Evans v Kosmar Villa Holidays Limited
Queen's Bench Division
11-15 December 2006
HH Judge Thorn QC

The Claimant's Case

1. The Claimant (then aged 17) & 8 friends (all teenagers) went on a package holiday to Corfu based at the *Marina Beach* Apartments in Kavos between 16th. & 24th. August 2002. The holiday was supplied by the Defendant tour operator. On 22nd. August at about 3.30am the Claimant dived into the shallow end (pool depth of 1.00 meter, water depth approx. 0.80 meter) of the Apartment swimming pool probably hitting his head on the bottom. He sustained a comminuted fracture of the 5th. cervical vertebra as a result of which he is an incomplete tetraplaegic. The Claimant accepted that he dived and that he did so assuming from observations of others that it was alright to do so without first checking the water depth. For this he also accepted he would be held, in part (but appreciably), responsible for his own misfortune. Nonetheless, but for causative breaches of contractual duty on the part of the Defendant and its accommodation suppliers the accident would not have happened. This was an English holiday contract.

1.1 The pool was *de facto* open and it should not have been.
1.2 It was officially a "No Diving" pool, but diving was condoned.
1.3 The signage regarding opening hours and "No Diving" was inadequate – particularly for night time users.
1.4 There were no signs reminding users which was the shallow and which the deep end (1.7 meters).
1.5 The 2 depth markings were at best inadequate.

2. The contractual obligation on the Defendant is to the effect that reasonable skill and care will be exercised in the provision of package holiday facilities (including the accommodation and the pool that was an integral part of that accommodation). In broad terms:

2.1 The warning signs in place and supervision of this pool were simply not good enough.
2.2 Either taken individually or together the shortcomings were such that the Claimant was not reminded to avoid diving into this small, shallow pool at the time he most needed it.
2.3 He was likely to have heeded a reminder.

3. What reasonable care demands in this situation must balance the fact that this is *holiday* accommodation with the fact that *because* it is holiday accommodation the risk of accidents such as that which befell the Claimant is a notorious one, the risk of injury and the type of injury likely to result from pool accidents are both serious, and people (particularly youngsters) are likely to be behaving in a relaxed, even high-spirited fashion neglectful of their own safety. If the duty to exercise reasonable skill and care to protect young holidaymakers from known serious risks extends (as surely it must) to the provision of pool facilities that are adequately supervised and signed, then proven breaches of such a duty are likely to have causative potency save in cases of reckless conduct on the part of the tourist the duty is designed to protect. Reasonable and proper performance of the holiday contract required compliance with pool safety signage recommended by the FTO.

The Defendant's Case

4. The Claimant had deliberately executed a dive into water the depth of which he did not know (but which he could easily have discerned from his observations throughout his holiday). He did so in the middle of the night, in the dark and knowing that there was no supervision. He ignored 2 "No Diving" signs and 2 depth markings on the edge of the pool, as well as other warning signs at various points around the pool terrace. This was not a case involving any hidden or underwater hazard.

5. The sole cause of the accident was his own decision to dive and to take a known risk. In these circumstances the Defendant did not owe the Claimant any duty to warn him against the obvious or protect him from an obvious risk that he chose to take for himself. (e.g. *Ratcliffe v O'Connell; Donoghue v Folkstone Properties; Singh v Libra Holidays; Tomlinson v Congleton Borough Council*). Alternatively, the signs and warnings around and about the pool were reasonable.

The Judgment

Judgment was given for the Claimant subject to a deduction for contributory negligence of 50%. The regime provided by the *Package Travel Regulations 1992* made D liable for proper performance of the holiday contract. Proper performance meant that reasonable care had to be exercised in the provision of holiday facilities. Reasonable care required compliance with international pool safety standards of the type publicized by the Federation of Tour Operators which D's staff had admitted were standards of general application in Greek holiday accommodation provided as part of D's portfolio of properties. Those standards had not been complied with (as regards warnings, depth markings, safety signage and pool closure enforcement); had they been, the accident would not have occurred. The case was entirely different from the "Occupiers' Liability" cases cited on behalf of D. The duties owed by a tour operator or hotelier in circumstances where they sold package holidays as part of a business to people who were likely to be in relaxed and high spirits were entirely different (& of greater scope) to the sort of duties expected of the occupier of open land (e.g. lakes, quarries, mountains) which the public could visit in leisure time to engage in activities of their own choosing. This Claimant on the facts had been in the pool only once before the accident and did not know at the time of the accident that he was diving into the "shallow end", neither did the management of the pool give him any reason to think that he should not dive, or that the pool was in fact closed. This was *de facto* a 24 hour resort with a 24 hour pool and it was incumbent on its operators to comply with basic international safety requirements.

Permission to appeal was refused by the trial judge. Application has been renewed in the Court of Appeal.