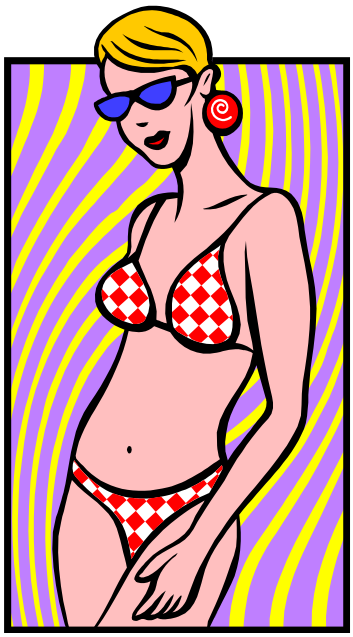
LOCAL STANDARDS IN HOLIDAY CLAIMS



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Back to basics…

By reason of the operation of Regulation 15(1) of the Package Travel, Package Holiday and Package Tours Regulations 1992 (SI 1992/3288):

"The [Defendant] is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by [the Defendant] or by other suppliers of services."

The standard by which the performance of the contract falls to be judged is not that by which it would be judged if it were located in England. Prior to the passage of the 1992 Regulations, the High Court considered a tour operator's duty under s.13 of the Supply of Goods and Services Act 1982 to carry out its obligations under the holiday contract with reasonable care and skill. In *Wilson v Best Travel Limited [1993] 1 All ER 353* Phillips J held:
"…there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another…the duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided that they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question…"

It is worth recalling the rationale behind the limitation of the tour operator's duty to compliance with local safety standards in that case: tour operators from many different countries send holidaymakers to many and varied destinations, at which standards on all manner of things will vary widely. It is therefore impossible to expect hoteliers and other suppliers to comply with all of the safety standards from all of the holidaymakers' home

nations. If any standard other than the local standard were to be imposed upon the foreign supplier, it would be necessary for it to comply with a number of standards, which might even conflict. This would be absurdly onerous.

It is for these reasons that Phillips J came to the conclusion that it is local standards that should be complied with in this context. This conclusion was upheld by the Court of Appeal in *Codd v Thomson Tour Operations Limited, The Times, 20th October 2000* following the entry into force of the Regulations. In that case the Claimant had been injured whilst trying to close the hinged door of a lift at the Spanish hotel at which he was staying. The hotel had maintained the lift appropriately, but had not displayed a warning notice, which would have been required under English standards but not under Spanish standards. Swinton Thomas LJ said this (at para.22 of the judgment):

"…Mr Griffiths then submits that the judge was in error in not applying the British standards to this particular lift in the hotel in Cala D'or with the result that there was a breach of duty according to English law. That is not a correct approach to a case such as this where an accident occurred in a foreign country. The law of this country is applied to the case as to the establishing of negligence, but there is no requirement that a hotel for example, in Majorca is obliged to comply with British Safety Standards: see Wilson v Best Travel Limited [1999] 1 All ER at 353…"

In *Holden v First Choice Holidays & Flights Limited, unreported, 22nd May 2006*, the next in time of the higher authorities dealing with this issue, Goldring J held that in cases such as this it is for the Claimant to prove that the supplier of services under the contract has failed to comply with local standards, and that (para.11D):

"…it does not seem to me that one can infer a local standard from what may well be a higher standard in a particular hotel or by a particular

company in particular circumstances. It is no substitute for evidence of what is local custom and what may be the local regulations…"

Confusion has arisen as a result of some *obiter* remarks made by Richards LJ in *Evans v Kosmar Villa Holidays Plc [2008] 1 WLR 297*. In that case the Claimant had dived into the shallow end of a swimming pool in Corfu, hitting his head on the bottom of it and sustaining serious injuries as a result. The pool was not safe for diving and the 'no diving' signs were not prominently displayed. The trial judge found the tour operator liable, but with a deduction of 50% on account of contributory negligence. The tour operator appealed, and was successful on the ground that there was no duty to warn of an obvious risk of which the Claimant was or ought to have been aware (paras.28, 41).

