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Travel Law Briefing

Gastric Illness Claims

The Court of Appeal handed down judgment in ***Wood v TUI Travel PLC [2017] 1 Lloyd's Rep 322*** on 16th January 2017. It is the first appellate authority regarding the liability of travel companies for gastric illness caused by alleged food poisoning, and is one of the most important decisions for the industry in recent times. It is not too much of an exaggeration to say that all hell has broken loose in the months since the judgment was released. I have taken a moment to pause and reflect on the implications of the decision for the industry, and to consider what can be done about the exponential increase in claims we are experiencing as a result.

The issues

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, and in particular food served in 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 s.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 s.13, is only that reasonable skill and care will be used.

The Defendant had initially argued, perhaps surprisingly, that it was not possible to have a single contract which included both the transfer of goods *and* services. As the Court of Appeal noted, however, not only are such contracts commonplace in everyday life, but this is precisely what is envisaged by the mirror provisions in ss.1(3) and 12(3) of the Act:

"s.1(3) For the purposes of this Act…a contract is a contract for the transfer of goods whether or not services are also provided under the contract…
s.12(3)…a contract is contract for the supply of a service for the purposes of this Act whether or not goods as also - (a) transferred or to be transferred."

The point was conceded by the Defendant by the time of the appeal and instead the focus was whether the provision of food amounted to a transfer of goods or a provision of services.

The facts

The facts of the case were unremarkable. Mr and Mrs Wood suffered acute gastroenteritis whilst staying a hotel in the Dominican Republic as part of an all inclusive holiday organised by the Defendant. After hearing expert evidence, the judge at first instance found that the cause of the illness had been the consumption of contaminated food and drink at the hotel as part of the package. He was satisfied that the hotel's food hygiene systems were of a sufficient standard that the Claimants 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 s.4 of the 1982 Act.

Burnett LJ in the Court of Appeal 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"*.

Satisfactory quality

In the Court of Appeal it was common ground between the parties that food which is contaminated with illness-inducing bacteria cannot sensibly be described as being of satisfactory quality. However, Burnett LJ explicitly endorsed this approach, observing that whilst it would always be a question of fact, *"where food is contaminated with bacteria that causes severe illness it is difficult to imagine that it could be described as of satisfactory quality"*.

Does the emphasis on 'bacteria' causing 'severe illness' leave the door open for an argument that food or drink which causes short-lived, mild and self-limiting illness *is* of satisfactory quality, or that there are some circumstances in which parties must accept that food or water will simply not be free from potentially harmful pathogens?

There was no analysis in the court of appeal about the precise meaning of the concept of 'satisfactory quality'. However, it is important to recall that it has a specific statutory definition under s.4(2A), namely: *"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"*. Such circumstances can include, by virtue of s.18, "freedom from minor defects" and "safety".

It is well established that 'satisfactory quality' is an objective standard. The focus is on the general standard of quality which goods are required to reach, and not their fitness for any particular purpose: see *Jewson Ltd v Boyhan (2003) EWCA Civ 1030*.

It may be that there is scope for a defence to be mounted in these type of claims on the basis that, objectively, food which causes very mild illness by reason of an inherent risk, for example the risk posed by unpasteurised cheese or by wild meat or shellfish, is nevertheless of satisfactory quality within the meaning of the Act. This remains to be tested, however.

The nature of the contract

By virtue of the concession made by the parties, the battleground in the Court of Appeal became whether or not the property in food at a hotel 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 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*". He held that it made no difference that the food was presented as part of a buffet rather than served directly to the table.

This is a sensible and workable solution. As the Court of Appeal recognised, if the line between the provision of the service and the transfer of goods were drawn elsewhere, or there was no transfer at all, it would produce some surprising results. The 'real world' answer is obvious; property in food is transferred at the time it is served, or the customer serves himself.

Causation

Underlying the appeal, of course, was the Defendant's concern 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*". There is some force in this argument, not least because of the widely reported allegations concerning claims companies encouraging holiday makers to bring false illness

claims.
However, Burnett LJ held that these concerns were, at least as a matter of law, misplaced because 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. He noted 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 of proving causation would 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*".

This answer to the floodgates argument raised by the Defendant has proven unsatisfactory, however, at least in the short term. The number of food poisoning claims brought against tour operators has increased exponentially in recent months, with some tour operators reporting increases of 1000% or more. Whether the claims will succeed or not remains to be seen, but it has proven easy, indeed very easy, for Claimants to obtain expert evidence to the effect that their illness was due to the provision of contaminated food.

