THE DECISION OF THE COURT OF APPEAL IN HARRISON v JAGGED GLOBE – AT LAST, SOME GOOD NEWS FOR TOUR OPERATORS?

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The Court of Appeal has recently given judgment in the case of Harrison v Jagged Globe [2012] EWCA Civ 835. The long-awaited decision clarifies the circumstances in which tour operators will be liable for the actions of their overseas suppliers – and will come as welcome news for an industry in need of it.

The decision at first instance

The facts in *Harrison v Jagged Globe Limited*, unreported, 14th April 2011, were highly unusual, not least as a result of the involvement of a world-famous explorer. The parties agreed the following:

- In 2004 Sir Ranulph Fiennes contacted the defendant to request that it assist him with an assault on Everest;
- The defendant, a tour operator specialising in mountaineering expeditions, agreed to do so, and it was arranged that Sir Ranulph would undertake a two week intermediate training course in the Alps in the Summer of 2004, and thereafter an expedition to assist with acclimatisation and assessment of his reaction to altitude;
- The latter expedition was to be a private version of the Cotopaxi trip advertised in the defendant's brochure;
- Sir Ranulph was asked whether he wanted the defendant to provide him with a leader on the expedition, and he declined. However, he was provided with local guides, who were to assist with acclimatisation, altitude training and training in relevant climbing techniques;
- Sir Ranulph booked the Cotopaxi expedition, and invited the claimant to join him on it;
- The claimant subsequently booked the expedition and the party set out to Peru in October 2004;
- In order to obtain publicity and sponsorship for the Everest expedition Sir Ranulph and the defendant had arranged for an HBO film crew to film part of the expedition.

It was arranged that Sir Ranulph would undertake a two week training course

It appears that the footage obtained by the film crew was insufficiently interesting for Sir Ranulph's purposes, and at some point he asked the local guides to assist in staging a fall down a crevasse, and subsequent rescue. The claimant, perhaps unwisely, agreed to appear as the fallen mountaineer. On 21st October 2004 she undertook the staged fall. However, in attempting to jump across the crevasse, she fell and hit her head on the side of it. She then undertook a further staged fall, in the course of which she had great difficulty in getting out of the crevasse, her rope having become entangled with the rucksack she was wearing. The claimant contended that as a result of these incidents she suffered post concessional syndrome and a whiplash injury to her neck respectively. Uniquely in the experience of all involved, there was video and audio footage of both incidents. This showed that the

first staged fall was a chaotic affair, with a great deal of confusion around when and where the claimant should jump, whereas the second staged fall was much better managed.

The trial judge found that the provision of assistance with staged falls did not form part of the package, not having been within anyone's contemplation until 20th October 2004, well after the contract had been concluded. However, this was not determinative of the case. The guides provided by the defendant had assumed responsibility for the staged falls in agreeing to assist with them, and in doing so, had imposed a tortious duty on the defendant to provide this assistance with reasonable skill and care. The first staged fall had been badly managed and executed, and the defendant was therefore in breach of the duty owed to the claimant, albeit she herself was negligent in failing to question the guides more closely regarding the execution of the fall, and damages would be reduced by 40% accordingly. In relation to the second fall, however, she had accepted the risk of injury, which was obvious to her from the result of the first fall, and by operation of the principle *volenti non fit injuria* the defendant was not liable to her in respect of it.

The excursion had formed no part of the package holiday

The trial judge relied on the decision of the Court of Appeal in *Parker v TUI Limited* [2009] EWCA Civ 1261. In that case the court had recognised a duty owed by the defendant to Mrs Parker in respect of a tobogganing excursion she had booked whilst on holiday in Austria. The excursion had formed no part of the package holiday, and the trial judge had found that there was no contract between the claimant and TUI in relation to the toboggan run, because they only acted as intermediaries to bring Mrs Parker into a contractual relationship with the excursion provider. Lord Justice Longmore held that TUI were indeed acting only as intermediaries, putting their clients into a contractual relationship with the excursion provider and not assuming any contractual duties themselves. However, he went on to find that by accompanying the excursion the defendant's reps assumed a responsibility to their customers, and owed them a duty of care in tort. The only real question, he thought, was whether they had discharged that responsibility. On the evidence, he found that they had done so, and the appeal failed. However, in *Harrison* the trial judge found that the advice given to the claimant was erroneous, and the claim therefore succeeded.

The decision of the Court of Appeal

The defendant appealed, and on 29th May 2012 the appeal was heard by the Court of Appeal. The Court gave short shrift to the notion that the tour operator should be liable for the negligence of the local guides, when they were providing services not contracted for as part of the package. It was held that the tortious duty did not extend beyond the parameters of the contract. The claimant had not contracted with the defendant for the provision of staged falls, and so when the guides provided her with assistance with the falls, they were acting on their own behalf and not on behalf of the tour operator. In the circumstances, there was no way of imposing liability on the tour operator for the negligence of their sub-contractors, and the claim against the defendant tour operator must fail. The appeal was therefore allowed.

Reconciling *Parker* with *Harrison*

The two decisions of the Court of Appeal may appear, at first sight, to be contradictory. But they simply serve to illustrate the difference between the obligations owed by an employer and those owed by a contractor who sub-

contracts the provision of services to an independent sub-contractor. In *Parker* the tour operator would have been liable for any negligence on the part of its reps because it employed them, and was therefore vicariously liable for their actions and omissions. This was the case even where the holidaymaker had not contracted for the services provided as part of the package holiday (or even as a freestanding excursion contract). The position is very different where a tour operator deals with a local independent sub-contractor, such as a ski instructor or excursion provider. If it sub-contracts for the provision of services to a reputable person or company, so long as those services do not form part of the package, and so long as the tour operator has not contracted as agent for an undisclosed principal, it will not be liable for any 'casual', or non-systemic negligence on the part of the local provider. Furthermore, where a holidaymaker enters into a further arrangement with the local supplier for the provision of services outside those contracted for via the tour operator, his or her only recourse will be against that local supplier, almost certainly in that foreign jurisdiction and subject to local law as well as local standards.

The decision of the Court of Appeal in *Harrison* has been met with rejoicing on the part of the travel industry. Understandably tour operators do not see why they should be liable for the negligence of an independent sub-contractor in relation to services provided outside the package booked by the holidaymaker. However, the decision will not be welcomed by those representing injured tourists, who will now be left with no recourse save the unappetising prospect of litigating abroad under foreign law, with all the costs consequences, limitation issues and increased risk that that entails. It may be that more needs to be done to educate consumers in the difference between the protection afforded in cases arising out of package holidays, on one hand, and activities booked off-package, on the other. It is tentatively suggested that the forthcoming overhaul of the Package Travel Directive may be a good opportunity for the relevant parties to address this issue.

The decision will not be welcomed by those representing injured tourists

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