Personal injury / Travel

Safe trip?

Liability & legionnaires' disease, by **Matthew Chapman** & **Paul McClorry**

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IN BRIEF

- A departure from the conventional approach in relation to legionnaires' disease and food poisoning cases. Is there strict liability on the tour operator? Could this reduce the need to obtain local standards evidence.

Legionnaires' disease is a rare condition. Litigation arising out of the contraction of legionnaires' disease is rarer still. *Kemp & Kemp* has a section devoted to legionella: it contains just two cases (the more recent, a decision from 2006).

In January 2005, guidance was produced by the European Surveillance Scheme for Travel Associated Legionnaires' Disease (EWGLINET) and the European Working Group for Legionella Infections (EWGLI) on the risks associated with travel and hotel facilities where the use of complex water systems, an abundance of wet leisure facilities and, often, a high turnover of staff can result in legionella growth. EWGLINET published guidance on legionella prevention.

It is not uncommon for an overseas hotelier, faced with a legionnaires' disease claim brought against a tour operator, to show that reasonable efforts were made to comply with the EWGLINET guidance. In other words, tour operators generally wish—for obvious reasons—to defend legionella cases on the ground that reasonable care and skill was exercised in the maintenance of a hotel's water supply. Clearly, recourse to a fault-based standard of care potentially imports consideration of the local safety standard (often, the defendant tour operator's first and last line of defence) and all travel lawyers are familiar with the line of authority that starts with *Wilson v Best Travel Limited* [1993] 1 All ER 353 (QBD) and ends with *Gouldbourn v Balkan Holidays Limited* [2010] EWCA Civ 372, [2010] All ER (D) 135 (Mar) with excursions to *Codd v Thomson Tour Operators* (2000) Times, 20 October, *Holden v First Choice* (2006) QBD 22/5/2006, *Evans v Kosmar Villa Holidays* [2007] EWCA Civ 1003, [2008] 1 All ER 530 among other cases. However, do notions of fault and local safety standards have any relevance to legionella cases? Isn't this, like food poisoning holiday claims, an area where the liability regime—derived from the parties' contract—is strict, with the result that the only live issue at trial is one of causation?

The contractual framework

First, a recap of the conventional position in holiday illness cases. A breach of contract is required as the condition precedent for the extended liability provisions of reg 15 of the Package Travel, Package Holiday and Package Tour Regulations 1992 (SI 1992/3288) (the 1992 regs). If the relevant contractual term is qualified by a requirement for reasonable care and skill then the 1992 regs are, clearly and obviously, not a strict liability regime; proof (by the claimant) of causative negligence by defendant or hotelier will be needed (see, *Hone v Going Places Leisure Travel Limited* [2001] EWCA Civ 947, [2001] All ER (D) 102 (Jun)). The decision in *Hone* provides the basic liability framework by emphasising that, absent the express assumption of a higher standard of care, reasonable care and skill will be the applicable standard. One will often (although not always) find a like standard of care in the express terms that are set out in the defendant's booking conditions. As indicated above, negligence for these purposes is—according to some authority (cf. however, *Evans*) – usually determined according to local safety standards and practices (*Codd* and *Wilson*). Equally, it is usually a matter for the claimant to prove negligence according to this standard. Intuitively, however, it seems unlikely that the provision by a hotel of a water supply contaminated with legionella will comply with the standard of care reasonably to be expected in any part of the world and legionella control systems are, to a considerable extent, the subject of regulatory norms in the European destinations to which most UK tourists travel on holiday.

However, it is in the nature of the contractual obligations of the tour operator that one sees a departure from the conventional approach.

Implied terms & water supply

In *Hone* the Court of Appeal directed us to the package holiday contract. Regulation 15 of the 1992 regs does not create or contain a free-standing cause of action. Instead, the extended liability owed by the tour operator as a result of reg 15 is parasitic on the contractual obligations that the parties to the package holiday contract have either agreed or, one might add, that have been imposed on them by Parliament. In the absence of any specific contractual term to the contrary, the default position is that the contract requires the exercise of reasonable care and skill. In other words, the contractual framework is fault-based.