Further, the emphasis given by the Court of Appeal to the evidential importance of other persons suffering gastric illness is misconceived. 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* cogent evidence that the Claimant's illness has an extraneous cause. The reasons are multifarious but include the notorious under-reporting by guests of low grade gastric illness, inaccurate reporting by hotels and tour operators, the variable impact that pathogens can have on persons of different ages and constitutions, even within a single holiday party, and the fact that certain pathogens, and in particular salmonella, can cause illness in small, isolated clusters rather than large scale outbreaks.

The tour operators' response

Defendants, faced with a huge increase in claims, and with expert evidence establishing causation without, seemingly, any difficulty at all, are left with two options.

The first is to fight fire with fire. The author has been the recipient of a number of experts' reports produced by experts instructed on behalf of Defendants which seem to suggest that even in the face of a multipathogen outbreak of illness it is impossible for Claimants to prove that the food provided to them by the hotel was contaminated. These reports are, I suppose, a necessary evil; if the Claimants' experts come to conclusions seemingly on the basis of a hunch and no more, why should not the Defendants' experts? But, though these diametrically opposed experts' reports may be pleasantly reminiscent of the pre-CPR days when experts were expected to perform a hatchet job on the opposition's case, they are really not terribly helpful

to the court or to the parties. In the ever-humble opinion of the author, it would be far better for the Claimants' expert reports to set out fully and clearly just why it is said that the illness in question is likely to have been caused by contaminated food, *on the basis of the evidence in that particular case*; Defendant's experts should then produce a similarly tailor-made report which either rebuts or accepts that hypothesis.

The Second option open to the tour operators is to concentrate on the credibility of the Claimant(s). In a number of well-publicised cases reported in the media recently this approach has been spectacularly effective, with Facebook and other social media postings used against their authors to determinative effect. The disastrous outcome for the Claimant in question results in him or her being labelled a fraud, with adverse costs consequences which can be life-changing, and not in a good way. This in turn is intended to have a chilling effect on any would-be fraudsters who might consider the tour operators to be an easy source of post-holiday income. It is likely to deter a fair number of dishonest Claimants, although in the opinion of the author it may well deter well founded claims as well.

In truth, tour operators seem to be utilising all of the potential weapons at their disposal in every case, in some cases even refusing to honour settlement agreements on the basis that they intend to investigate whether or not each and every case against them is fraudulent, although whether they can continue to incur costs on this scale for very much longer must be questionable.

The statutory defences

The statutory defences in Regulation 15(2)(c) are often overlooked and rarely relied upon in practice, but may assume increasing importance following the decision in *Wood*. As a reminder, they provide that it will be a defence *even where damage has been caused by a failure to perform or improper performance of the contract*, for the Defendant to prove that the failures are due to:

Unusual and unforeseeable circumstances beyond the control of (the Defendant), the consequences of which could not have been avoided even if all due care had been exercised; or

An event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

The critical point is that the defences can operate even where there has been a breach of a strict term to provide goods of a satisfactory quality. That they *might* do so in an food poisoning case is consistent with Burnett LJ's observations that "*there is little doubt that food might be contaminated without fault on the part of a restaurant or hotel*". Accordingly, the provision of contaminated food is not inherently inconsistent with an argument that the contamination was caused by an event which a Defendant could not forestall, even with all due care.

Defendants should be under no illusion but that reliance upon the statutory defence will be an uphill struggle. In evidential terms, there is likely to be a significant difference between resisting a claim by a Claimant that there has been a failure to exercise reasonable care, and positively proving that the illness which the Claimant did suffer was caused by an identifiable event which could not have been prevented. However, there may be a small group of cases where this is possible, particularly if the pathogen can be identified and expert evidence is called about the probable source of it (for example in cases where it may have been transferred onto food by the hands of other guests, or because it was present in food which is intended to be served uncooked and from which, despite thorough washing and preparation, the pathogen could not be eliminated completely). It is anticipated that as battle lines are drawn between the respective sides of the disputes, arguments along these lines will become increasingly common in the future.

Conclusion

As all practitioners working in this field know, there has been a massive increase in food poisoning claims in the last few months, fuelled partly by claims management companies, some of whom are known to be using questionable methods to source their claims. A significant proportion of these Claimants are likely to be lying, but the precise numbers are unknown. The tour operators are fighting these claims tooth and nail, and experiencing substantial success in doing so, although the costs involved are wholly disproportionate to the value of the claims. It remains to be seen whether this alone will be enough to discourage dishonest Claimants, but present signs are encouraging. It is likely that the issues around causation and expert evidence will be tested in the Court of Appeal in the coming months and that a definitive answer will be provided to questions which are currently testing courts around the country.

By Sarah Prager