

LOSS OF ENJOYMENT IN HOLIDAY CLAIMS – LOTTERY OR SCIENCE?

Claire Scargill

This article discusses the recent case of Milner v Carnival [2010] EWCA Civ 389, a Court of Appeal case which seems to have put limits on the amount of damages that can be claimed for distress and disappointment – or at least seems to have brought a modicum of certainty to this area of the law.

How much do you enjoy your holidays? Can you put a price on the enjoyment you receive? The holiday cost itself reflects the distance you have to travel, the standard of the accommodation and all the extras that go with it in terms of the meals and excursions that will be included but what is the value of the enjoyment you will receive?

In 1973, Swans Tours advertised a holiday in their brochure claiming, 'you will be in for a great time when you book this house party holiday.'

One recipient of that holiday, Mr Jarvis, claimed to have had a miserable time and sued Swans Tours for his failure to have the promised 'great time'. Mr Jarvis was successful. Whilst holiday companies now try to avoid detailing exactly how good a time a holidaymaker will have on one of its holidays, since *Jarvis v Swans Tours* [1973] 1 All ER 71 the courts recognise that holidays are taken to be enjoyed and therefore, should a breach of contract reduce the enjoyment which the holidaymaker was expecting to receive, damages to reflect this loss of enjoyment can be claimed.

For the 37 years that have followed *Jarvis*, putting a value on holiday enjoyment has been somewhat of a guessing game for the courts. The intangible nature of the damage has made its assessment unpredictable. How much one person will enjoy a holiday can be wildly different to how much another person enjoys that same

holiday. Similarly, any problems which arise on the holiday can affect different people in different ways. The crux of the issue is the expectation which was formed versus the extent to which that expectation was met. Expectation of course can vary greatly depending on the holiday-

maker's past experiences and current needs, wants and desires.

Part of the problem has been that the question as to how much enjoyment one expected to get from a holiday does not

usually arise until it has all gone horribly wrong. At that stage the claimant will claim that this holiday of a lifetime which has been several years in the planning has not provided any enjoyment whatsoever, when actually the run of the mill last-minute holiday to a destination visited several times previously by the claimant lived up to all expectations until the stickerless glass door or puddle of water on the shiny marble flooring on the last day of the holiday caused some minor injury (and embarrassment). The breach of contract itself, which may only have affected a small portion of the holiday, can fuel such disappointment that the, possibly unintentional, embellishments as to how much the holiday meant to the family/couple/group understandably flow in abundance. The enjoyment that was received is now lost in a cloud of anger and fury because of the clear balcony door which was invisible to the naked eye.

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How can the defending holiday company gauge or predict the loss of enjoyment damages that will be awarded and how can the claimant understand when a reasonable offer has been made? Save for asking the holidaymaker to detail prior to departure the exact purpose of the holiday and, on a scale of 1 to 10, to say how vital the holiday is to their emotional and psychological wellbeing, which can then be used post-incident as a tool for measuring any loss of enjoyment, it has been necessary to wait for the courts to add some long overdue certainty to this unpredictable head of damage.

Now however, parties have the case of *Milner v Carnival (t/a Cunard)* [2010] EWCA Civ 389 which has marked the way for more predictable loss of enjoyment damages in relation to holiday claims.

Mr and Mrs Milner, who were experienced cruisers, booked a 106 night cruise on the maiden voyage of the Queen Victoria for what the brochure promised would be a 'glamorous voyage' and 'the experience of a lifetime'. The Milners booked 18 months in advance in order to secure their preferred cabin which was a 'Princess' grade cabin, number 7083, located 'mid-ships' on the starboard side of deck 7. This central location was believed to be the best in terms of stability during rough seas.

The Milners paid £59,052 for the cruise (discounted by 10% from £65,558) which included travel, food, beverages and entertainment of the highest standard for the duration of the 15 week cruise. The couple were expecting star treatment. The cruise set sail from Southampton on 6 January 2008 heading for New York. From New York the liner headed to Los Angeles via the Panama Canal. The cruise then travelled to Honolulu bound for Australasia then onto Hong Kong, South-East Asia, India and onto the Mediterranean through the Suez Canal before docking back at Southampton.

The brochure promised the cruise would be the 'the experience of a lifetime'

Unfortunately the cruise was memorable for all the wrong reasons. On the first night the ship encountered stormy conditions with winds blowing at forces 7, 8 and 9. Waves reached 5-6 metres high which resulted in flexing 'mid-ships'. The Milners' cabin was damaged causing the floor plates to flex and vibrate. Two sleepless nights were suffered due to the resulting noise. On the third night the Milners were moved to an inside cabin, number 6083, which was of a lower standard and with fewer amenities than cabin 7083. This cabin also had no natural light. Once at New York the couple were moved to a suite, number 8090, which, whilst described as 'excellent' by Mr Milner, was only a temporary base as this had been booked from Los Angeles by other holidaymakers. This resulted in the Milner's, who were unable to unpack properly, feeling like travelling gypsies. In Los Angeles the Milners rejected a further move to a fourth cabin, number 7030, on the basis that it was not mid-ship, it lacked a bath and did not have suitable hanging space for Mrs Milner's 21 formal gowns, which were bought especially for the cruise. As a result of having to leave cabin 8090, they moved back to their original cabin at Los Angeles but further storms resulted in more noise and continued discomfort and distress. The Milners were provided with cabin 8080 which was available until Hawaii and were again offered cabin 7030 onwards from Hawaii. The Milners rejected 7030 for the reasons set out above and decided instead to disembark the ship in Hawaii after 28 days on board. The couple spent 6 weeks in Hawaii before joining the Queen Elizabeth back to Southampton at a cost of £13,440.

