TATLA

TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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In April 2018 the Ministry of Justice published a new Pre-Action Protocol for the Resolution of Package Travel Claims. It governs all claims arising from gastric illness during package holidays where the letter of claim was sent after 7th May 2018 and the value of the claim does not exceed £25,000 on a full liability basis. At the same time, gastric illness claims have been brought within a stringent fixed costs regime. Many have predicted that these new provisions, coupled with the undeniable shift in the judicial attitude towards illness cases, sounds the death knell for the 'mass' market of claims in this area.

However, in spite of intense industry lobbying, the MoJ concluded that the case had not been made out for extending the protocol to other foreign accident claims. It specifically accepted the stance taken by APIL that "*an extension to include all types of package holiday PI claims represented a 'cure that goes much further than the identified malaise'*".

This edition of the TATLA newsletter therefore has something of a 'retro vibe', in that in considers a recent decision on an issue that used to vex practitioners on a daily basis: **local safety standards**, and in particular to what extent it is permissible rely on a report from a foreign lawyer rather than a more technical expert. Perhaps a sign of things to come…

<u>Thomas v Hays Tour Operating Limited</u>; 26-27th June 2018 – His Honour Judge Tindall – Birmingham County Court

Facts

1. The Claimant and his wife booked a Mediterranean cruise holiday with the Defendant tour operator. On the first night, before the cruise itself had started, they were accommodated in a Holiday Inn Hotel in the Italian City of Genoa. The Claimant had a complex pre-existing disability as a result of which he used a wheelchair, although he was able to mobilize over short distances with the aid of a walking stick.

2. It was the Claimant's case that he and his wife dropped their bags at the hotel and immediately left to explore Genoa before returning in the late evening. He entered the bathroom for the first time and slipped on what he described (in a contemporaneous accident report) as a greasy residue on the floor. It was alleged that the residue was, on the balance of probabilities, either left by previous guests and therefore should have been cleaned away by the hotel staff, or alternatively was itself a result of the cleaning process itself.

3. Liability was strictly denied. The defendant did not accept that the Claimant had slipped on any residue and asserted that it was more probable that the Claimant had fallen due to his disability.

4. The Hotel was joined as a Third Party and there was a dispute between the Defendant and the Hotel as to whether the latter was required to indemnify the former pursuant to Italian law in the event that the Claimant succeeded.

Factual findings

5. The judge accepted on the balance of probabilities that the claimant had slipped because of a greasy substance, not water, left on the floor. It was either not cleaned up properly by cleaners, or was a product that they had left behind.

Local safety standards

6. The issue of local safety standards was the major battleground in the case.

7. The Defendant relied in particular upon the observation of Tomlinson LJ in **Lougheed v On the Beach** (2014) EWCA Civ 1538, at page 13:

   "One would not expect to find locally promulgated regulations governing the frequency with which a hotel floor should be either cleaned or inspected for the presence of spillages on which guests might slip. The standards by which the hotel is to be judged in its performance of such tasks as are unregulated, or where regulations are supplemented by local practice or are recognised to be inadequate must necessarily, and on authority, be informed by local standards of care as applied by establishments of similar size and type."

8. The question arose as to what type of evidence was reasonably required in order to discharge the burden placed on the claimant to demonstrate a breach of the local standard.

9. The Defendant in the present case had called the Holiday Inn Hotel Manager to give evidence. She had appended to her

witness statement a CV which demonstrated that she had very extensive experience of working in a managerial position in similar Hotels throughout the region. In cross-examination, she accepted that she would not expect, and nor was it her experience, that cleaning staff would either leave slippery substances, whether by failing to clear them away, or by virtue of the products that they used. The judge noted that in Lougheed, whilst rejecting the attempt by the Claimant to 'plug the gap' in its own case (where it had no expert evidence at all) by relying on the evidence of the Defendant's witness, such evidence was held not *necessarily* irrelevant. He cited Tomlinson LJ's observation that:

"I would not however wish it to be thought that evidence of relevant local practice or standards can only be given by an expert witness called as such, or at any rate in the form of a report of an expert for the introduction of which evidence the permission of the court has been given. I agree…it is ordinarily preferable that evidence of these matters should be given in that way, not least because both the opponent party and the court has the protection and the reassurance of the standard form of declaration given by any person who seeks to give expert evidence. A Claimant who chooses not to adduce such evidence in a case of this sort does so at his peril. That is not however to say that the evidence could not in an appropriate case be given by an appropriately experienced and qualified individual who nonetheless did not put himself forward as professing expertise in the field. Because cases are infinitely various, and the exigencies of litigation unpredictable, I would not wish to be over-prescriptive

10. As the judge stated "Tomlinson LJ did not say that a hotel manager was not qualified to give that evidence of local practice (perhaps a better word than standards in the current 'unregulated' context): indeed one would have thought an experienced hotel manager who has worked at a number of similar hotels and was familiar with the range of cleaning practice and standards would be well-placed. Accordingly, he accepted that the evidence from the Holiday Inn manager was, whilst not necessarily sufficient by itself, cogent evidence of the applicable standard.

