[2017] TLQ 36

COURT OF APPEAL TAKES STRICT LINE ON LIABILITY FOR FOOD POISONING ON PACKAGE HOLIDAY

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The Court of Appeal handed down judgment on 16th January 2017 in in *Wood v TUI Travel Plc* [2017] EWCA Civ 11, the first appellate authority on the liability of travel companies for gastric illness caused by alleged food poisoning.

The issue in the case was whether, in a claim based upon gastric illness which is alleged to have been caused by consuming food at an all-inclusive restaurant, in particular a 'buffet', as part of an ordinary package holiday, it is enough for a claimant to establish that the food was contaminated by an illness-inducing pathogen, or whether he or she must go further and show that the contamination was itself caused by the failure of the defendant, its servants or suppliers (i.e. the foreign hotelier) to exercise reasonable skill and care.

This issue, in turn, depended upon whether or not the provision of food and drink as part of a package holiday can properly be characterised as a contract for the transfer of goods within the meaning of section 4 of the Supply of Goods and Services Act 1982 – in which case the implied contractual term is that the goods will be of 'satisfactory quality' – or whether provision of food is a service, in which case the implied term, pursuant to section 13, is only that reasonable skill and care will be used. The defendant conceded that it was possible to have contracts which included both the transfer of goods *and* services – indeed, this is expressly envisaged by section 1(3) of the Act – but argued that in the case of food and drink served as part of an all inclusive package – the contract is for the provision of services alone

On the facts of *Woods*, which were unremarkable, the judge at first instance found that the hotel's hygiene systems were of a sufficient standard that the claimant could not establish a failure to exercise reasonable skill and care. However, he held that the contamination of the food alone was enough, since the presence of a pathogen (even of unknown origin) rendered the food of unsatisfactory quality and therefore in breach of the term implied by section 4 of the 1982 Act.

In the Court of Appeal it was common ground that food which is contaminated with bacteria cannot sensibly be described as being of satisfactory quality. Similarly, Burnett LJ readily accepted that there was no inherent inconsistency between the judge's finding that the hygiene at the hotel was good but the food was nonetheless contaminated: "*there is little doubt that food might be contaminated without fault on the part of a restaurant or hotel".*

Accordingly, the battleground for the parties became simply whether or not the property in food at a restaurant was ever 'transferred' to the consumer at all. If it was not, the contract only comprised 'services' and the implied term was only fault-based. The defendant's argument, based in large part on the recent decision of the Supreme Court in *PST Energy 7 Shipping LLC v OW Bunker* (2016) AC 1034 – a shipping case – was deceptively simple: it was argued that there was no contract to transfer food and drink at all. Instead, all the tour operator did was to provide its customers with a licence to consume food and drink at the hotel's restaurant, whether a buffet or otherwise. The provision of the food up to the point of consumption was a service. When the food was consumed it was destroyed and property in it never passed. Accordingly there was no transfer of goods and no strict implied term requiring satisfactory quality

Most practitioners in the field would probably confess that this was not an argument which had ever unduly vexed them in practice. It has an air of unreality about which, as the Court of Appeal accepted, arose from a flawed analogy with a *sui generis* contract in a shipping case, the facts of which were far removed from the "*many thousands of customers who enjoyed breakfast, perhaps with orange juice, tea or coffee, in their hotels or guest houses every morning in this jurisdiction or the world over as part of their package holidays*".

Burnett LJ concluded that: "*In the absence of any express agreement to the contrary, when customers order a meal property in the meal passes to them when it is served. The same is true of a drink served by the establishment. That is so whether the transaction has no other components, for example in a restaurant or café, or the transaction provides other services, the most usual being accommodation".*

The defendant expressed concern to the Court that it should not "*become the guarantor of the quality of food and drink the world over when it is provided as part of the Holiday*". Burnett LJ held that these concerns were misplaced because, in effect, the need to prove causation, and in particular that the gastric illness was actually caused by contamination of

food rather than some other extraneous factor, provided sufficient protection to the tour operator. In comments which echo those made as long ago as 1997 in *Hoffman v Intasun,* he emphasised that "*it is well known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an accepted hazard of travel*". He also explained that it is never enough to invite a court to draw an inference from the fact that someone was sick and the task might provide difficult "*in the absence of evidence of others who had consumed the food being similarly afflicted*". Sir Brian Leveson went further, commenting that "*I agree that it will always be difficult (indeed very difficult) to prove that an illness is a consequence of food or drink which was not of satisfactory quality, unless there is cogent evidence that others have been similarly affected".*

It is submitted that in general terms these comments reflect sound common sense and are to be welcomed. They also largely represent established practice, with most practitioners on both sides of the court aware that cases can stand or fall on the quality of the causation evidence. However, the emphasis given to the evidential importance of other persons suffering gastric illness seems misplaced and disproportionate. Just as the court accepted that food can become contaminated without there being any fault, it is generally accepted that the absence of an 'outbreak' of illness, or even a pattern of recorded cases, is not *necessarily* strong evidence that the claimant's illness has an extraneous cause. The reasons are multifarious but include the notorious under-reporting of low grade gastric illness (and inaccurate reporting by hotels/tour operators), the variable impact that pathogens can have on persons of different ages and constitutions, even within a single holiday party (the young, old and those with pre-existing conditions being more vulnerable) and the fact that certain pathogens – in particular salmonella – can cause illness in small, isolated clusters (for example from a single batch of eggs), as was found to be the case in *Kempson v First Choice* (2007) Birmingham County Court.

Ultimately, it seems that despite a brave attempt by the defendant to change the law in this area, the status quo largely remains. Claimants have been given a firm reminder that they still bear the burden of proof, even if the contractual term is a strict one, and cases will

continue to be fought – and won or lost – on the question of medical causation, with experts of different disciplines assuming even greater importance than before.

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