In the course of his judgment (at para.23) Richards LJ held that *Wilson v Best Travel Limited [1993] 1 All ER 353* remains good law, and that Claimants must show that the accommodation complained of breached local, rather than English, safety standards. However, he went on to say (at para.24):

"…What was said in Wilson v Best Travel Ltd did not purport to be an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently also the view taken in Codd, where the court found there to be compliance with local safety regulations but nevertheless went on to consider other possible breaches of the duty of care…"

"…If there was a duty to exercise reasonable care to guard against what the claimant did in this case, then in my view the judge was entitled to find a breach of duty. It was open to him accept the evidence of the claimant's expert, Mr Boydell, as to the deficiencies of the signage, and to find non-compliance with the FTO guidance; and his conclusion that there

was a failure to exercise reasonable care, in particular as to the prominence of the "no diving" signage around the pool, is not one with which there is any reason to interfere…"

These remarks have given rise to some difficulty in this area of law. Some Claimants have sought to rely on them as an indication that as well as a duty to comply with local safety standards, the tour operator also owes a free-standing duty to exercise reasonable skill and care generally in the provision of facilities, which duty is to be considered by reference to English standards. However, those acting for tour operators contend that they mean no more than that a tour operator may also be liable where, for example, in its terms and conditions it accepts a more onerous duty, where international safety standards apply to a particular activity (such as food preparation or skiing), or where it knows or ought to be aware of a particular hazard at the hotel. If, for example, local standards do not require the provision of lifeguards at a water park, but the tour operator is aware that there have been 50 accidents at the park in the last six months, it might be arguable that it owes its customers a duty in respect of safety at the park which goes beyond the local standard.

The confusion has been augmented by the decision of the High Court of Justice of Northern Ireland in *Griffin v MyTravel UK Limited [2009] NIQB 98*. The Claimant in that case had been staying at a hotel in Rhodes. On the third day of his holiday he had drawn back his bedcovers with the intention of going to bed, when the bed collapsed, causing an injury to his right foot. McCloskey J found (para.27) that from time to time the chambermaid ought to have checked the fastening mechanism by which the headboard was attached to the bed; the failure to do so was a breach of duty which caused the accident.

More recently in the English jurisdiction, Leveson LJ, in *Gouldbourn v Balkan Holidays Limited (2010) 154(11) SJLB 30* summarised the position and set out the approach to be taken in cases of this nature (paras.19 and 20):

"…It is a mistake to seek to construe the judgment of Phillips J as if it was a statute: see the observations of Richards LJ in Evans v Kosmar Villa Holidays PLC[2008] 1 WLR 297 at para 224 page 3068 to the effect that the case did not purport to be an exhaustive statement of the duty of care. Nevertheless it does identify a very important signpost to the correct approach to cases of this nature, which will inevitably impact on the way in which organisations from different countries provide services to UK tourists. To require such organisations to adopt a different standard of care for different tourists is quite impracticable. What might be required for American tourists may well be different to that required by a French or Western European tourist, itself different to that required by a Japanese tourist. Neither do I consider that the Regulations impose a duty on English tour operators to require a standard of care to be judged by UK criteria or necessarily western European criteria.

In my judgment the reference to "uniform international regulations" is intended to do no more than include into any assessment of the standard of care those standards which the relevant country has accepted and adopted…"

Eldridge v TUI UK Ltd, 16th December 2010, Birmingham County Court was a case directly concerned with the nature of the contract between the consumer and the tour operator. A group of 57 consumers stayed at a Majorcan hotel between June and September 2003. The Defendant was the tour operator for their package holidays. A number of the consumers contracted cryptosporidium and it was their case that the hotel swimming pool was to blame. The Claimants sought to rely on the absolute Spanish

law duty to keep swimming pools free of pathogens. It was their case that their (English) contract with the Defendant tour operator incorporated the strict Spanish obligation.