In recent years, claimant travel lawyers have fashioned a new approach to food poisoning claims in which it has been alleged

The legionella bacteria: the facts

- Legionnaires' disease is a pneumonia-like illness which results from exposure to the legionella bacteria.
- As many as 50 different species of the legionella bacteria have, as at present, been identified (of which the most common is legionella pneumophila).
- The incubation period for legionnaires' disease ranges from two to 19 days, although most people exhibit symptoms within 10 days of exposure. Typically, symptoms present rapidly.
- The legionella bacterium will not affect all of those exposed to it. In an outbreak of legionnaires' disease a tiny proportion, usually 1%-2% or less, of those exposed to the bacterium go on to develop the disease and to show symptoms. However, if someone is unfortunate enough to be infected with legionnaires' disease then the effects can be deadly.

that the defendant tour operator's obligation to provide food and drink as part of a package holiday contract (in which, in an all-inclusive or full/half board context, there is transfer of title to the food and drink which form part of the package holiday services) is strict: that is, a contractual obligation to ensure that the food/drinks which are the subject of the package holiday contract reach a "satisfactory" standard. The source for this contractual obligation is s 4(2) of the Supply of Goods and Services Act 1982. There is some support at first instance for this approach: in, for example, *Kempson & Kempson v First Choice Holidays & Flights Ltd* (unreported) (see also, Alex Pelling, *Food Poisoning* Int'l Travel L.J. 7 (2000), where a spirited case is made for the argument that the relevant implied term is the strict duty of care contained in s 4 of the Supply of Goods and Services Act 1982 (SGSA 1992).)

Section 4 of the SGSA 1992 materially provides as follows: "Implied terms about quality or fitness (1) Except as provided by this section and section 5 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods. (2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality. (2A) For the purposes of this section and section 5 below, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances."

Can this contractual obligation—the same as that now customarily relied on in food poisoning cases—be deployed in a *legionella* case? The water supply of an overseas hotel is, it is suggested, as much "goods" within the meaning of s 4 of SGSA 1982 as the food and drink supplied as part of the same contract (see, *Benjamin's Sale of Goods* (8th ed, 2010), para 1-087). Property in such goods passes as a result of the package holiday contract. Accordingly, if a claimant proves that he contracted legionnaires' disease as a result of his use of the hotel's water supply then:

(i) The water supply cannot—by definition—have been "satisfactory" (in the sense that it was unsafe); and

"If someone is unfortunate enough to be infected with legionnaires' disease then the effects can be deadly"

(ii) Any exercise of reasonable care and skill by the defendant and/or by its hotelier with respect to the control of legionella within the hotel water supply will be of limited, if any, relevance (the only relevance of such care may be its bearing on the causation issue: that is, whether exposure to the Hotel water supply, rather than some other source, was the cause of the infection. Clearly, the more care that is taken to maintain the hotel water supply and to eliminate the growth of legionella the less likely it is that the hotel—as opposed to some other water source—was the cause of infection/illness).

A recent case

In September/October 2006 a Mr Barnes travelled with his wife to Hurghada, Egypt. He contracted legionnaires' disease during the course of his holiday. He alleged that this resulted from exposure to the water supply at his all-inclusive hotel accommodation. The defendant was the tour operator for the package holiday. Barnes died just over two years after his holiday for reasons wholly unrelated to his legionnaires' disease infection. His widow pursued the claim against the defendant tour operator on his behalf. The proceedings were listed for a two day trial in the Manchester County Court in May 2011 and were tried by a recorder. Both parties relied on expert evidence that dealt with the liability and causation issues. There was consideration by the experts of breach of duty both insofar as it touched on the issue of causation (which issue occupied most of the time at trial), but also as it related to the question whether reasonable care and skill was exercised by the Egyptian hotelier in his maintenance of the water supply. The claimant's stance at trial was that the exercise of reasonable care and skill would not absolve the defendant of liability if it were proved that Barnes had contracted legionnaires' disease by reason of his use of or exposure to the hotel water supply. Ultimately, it was unnecessary for the trial judge to resolve this issue because, during the course of the trial, the defendant conceded that the contractual framework was, pursuant to s 4(2) of SGSA 1982, one of strict liability. The only issue remaining at trial was, therefore, causation and this was resolved in the claimant's favour. Liability was established.

Conclusion

It is unfortunate that there is, as yet, limited authority on the proper contractual framework for claims where the property in goods is passed as a result of the package holiday contract. However, it appears that a different approach is now being taken to food poisoning and to legionella claims. This is one area of package holiday personal injury law where liability may be strict and, therefore, where considerations of reasonableness and local safety standards have only the most limited, if any, role to play. NLJ

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