THE ASSESSMENT OF DAMAGES IN HOLIDAY CASES: THE IMPACT OF MILNER v CARNIVAL Plc

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In a recent appeal decision, Milner v Carnival Plc *[2010] 3 All ER 701, the Court of Appeal reviewed the assessment of damages in holiday cases, compared with the assessment of other heads of general damages. This article reviews the decision and explores its implications.*

The Claim before the Court at First Instance

On 19th June 2006 the claimants booked a cruise with the defendant. The cruise was unique in that it was the maiden round the world cruise of the Queen Victoria vessel, and was the first occasion on which the three Queen vessels (Elizabeth II, Mary II and Victoria) had been seen together, and as such attracted a premium price. Although the cost of the cruise was £65,558, the Milners obtained a 10% discount, and thus paid a total of £59,052.20 for the holiday. The vessel was to depart Southampton on 6th January 2008, to cruise around the world for 106 nights, and to return to Southampton on 22nd April 2008. During the voyage the couple were to be accommodated in cabin 7083, which is a Princess Grade cabin situated on deck 7, amidships on the starboard side. The importance of the position of the cabin to the claimants is illustrated by the fact that they refused a free upgrade to a superior cabin because its location could not be guaranteed. The significance of the location of the cabin amidships is that this is the area least affected by movement of the ship in poor weather.

The cruise attracted a premium price

Having booked the cruise the claimants anticipated it eagerly for a period of some 19 months. Mrs Milner purchased 21 formal gowns at a total cost of approximately £4,300 for use at the three or four formal dining nights per week throughout the cruise.

Unfortunately the convex metal floor plate in the Milners' room flexed loudly, particularly as the vessel reached open seas. As a result of the noise and vibration, the couple were unable to sleep, and notified the Purser's Office of the problem. After two sleepless nights, they were provided with alternative accommodation in the form of suite 6083, an inside cabin fitted for the disabled, with no natural light. Their luggage remained in suite 7083, so that it was necessary for them to move between cabins, sleeping in suite 6083 and dressing in suite 7083.

On 13th January the couple were moved to suite 8090, which was a satisfactory alternative to suite 7083. However, they were unsure of the period for which they would be able to stay in that suite, which disrupted their enjoyment of this portion of the cruise, and prevented them from unpacking. They felt unwell, and Mr Milner suffered from mouth ulcers and Mrs Milner from breathing problems. The ship's doctor diagnosed Mr Milner as suffering from stress related ulcers.

On 26th January the Milners were offered suite 7030 for the remainder of the voyage. Mr Milner acknowledged that this room was large, but said

that it did not have a bath and was fitted out for a disabled person, and therefore 'did not feel right'. There was also limited wardrobe space. Perhaps of primary significance, this cabin was not situated amidships. The Milners rejected it.

On 30th January the Milners moved out of suite 8090 to make way for the passengers who had originally booked it, and who joined the ship on that date. They returned to suite 7083, but the noise continued as before. They moved to suite 8080 on 31st January, another temporary solution, and remained there until 4th February, when they disembarked the Queen Victoria at Honolulu. They remained in Hawaii until 25th March, when they boarded the Queen Elizabeth II. The parties agreed that they would be compensated for the loss of the remainder of the cruise on a *per diem* basis (a total of £48,240), but that the cost of the return journey aboard the QE2 (£13,440) would be deducted from this compensation.

The brochure led readers to believe that the cruise would be the experience of a lifetime

The Judgment at First Instance

The trial judge made the following findings:

a) The claimants were genuine people;

b) The brochure led readers to believe that the cruise would be the experience of a lifetime;

c) Suite 7030 was forward of midships on the port side. It was larger than suite 7083;

d) There was hyperbole on both sides in relation to the disembarkation at Honolulu. Suites 7083 and 7030 were both unacceptable to the claimants and so they had to disembark;

e) With regard to the disembarkation, the parties agreed that the claimants would disembark, and would be compensated, with the amount of compensation to remain at large;

f) Cabin 7083 was not fit for sleeping in, so that a significant proportion of the package was not provided;

g) However, cabin 7030 was a suitable alternative, which the claimants unreasonably refused. Therefore they were not awarded any sum in respect of the cost of their return passage on the QE2;

h) He awarded the claimants £2,500 each in respect of diminution in value of the holiday; £7,500 each in respect of distress and disappointment, said by the defendant to have been characterised as 'platinum damages for a platinum cruise'; and £2,000 in respect of the wasted expenditure on gowns which were unlikely to be worn.

The Appeal

The Appellant appealed on the basis that:

a) The awards for distress and disappointment were excessive;

b) The awards for diminution in the value of the holiday were excessive;

c) Taken together, the awards for distress and diminution amount to double recovery; the expenditure wasted by the second claimant was wasted as a result of the claimants' disembarkation at Hawaii, for which she was compensated by agreement;

d) The second claimant's wasted expenditure was adequately compensated as part of the award for distress and disappointment.

In the skeleton argument filed on behalf of the Appellant it was said that the award made was manifestly excessive in comparison with similar cases. Two main points of principle were identified:

a) There was a risk of double recovery in the light of the overlap between damages for diminution in value and distress;

b) The award for distress should not take into account the amount paid for the holiday and therefore the concept of 'platinum damages for a platinum cruise' said to have been referred to by the trial judge was wrong.