11. Each of the parties had also obtained expert evidence from an Italian Lawyer. As between the Defendant and the Third Party this was unsurprising: the Part 20 Claim for Contribution or Indemnity was governed by Italian Law as the Applicable Law. However, as between the Defendant and the Claimant it was argued that an Italian Lawyer was the wrong expert, since English law applied to the case and it was only Italian *standards, not local law* which were relevant.

12. The Claimant argued that the Defendant's stance was too simplistic and relied upon the following extract from Saggerson on Travel Law:

"It is incumbent on the claimant to establish breach of duty and so it may be argued that it is incumbent on the claimant to prove what local standards apply and the extent to which they have been broken. Does this mean that unless the claimant can establish the existence and breach of a specific local regulatory provision the claim will fail? The answer is an emphatic 'no'….the standards applicable to a service or facility in a foreign jurisdiction may be governed not

only by specific regulations of guidelines, but also by standards of general customary practice (what a reasonable hotelier would or would not do) which are derived from the local general law."

13. The judge carefully analyzed the content of the Italian lawyers' reports. The Claimant's expert – Mr Ceriani – gave the following evidence based upon the provisions of the Italian Civil Code which requires that "*everyone is liable for injuries caused by things in custody, unless he proves that the injuries were the result of a fortuitous event":*

"*"It is to be concluded that ensuring the cleaning of the room and the safety of the customers is a local standard duty (also contractual) the hotel manager/owner owes his clients. This duty is to be complied by adopting any reasonable measure. Including, in the given situation, the execution of cleaning operations with due diligence and avoiding to leave on the floor greasy or wet spots which are potentially posing a risk of slipping….*

From the outlined duties and from the criteria provided by Italian Legislation and case law to ascertain liabilities of custodians or premises and more specifically hoteliers towards guests, having regard to the ultimate purposes of the set liabilities, it can be inferred that the local standards require also to prevent and avoid risks of slipping by any, deemed reasonable in given circumstances, mean including by carrying out adequate cleaning to avoid the risk posed by the presence of a grease spot."

14. The judge, following the approach espoused in Saggerson, accepted that this was admissible and relevant evidence of the applicable local standard. His judgment on this issue is worth reproducing in full:

Whilst Mr Ceriani's conclusion is obviously based on Italian legal principle, he infers (in the absence of any suggestion of local safety regulations, which as Tomlinson LJ said in Lougheed p.13 is unlikely with cleaning up floors/spillages) that this feeds through into local standards of hoteliers as towards guests. I do not accept that evidence can only be given by an expert in health and safety as opposed to a lawyer – that has never been suggested previously in this case. In my judgment, this is entirely appropriate evidence on local standards, which is not gainsaid by either of the other experts who either focus entirely on law as with Mr Gravante, or start making speculative findings on the evidence which I reject, like Mr Grillo.

Moreover, Mr Ceriani's opinion on local standards makes sense. It would be very odd given the robust Italian Law reversing the burden of proof beyond Ward if it were not a breach of local standards for hotel cleaners through lack of due diligence (as I have found) to leave a floor greasy or wet causing a clear risk of slips and falls. Moreover, that opinion is consistent with the expert evidence of an experienced hotel manager in Ms Giardina. She has considerable experience in working at a number of similar quality hotels to the Genoa Holiday Inn (pgs.119-120), showed an awareness of local cleaning standards, and agreed it would never be acceptable for a cleaner to leave a bathroom floor in a greasy and slippery condition. However, unlike Lougheed, this is not a case of the Claimant seeking to fill a hole in his local standards evidence in cross-examination of a hotel manager having failed with a last-minute application to adduce standards

evidence. This is a case where the Claimant got expert evidence on Italian Law and standards, but the Defendant and Third Party did not, limiting their experts to Law, and then Hays tried to plug its own gap with engineering evidence before abandoning it. Mr Ceriani's evidence is consistent with the experience on the ground of Ms Giardina giving evidence not just about her own hotel as in Holden, but also hotels of a similar size and type: Lougheed at p.13"

15. The judgment represents something of a renaissance for a broad approach to local standards evidence, and demonstrates that notwithstanding the failure of the claim in Lougheed, it is not every case which requires 'technical' evidence. However, it is necessary to sound a clear note of caution: there will be very many cases in which a report from a lawyer is simply not sufficient. Cases concerning defects in hotel equipment, malfunctioning plumbing, the adequacy of lighting and the absence of handrails are but a few regularly encountered examples. It is only where the issue is truly 'unregulated' that recourse to a lawyer will be appropriate, and it will be always be necessary to ensure that the lawyer carefully focuses on how local legal norms *constitute* the applicable standard, rather than giving chapter and verse on the applicable foreign law.

A full copy of the Judgment is available on request.

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