The defendant refunded the claimants with £48,270, which was the balance of the unused portion of the cruise (based upon the undiscounted price of the cruise). The claimants' outlay for the cruise was therefore £10,812. The claimants sued for £8,500 for diminution in

value; £50,000 for loss of enjoyment; and £4,300 reimbursement of the cost of the unused evening gowns and a £13,440 refund for their return cruise.

On 14 May 2009 at first instance in the Bradford County Court, Judge Shaun Spencer QC rejected the claim for the reimbursement of the return journey as the claimants had unreasonably rejected the alternative cabin number 7030 offered to them. However, the claimants were awarded £22,000, which was broken down into £2,500 each for diminution in value; £7,500 each for loss of enjoyment and £2,000 reimbursement for the unused evening gowns. The defendant appealed against the level of damages awarded.

On 20 April 2010, in the Court of Appeal, Lord Justice Ward began his judgment with the following statement:

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Ward LJ introduced 'brackets' for damages relating to loss of enjoyment which, whilst broad, will assist in predicting such damages in the future. The brackets are divided according to the type of holiday being enjoyed. The highest awards for loss of enjoyment would be for holidays involving weddings where the case law included cases where damages ranged from £4,360 to £4,406 per person. Next would be honeymoons where the range was from £321 to £1,890 per person. Special holidays ranged from £264 to £1,161 and finally, ordinary holidays where the range of awards was from £83 to £876 per person.

In this case, in terms of loss of enjoyment, the court agreed that expectations were understandably 'sky high'. Ward LJ agreed with Shaun Spencer QC's assessment that:

The nature of the description in the brochure as to what the cruise was going to be like is such as reasonably to give to the Milners and to anyone else who was embarking on the cruise, the feeling that they were in for the experience of a lifetime.

The brochure included details and descriptions as follows:

When Samuel Cunard set out to deliver mail across the Atlantic 167 years ago, he little realised he was taking the first step towards a new standard of luxury travel. Since then, Cunard has become a byword for comfort, style, and the ultimate in effortless exploration generation after generation. Today, the legendary Cunard Experience continues to exceed your expectations, with all its accomplished hallmarks, from the very first moment you step aboard.

Sleek, contemporary Queen Victoria embraces the most advanced technology and a host of luxurious innovations.

It was therefore agreed that this holiday was indeed a holiday of a lifetime and that the holiday had been effectively ruined. Ward LJ stated that the high expectations were not linked to the monetary value of the cruise but to the 'long awaited special and exceptional event'. The Milners booked 18 months in advance to specifically book their preferred cabin in the location of their choice and they were entitled to expect that it would be among the 'most spacious and sumptuous suites at sea'. It did not live up to their expectations.

Whilst Ward LJ was reluctant to 'tinker' with the previous judgment, he held that £7,500 each for loss of enjoyment was far too high. It was also

held that the package had been cancelled by agreement when the Milners disembarked and they were therefore not entitled to claim loss of enjoyment against the portion of the holiday not experienced i.e. days 29-106. Loss of enjoyment could only be measured against the 28 days actually on board. He awarded loss of enjoyment damages from the highest bracket and Mr Milner received £4,000 and Mrs Milner received £4,500.

In terms of diminution in value, it was held that in this case, in measuring the things that were not provided against the things that were provided in order to remedy the breach, i.e. an upgraded cabin at no extra cost, the value of the Milners' cruise was reduced by one third. However, rather than measuring the damages against the undiscounted holiday cost of £65,558 as held by the judge at first instance, Ward LJ held that the appropriate benchmark was the price actually paid, i.e. £10,812 for 28 days or £386 per day. £3,500 in total was awarded for diminution in value for both claimants bringing their total award to £12,000.

No damages were awarded for the out of pocket expenses as it was held that the cruise was terminated by agreement when the Milners unreasonably refused the offer of the alternative cabin number 7030. The inability to wear the gowns and the additional expenses incurred in

repatriation were deemed to have been accepted by the claimants when they disembarked in Hawaii. This loss therefore did not flow from the breach of contract.

It appears therefore, that following the *Milner* case, a measure *can* be placed upon the intangible emotion that is enjoyment, or more specifically, loss of that enjoyment, following breach of a holiday contract. Introducing guidelines creates a starting point for negotiations which ultimately could speed up settlements and reduce costs and the need for court time. Of course, the type of holiday experienced has to firstly be agreed in order to establish within which bracket the damages will fall and where negotiations should begin. This therefore invites arguments as to what type of holiday is deemed to be 'special' and what is simply

'ordinary'. Whilst New Years Eve and 50th birthdays are more than likely 'special', what of the 26th birthday or Easter holidays, divorce celebrations and other less significant events? As with overall enjoyment and expectations, how 'special' certain religious holidays or non- 'milestone' birthdays are to an individual will differ greatly between families and cultures. The claimant's verbal evidence will once again feature highly in determining this point and persuading the court that their experience warrants a higher award.

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