The Defendant's case was that it was contractually obliged only to exercise reasonable care and skill (it also challenged the absolute nature of the Spanish law obligation, although it failed to support its challenge with expert evidence and the Judge concluded that, 'the rules in Spain at the material time provided that hotel swimming pools were to be kept free of cryptosporidium'.) In considering the nature of the contractual obligations assumed by the Defendant the trial Judge directed himself, by reference to *Hone v Going Places*, that the Defendant was able – in its brochure booking conditions – to make express promises (for example, 'there is a swimming pool') and to accept absolute obligations. In determining whether such promises had been made or obligations accepted it was necessary to have regard to the proper meaning of the contract (applying conventional (English law) principles of interpretation).

This analysis took the judge back to the Defendant's booking conditions and, in particular, a clause which read as follows, *'We have taken all reasonable care to make sure that all the services which make up the holidays advertised in this brochure or which form excursions available from our representatives, are provided by efficient and reputable businesses who* ***should follow the local and national laws and Regulations of the country where they are provided****.* [emphasis added]' The judge concluded that, on a proper interpretation, the Defendant tour operator had, by its booking conditions, accepted the absolute obligation contained in Spanish law. The Defendant was bound by its English law contract with the consumer to provide a swimming pool that was free of pathogens (as required by Spanish law). For good measure, the trial Judge also found that the standards of reasonable care provided by the package holiday contract were those required by the local (absolute) rules (in other

words, quite apart from the express acceptance of local law, the standard of care was determined by the local safety framework which was absolute in nature).

On the other hand, *Wright v TUI UK Ltd*, *2nd February 2011, Birmingham County Court* concerned a Claimant consumer who fell from a floating jetty owned by his Egyptian hotel and provided by the hotel for the use of its guests. The Defendant was the tour operator for the Claimant's package holiday. The Claimant fell from the jetty when it was detached from its moorings by members of the hotel staff for the purposes of maintenance work. The Claimant was successful at trial in establishing liability on the part of the tour operator and he did so on the conventional basis that reasonable care and skill had not, by reference to a local general standard of reasonableness, been exercised.

However, the Claimant had also attempted an alternative argument. He sought to rely on article 178 of the Egyptian Civil Code which, it was argued, imposed a quasi-strict liability on the person with control of an object which required special care or supervision (the jetty). The Defendant tour operator's booking conditions contained a clause that was identical to that considered by the Court in *Eldridge v TUI* (unsurprising given that the same tour operator was sued by the consumer in both cases). The Claimant argued that he was entitled, by reason of the booking conditions, to rely on the quasi-strict liability provision in the Egyptian Civil Code. In other words, it was the Claimant's case that the booking conditions – as a matter of contract – incorporated local law (not just local standards). While the Claimant was successful at trial (on conventional grounds), the trial judge rejected the argument that the Egyptian Civil Code provision was of relevance. *Eldridge v TUI* was distinguished on the ground that the local enactment in that case concerned a regulatory requirement (that swimming pool water be free of pathogens), whereas article 178 of the Egyptian Civil

Code was a local *liability* law and, as such, irrelevant to the Court's consideration.

The decision in *Wright v TUI* may be regarded as somewhat problematic. The Claimant was not arguing that – *absent the contract* – he was entitled to rely on local law. Instead, as a matter of the proper interpretation of his English (package) contract with the Defendant, he argued that he was entitled to rely on a provision of Egyptian law (a position that was consistent with the decision at first instance *Eldridge v TUI*). To the extent that the trial judge in *Wright v TUI* drew a distinction between a specific regulatory provision (as was present in *Eldridge*) and a more general liability provision (as in *Wright*) one wonders whether the distinction can be justified by reference to the parties' contract.

