Richard Paige discusses Holiday Sickness Scams

In the last couple of years there has been an explosion in the number of holiday sickness claims in the UK. It has reached epidemic proportions so rapidly that all the national newspapers have run stories about hotel owners, mostly in Mediterranean resorts, threatening to ban British holidaymakers. The stories have probably been exaggerated to sell papers and there is likely to be a degree of sabre-rattling from the hotel owners, but there is no doubt that it has become a significant problem for the British holiday industry, so much so that ABTA launched its "Stop Sickness Scams" campaign in June 2017 (https://abta.com/tips-and-latest/abta-campaigns/holiday-sickness).

The reasons for this upsurge in such claims is obvious – recent reforms to the recoverability of costs in whiplash claims have made those claims less lucrative for claims management companies and certain firms of solicitors; and holiday sickness claims are not subject to the regime of fixed recoverable costs that road traffic claims are; although that is likely to change shortly given the Government's announcement on 9th July 2017 (https://www.gov.uk/government/news/crackdown-on-fake-holiday-sickness-claims). Sadly, it is also a reflection of the culture in which we currently live, that many people are now prepared to make spurious compensation claims whenever a suitable opportunity presents itself.

In an effort to help the travel industry tackle this problem, Park Square Barristers will shortly be running a training day on "holiday sickness scams", drawing on over a decade's worth of experience as a leader in the field of defending civil insurance fraud. To whet the appetite, I will briefly review the judgment of the Court of Appeal in Wood v TUI Travel plc t/a First Choice [2017] EWCA Civ 11, the leading authority on holiday sickness claims, from earlier in the year.

Wood v TUI

Mr and Mrs Wood travelled to the Dominican Republic in 2011 for an all-inclusive holiday during which both fell ill with gastroenteritis. The trial judge found as a fact that the gastroenteritis was caused by the consumption of contaminated food or drink provided by the hotel at which they were staying.

The claims were primarily advanced under the Package Travel, Package Holidays and Package Tours Regulations 1992, but failed on that basis as the judge found that the Claimants had not established fault on the part of the hotel, as required by the Regulations.

The case was alternatively pleaded on the basis of a breach of the implied condition found in s. 4(2) of the Supply of Goods and Services Act 1982, that the food would be of "satisfactory quality". It was more or less accepted by all concerned that contaminated food could not be described as being of "satisfactory quality".

The case was argued in the Court of Appeal on the question of whether the supply of food in a buffet or restaurant amounted to a "supply of goods" (to which s. 4(2) applied) or a "supply of services" (to which ss. 12 and 13 applied). The distinction is an important one because the supply of services must be carried out with reasonable care and skill (s. 13) whereas no such standard is applied to the supply of goods – either they are of satisfactory quality or they are not.

Ultimately the Court of Appeal resolved the issue in favour of the Claimants, that the supply of food amounted to a supply of goods to which s. 4(2) applied. This, in effect, created a strict liability in cases of food poisoning from contaminated food – it will be no defence to argue that all reasonable care was taken in the preparation of the food. This will have wide ranging implications beyond the travel industry.

Although this was, undoubtedly, a blow to the travel industry and those defending such claims, the last three paragraphs of Burnett LJ's judgment more than compensate when he said:

- In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and that the food was not "satisfactory".
- 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.
- Proving that an episode of this sort was caused by food which was unfit is far from easy.
- It would not be enough to invite a court to draw an inference from the fact that someone was sick.
- Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted.
- Additionally, other potential causes of the illness would have to be considered such as a vomiting virus.

Of particular importance to the litigator is the clear statement that a Court cannot infer, merely from the presence of sickness, that it arose from contaminated food – it is for the Claimant to prove that it arose as a result of contaminated food.

Some might think that evidence of the hotel's levels of hygiene would be irrelevant because the Court held that it would be liable if the food was contaminated irrespective of the care that was taken in its preparation. Whilst, this would be correct when applying the legal test, it could not be further from the truth when considering the evidential standard. Burnett LJ went on to say in his judgment that "The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary."

Further support can also be gained from the judgment of Sir Brian Leveson when he said: "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 a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded."

In the absence of a stool sample test demonstrating bacterial infection, the judgments indicate that it will be very difficult for Claimants to prove their claims unless:

- others have been also been affected – it is difficult to foresee how a Claimant could legitimately gather the necessary evidence, in the absence of mass complaints in resort;
- other causes have been excluded – for example a vomiting virus. Again, this will present a Claimant with significant evidential difficulties.

Conclusion

When such cases are presented in Court it is important to ensure that the judge knows which party bears the legal and evidential burden – it is for the Claimant to prove that their sickness was caused by contaminated food; it is for the Claimant to prove that others were similarly afflicted; it is for the Claimant to prove that there was no other possible cause for the illness. In the absence of such proof the claim should fail, as the judge is not entitled to draw any inferences as to the cause of the sickness – the Claimant must prove it.

Profile

Richard Paige, having developed a successful practice in personal injury and clinical negligence, now specialises in civil insurance fraud. He was a founding member of the civil fraud team at Sovereign Chambers before the merger which formed Park Square Barristers. Richard is instructed by most of the country's leading firms specialising in civil insurance fraud and many of the UK's insurance companies.

If you would like to receive an invitation to the training day, please contact the civil clerks at PSQB:

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