The Judgment in the Court of Appeal

The Court of Appeal was referred to the decision in *Adcock v Blue Sky Holidays Ltd*, an unreported decision of the Court of Appeal dated 13th May 1980. In that case Cumming-Bruce LJ said:

> *Contracts for holidays vary on their facts very greatly. The facilities offered by the tour company vary enormously from case to case. It would be a grave mistake to look at the facts in, for example, the* Jackson *case or the* Jarvis *case and compare those facts with the facts in another case as a means of establishing the measure of damages.*

Those words of wisdom falling from Cumming-Bruce LJ were said by the Court to be 'salutary'. Nevertheless, the Court went on to consider whether it could offer any further general guidance to practitioners in this area.

Assessing the quantum of damages for inconvenience and distress

The Court considered that the factors to be considered in determining the appropriate award in respect of this head of loss include:

a) The type of holiday; so that a special occasion, such as a honeymoon, is likely to attract more damages than for an ordinary annual package holiday.

b) The nature of the breach; so that the sports fanatic denied his sporting facilities will suffer more disappointment than his wife who is perfectly happy on a sunbed by the side of a pool. Thus the features of the holiday which were regarded as the primary features will make a difference.

The search for comparability, they said, must extend beyond comparing one holiday with another. There must be some consistency with the level of damages awarded in other fields. They therefore undertook a review of the Judicial Studies Board guidance in relation to psychiatric injury, the leading cases in affront to feelings in the fields of sexual and racial discrimination, and bereavement damages under the Fatal Accidents Act 1976.

A special occasion, such as a honeymoon, is likely to attract more damages

In assessing damages under this head of loss, it is vital to compare the expectations raised by the defendant tour operator against the reality of the experience actually provided. In the Milners' case the expectations were 'sky high', said the Court. The cruise was advertised to be '… a legendary experience exceeding expectations' and an '… unprecedented event in Cunard's long and illustrious history'.

In summary, said Ward LJ, the Milners were promised and they expected 'star treatment' and an altogether infinitely more delightful experience than their previous cruise around the world. He therefore concluded that theirs was an exceptional case. 'The indisputable fact is that the holiday of a lifetime was ruined for them', he said. However, he went on to find that the award made at first instance could not be justified, being, as it was, out of line with the sums awarded in other holiday claims and with comparators in the other fields referred to above. He was therefore satisfied that the judge erred in awarding the claimants £7,500 and £9,500

respectively, in addition to £2,500 each for the diminution in value. Accordingly he substituted the sums of £4,000 and £4,500 for the sums awarded.

Assessing the quantum of damages for diminution in value of the holiday

The Court stressed that in assessing damages for diminution in the value of the holiday, it is essential to disregard *how the claimant may have felt* about the diminution in the service supplied, for therein lies the risk of a duplication of damages.

In assessing diminution in value it is appropriate to take an arithmetical approach, but then to step back from the resulting damages figure and to determine whether it is appropriate. Using this approach, the Court concluded that the value of the cruise was diminished by about one third when regard was had overall to that which was not provided balanced against that which was enjoyed. It therefore awarded Mr and Mrs Milner £3,500 under this head.

A spoilt holiday is not the end of the world

Conclusions

Prior to the decision of the Court of Appeal in *Milner*, County Courts throughout England and Wales were struggling to assess damages in holiday claims in a way which was consistent and proportionate. As a result of regional variations, it was extremely difficult for practitioners to advise their clients as to the likely value of their quality complaint cases. The Appellant in *Milner* invited the Court of Appeal to provide detailed guidance in the form of brackets relating to different types of claim, suggesting that figures be provided for wedding holidays, honeymoons, holidays of a lifetime and the like, as well as the more standard annual package holiday. The Court of Appeal did not accede to this invitation, feeling, perhaps understandably, that there is an infinite variety of holidays available and that every case must turn on its own facts.

Nevertheless, the Court was prepared to provide some guidance to the lower courts and to practitioners in this field. That guidance tends to decrease the sums to be awarded in holiday cases, not least because any comparison with claimants who have suffered a recognised psychiatric injury, or the bereavement associated with the death of a close relative or spouse, will cause a judge to come to the conclusion that a spoilt holiday is not the end of the world. It will now be rare indeed for a ruined holiday to attract an award in excess of £2,000, unless it falls into one of the exceptional categories of cases identified by Lord Justice Ward.

It is, furthermore, now absolutely clear that although awards for diminution in value are linked to the cost of the holiday, awards for loss of enjoyment are not. The two heads of loss are conceptually distinct and must be approached separately. First, one determines the proportion of the holiday spoiled by the breach complained of; then, an arithmetical calculation is made to determine the monetary value of that proportion. This provides the value of the claim for diminution in value. Secondly, a determination is made of the extent of the distress caused by the breach, and the financial value to be placed on this distress (bearing in mind awards made in other areas of the law and in other holiday claims). This figure is to be awarded in respect of loss of enjoyment. Third, however, the court must examine the resulting damages figure and decide whether it is either excessive or inadequate compensation for the breaches complained of. The total award may then be adjusted to render it appropriate.

The higher courts are unlikely to revisit the assessment of damages in holiday claims in the near future. All the guidance that can be given in

such a wide area has, it is thought, now been given. It is now for the County Courts to apply the principles set out in the judgment. Early indications are that they are doing so, and that as a result awards are decreasing, particularly in respect of diminution in value of the holiday. More care is also being taken to guard against double recovery in respect of the overlap between the two heads of loss, which was, historically, considerable, but which is now thought to be diminishing. In the author's opinion the Court of Appeal would be pleased to note that awards are becoming more consistent and predictable and that as a result it is easier for practitioners to advise their clients and therefore for meaningful and appropriate offers of settlement to be made at an early stage.

Awards are becoming more consistent and predictable

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