Recent caselaw

Japp v Virgin Holidays [2013] EWCA Civ 1371

The Japp family went on a package holiday to Barbados. Mrs Japp's room had a balcony accessed by sliding glass door. During the holiday, Mrs Japp went onto the balcony. She closed the door behind her as the air conditioning was on. The telephone rang, and Mrs Japp rushed back into the room to answer, walked straight through the closed glass door, and sustained very nasty injuries.

It was common ground that the glass in the door was ¼ inch annealed float glass, and not safety glass.

The first argument related to the local standard for glass sliding doors in Barbados. Both sides called expert evidence.

It was common ground that the Barbados National Standards Institution (the local equivalent of British Standards) had published the Barbados National Building Code in 1993, the year before the door in question was installed.

This described itself as setting out "essential minimum provisions" in respect of health and amenity in the public interest. The Code specified that doors such as this should be fitted with safety glass. It was also common ground that the Code was not legally binding, although the Barbadian government had expressed the intention to make it so.

The expert evidence called by the Claimant was that the custom and practice was to comply with the Code. The Defendant's evidence was that the main local supplier continued to supply doors that were not fitted with safety glass and that these continued to be in common use in Barbados notwithstanding the Code.

The trial judge held that that the Code did set out the relevant local standard which was applied on the ground. But he also made a very useful observation about the status of a non-binding recommendation such as the Code. Interestingly, when the leading case of *Wilson v Best Travel Ltd* [1993] 1 ALL ER 353 was decided the position in the UK was that non-binding British Standards specified safety glass for such positions, but there was no building regulation to that effect. Phillips J considered it was "at least arguable" that the hotel would have been in breach of the Occupiers' Liability Act 1957 had the accident occurred in the UK. In *Japp* the judge considered that the dangers of safety glass had been known for many years, and that the hotel either knew or ought to have known of these dangers and of the provisions of the Code.

The complication in the case is that the trial judge held that the relevant date to consider the door against the local standard was the date of the accident, not the date of installation (although he later stated that he considered there was a breach of duty at the time of installation and at the time of the accident).

The Court of Appeal rejected this analysis, and confirmed that the relevant date for consideration of the local standard was the date at which the door was installed – unless the relevant local regulation provided for it to have retrospective effect.

However, notwithstanding this finding, the appeal failed on the basis that the Building Code had been mandatory even at the time of installation, and that its provisions had been breached at that time.

Russell v Thomas Cook, 2012, Birmingham County Court

The Russell family took their 4 year old daughter (the Claimant) on her (and the family's) first ever holiday together to a hotel in Spain. At the time the holiday was booked the Claimant's parents made it clear that they were not seasoned travellers and specifically requested accommodation which was suitable for young children. They were duly reassured and, with their minds at ease, off they went.

The family was allocated a room with a glass balcony door. Shortly after arrival, as her parents were unpacking, the Claimant ran towards the door. She failed to realise that it was still shut and collided with it. The glass was only 5mm thin and was not reinforced with any kind of safety film or wiring. It shattered into large jagged pieces and caused serious injury.

The Claimant pursued a claim against her tour operator pursuant to the Package Travel (etc) Regulations 1992. There were two primary arguments. The first was that the thickness and nature of the glass did not comply with applicable local safety regulations or standards in Spain. The second was that, irrespective of local safety standards, there had been a breach of what is commonly known as "the second Limb of *Wilson v Best Travel*."

HELD:

The Claimant was successful in establishing liability under both heads of her argument. The first issue involved the resolution of competing expert architectural/engineering evidence and is of limited application beyond the specific facts of the case. The second issue is worthy of further consideration, however.

The second limb of *Wilson* is encapsulated in the following passage from Phillips J's (as he then was) judgment: "The duty of care of a tour operator is likely to extend to checking that local safety regulations are complied

with. Provided that they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question."

