CLARIFICATION OF TOUR OPERATOR LIABILITY FOR SICKNESS CLAIMS. WOOD AND WOOD v TUI TRAVEL PLC [2017]

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On the issue of food poisoning on holiday we now have a clear binding judgment from the Court of Appeal which provides clarity to the travel industry. This is following the suggestion that strict liability applied to all-inclusive holiday sickness claims (*Hutchinson and others v First Choice* [2006], *Kempson & Kempson v First Choice* [2007], and *Antcliffe and others v Thomas Cook* [2012]).

The case of *Wood and Wood v TUI* is very different to the huge wave of non-specific, unreported illness, solicitor-led claims being faced by the travel industry. In the case of *Wood*, the Bahia Principe Hotel in 2011 was subject to a large number of claims and complaints relating to sickness. Mr and Mrs Wood suffered a bacterial infection. It is important to note that Mr and Mrs Wood complained to the hotel of the gastroenteritis immediately whilst in the resort. Mr Wood was admitted to hospital whilst in the resort and was discharged three days later. He had a confirmed bacterial infection. Mrs Wood also became ill whilst in the resort, and it was never disputed between the parties that sickness had been suffered whilst on holiday.

Local standards

The defence presented to the court by the hotel was that the hotel had complied with local standards. The court accepted, having seen detailed evidence of the systems in place at the hotel and contemporaneous documentation that care had been taken to comply with high standards of food hygiene. The claimants failed to establish that the hotel was at fault pursuant to the 1992 Package Travel Regulations. The judge also concluded that the food might be contaminated without any fault on the part of the restaurant/hotel and in this circumstance it was likely that this was the case.

Supply of Goods and Services Act

The appeal did not, in any way, deal with the issue of causation of the couple's sickness, but simply dealt with whether the Supply of Goods and Services Act 1982 (the Act) applied to

the all-inclusive food provided; and if so, whether the implied condition in s 4(2) of the Act applied. Section 4(2) implies a condition into the contract that food would be of satisfactory quality. Clearly, food that is contaminated with bacteria would not be of satisfactory quality and liability would attach.

The judgment of the case dealt with whether a claim could successfully brought under the Act. If the supply of food was deemed to be a service, rather than goods, then the implied term would be that the service should be carried out with reasonable skill and care – similar to the standard developed by case law in claims brought under the Package Travel Regulations 1992. If the transfer of food was deemed to be goods then the implied term would be that the goods must be of 'satisfactory quality'. The sensible reasoning as set out in paragraphs 27 and 28 of the judgment is very clear. If customers order a meal, property in the meal transfers to them when it is served. The food and drink supplied to Mr and Mrs Wood in the hotel in the Dominican Republic were 'goods' and the food would therefore be transferred to them as 'property'. If food is contaminated with bacteria which causes severe illness, it could clearly not be described as being of satisfactory quality. Hence the claim succeeded.

Causation

This brings us back to the fact that the case of *Wood* involved a claim where causation of sickness was never in dispute. It was accepted by the hotel that Mr and Mrs Wood had suffered from a bacterial infection as a result of food provided by the hotel. This is in stark contrast to the position adopted by the majority of tour operators and hoteliers when faced with the overwhelming surge of sickness claims. These are characterised by being solicitor-led, isolated cases of non-specific gastric problems, with no objective medical evidence in support and simply a telephone interview repeating the claimants own assertions.

Where a customer suffers food poisoning caused by a known pathogen as part of a wider hotel outbreak, which points to the hotel being the source of infection, it is often sensible for the claim to be settled on best terms when no other causes are likely. However where causation is in dispute, the sickness claim needs to be carefully investigated, particularly where no pathogens are identified as being responsible for any illness.

Key points of the judgment

For tour operators dealing with such claims, clause 29 of the judgment of *Wood* is of great assistance. It makes it clear that strict liability does not apply to sickness claims. The Court of Appeal went on to say that in claims of this sort, i.e. holiday sickness claims, the claimant must:

1. Prove that the food or drink provided was the cause of their troubles
2. Prove that the food was 'not satisfactory'.

Those dealing with claims involving travellers' diarrhoea can take heart from the fact that the Court of Appeal considered the fact 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 proving liability for the purposes of the 1982 Act: "That is an accepted hazard of travel."

The Court of Appeal provides further assurance to tour operators in confirming that proving an episode of this sort was caused by food which was unfit, is far from easy:

"It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved and it might be difficult to prove that food or drink was not of satisfactory quality in the absence of evidence of others who had consumed the food had been similar afflicted."

Additionally, other potential causes of the illness would have to be considered. A vomiting virus, such as Norovirus, being an example. One would then use the helpful case of *Nolan and others v TUI UK Ltd* [2015] to seek to defend a claim.

Paragraph 30 makes it clear that, when defending food poisoning claims, the onus is going to be on the defendant and the hotel to demonstrate good standards of hygiene and monitoring of food, to minimise the chances of contamination.

Evidence of compliance

This reiterates the successful approach in *Nolan* and others whereby, upon provision of detailed evidence of compliance with food handling, cleanliness and hygiene regimes the defendant was able to successfully defend claims for Norovirus.

Similarly the Court of Appeal in *Swift and others v FCOL* [2016] has made it clear that there is no strict liability regime or counsel of perfection when it comes to deal with food poisoning claims. A kitchen will never always be spotlessly clean but what is required is detailed documentation and witness evidence to show good systems and a safety management system being adopted and enforced.

Hospital admission

The admittance of Mr Wood to hospital not only in the Dominican Republic but also in the United Kingdom is in stark contrast to many of the sickness claims we see today. Operators and hoteliers can take heart from the comments at paragraph 34 of the judgment, from Sir Brian Leveson who confirmed 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 a satisfactory quality unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded."

Comment

Our advice to tour operators is to ensure they have good systems in place, obtain evidence from the hotels and indeed their own staff, of the implementation of good systems, and look to challenge causation on claims brought where there is no objective evidence of bacterial or viral infection or contamination coming from the hotel.

This judgment is very much the type of support the industry needs, to seek to challenge the wave of non-specific isolated sickness claims being actively claim- farmed against tour operators.

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