursue the claim on the other bases pleaded...What was said in *Wilson v Best* did not purport to be an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently the view taken in *Codd* where the court found there to be compliance with local safety regulations but nevertheless went on to consider other possible breaches of the duty of care.*

“Whilst on the face of it not easy, these apparently conflicting authorities can be reconciled, at least to some degree, by differentiating between those concerned with physical defects in the fabric of the buildings/fixtures and fittings and those which relate to either the provision of services (e.g. ski instruction) and/or the construction of buildings and their compliance or otherwise with local building regulations.”

This case comes down to the most general implied term that reasonable skill and care would be exercised in the provision of facilities and services at the complex.

*It is a correct approach, where a tour operator is under a contractual duty to supply facilities to a reasonable standard, that the principles to be applied are analogous to those in the *Occupiers Liability Act 1957*.”*

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The case of *Evans* was cited and followed with approval in the Northern Ireland High Court in the case of *Griffin v My Travel* [2009] NIQB 98. The judgement can be found on Lawtel and a perusal of the full reasoning is recommended.

It would appear from these latter cases that the courts were rowing back from insistence on the proof of failure to adhere to local regulations/standards and applying the common duty of care approach, at least in connection with actual defects in the premises as opposed to cases involving different standards of building construction. However, in a subsequent case in the Court of Appeal, *Gouldbourne v Balkan Holidays* [2010] EWCA 372, the issue has been further muddled by the following observation:

"It is a mistake to construe Wilson v Best as if it were a statute (see Evans v Kosmar). Nevertheless, it does identify a very important signpost to the correct approach to cases of this nature. To require such organisations to adopt a different standard of care for tourists of different nationalities is quite impractical."

It should be noted that the case of *Gouldbourne* was concerned with the applicable standards in connection with the provision of ski instruction in Bulgaria.

Whilst on the face of it not easy, these apparently conflicting authorities can be reconciled, at least to some degree, by differentiating between those concerned with physical defects in the fabric of the buildings/fixtures and fittings and those which relate to either the provision of services (e.g. ski instruction) and/or the construction of buildings and their compliance or otherwise with local building regulations. In respect of cases relating to defects, it is clearly arguable that there is no absolute requirement for a claimant to prove breach of local standards but may rely on the implied warranty to exercise reasonable skill and care in and about the provision of the services or facilities, the extent of such warranty being analogous to the common duty of care under the Occupiers Liability Act 1957. In the other class of cases, it would be prudent for a claimant to obtain and adduce expert evidence as to the local standards.

SIMON CHEVES



MATTHEW WILDISH

Matthew has been clerking since 1990; he joined Tanfield Chambers in 1998. He is a Qualified Member of the Institute of Barristers' Clerks. Married with three children, spare time is spent taxiing children between ballroom dancing, football and cricket! Matthew is a Football Association Qualified Coach and Referee.

WHAT'S NEW

DON'T FORGET the 10th edition of the **Judicial Studies Board guidelines** was published on 2nd September 2010

For further information or to instruct a barrister, please contact **Matthew Wildish**, Deputy Senior Clerk or **Kevin Moore**, Senior Clerk on +44 (0) 20 7421 5300 or clerks@tanfieldchambers.co.uk

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