There have been very few, if any, reported cases in which the Courts have applied this part of the judgment in *Wilson*, perhaps because it is not easy to envisage a situation where the relevant feature of the foreign hotel is so dangerous or worrisome that a holidaymaker would choose not to go there at all. In *Wilson* itself, the adult Claimant also collided with a glass door which did not have any safety features, but the judge was not persuaded that this would have dissuaded him from travelling to Greece.

In *Russell* the key difference was the Claimant's very young age and the particular circumstances of the family. The Court found that a reasonable holidaymaker in their position, having been specifically reassured that the room was suitable for a young family, should have been told that the glass was not safety glass and was very thin. It was foreseeable that young children would run around and bump into objects and it was not surprising that the family had sought reassurance in what was their first trip abroad. The judge accepted that, had they been given an appropriate warning, they would not have chosen to stay in this particular hotel at all.

The decision is a salutary one for both Claimants and Defendants. It serves as a reminder that, whilst compliance or non-compliance with local safety standards often provides the touchstone of liability, there remain a small number of cases which may nonetheless be decided by reference to broader considerations of universal or irreducible safety standards in the specific factual circumstances.

res ipsa loquitur

Bramley v Virgin Holidays, 25th May 2012, Ilford County Court

The two Claimants, both children, travelled to Florida with their parents on a 14 night regulated package holiday sold and organised by the Defendant tour operator. They arrived at Orlando airport, collected their rental car and drove immediately to the hotel.

During the course of the first week of the holiday the Claimants' parents noted that they were receiving a number of insect bites which were scattered across their bodies. They assumed that these were caused by mosquitoes and were advised by a local pharmacist to use anti-histamines. On an evening towards the end of the holiday the parents walked into the Claimants' bedroom to find their children, and their beds, crawling with numerous insects. They were covered with large red bites and in considerable distress. There were so many insects that the parents were able to capture specimens to provide to the local hospital, which confirmed that they were bed-bugs.

The claim was brought against the Defendant under Regulation 15 of the Package Travel (etc) Regulations 1992. The Defendant did not adduce any witness or documentary evidence from the hotel itself pertaining to bed-bugs or pest management. The only documents from the hotel were ordinary housekeeping sheets which confirmed that rooms were cleaned on a daily basis.

The Defendant's case was that it was for the Claimant to prove that the bites had been caused by the negligence of the hotel and that there was no evidence to support this allegation. There was no evidence of any previous or subsequent problems at the hotel and the Claimants' parents had not reported the bites to the Hotel staff until the end of the holiday when the situation escalated. The Defendant relied upon documentation drawn from the internet and elsewhere which suggested that the bedbugs were difficult to identify and to treat, and could be transported on luggage and clothing. It argued that it was for the Claimants to prove that they had not brought the bugs into the room in the first place.

HELD:

It was held that this was a case where *res ipsa loquitur* applied. The doctrine was triggered when there was something within the management or control of the Defendant (here, the hotel room and its condition) and an event occurs which calls for an explanation because it is more consistent with a failure properly to perform contractual or tortious duties than with the exercise of reasonable skill and care (the presence of an infestation of insects in the room). The doctrine was designed to achieve justice and fairness where the precise cause or mechanism of the event was not and could not be known to the Claimant (how the bed bugs came to be in the room) but where it was open to the Defendant to adduce evidence that it took reasonable skill and care to address the problem.

The judge applied the principle set out in *Moore v R Fox* [1956] 1 QB 596 that where *res ipsa loquitur* applies, the evidential burden on the Defendant is not discharged by suggesting several hypothetical causes or explanations which are or might be consistent with the absence of negligence. The Defendant must go further and show that they were not negligent or to give an explanation, based on evidence, that their behaviour was not consistent with negligence. Since the Defendant had failed to produce any documents or witness statements from the hotel which actually pertained to the issue of bed-bugs or pest management, it could not discharge the burden cast upon it and the claims succeeded.

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