Claims for gastric illness contracted during the course of a foreign holiday

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What is the cause of the illness?

1. In most gastric illness claims **causation** is the critical issue because it will be determinative of whether:

    a. The illness was viral or bacterial. The distinction between the two is that in *most* (although not all) cases of viral illness, the standard of care will be fault-based rather than strict.

    b. If the illness came from consuming contaminated food, that food formed part of the holiday contract for which the Defendnat is liable.

Viral or bacterial?

Beware semantics

2. In scientific terms, there is a clear distinction between bacteria and viruses. Bacteria are single-celled microorganisms that thrive in many different types of environments including extreme heat and cold, radioactive waste, and the human body. By contrast viruses are even tinier: the largest of them are smaller than the smallest bacteria. All they have is a protein coat and a core of genetic material, either RNA or DNA. Unlike bacteria, viruses can't survive without a living host.

3. However, the terms ‘viral’ and ‘bacterial’ are used very loosely by lawyers practising in the field of travel litigation. They have become convenient short-hand for distinguishing between gastric illness caused by the consumption of food (mainly bacterial) or illness caused by the spread of an airborne or other contagion from person to person without the involvement of food (viral). The reason that this distinction must be treated with caution is that it is perfectly possible for food to become contaminated with the same viral pathogen which has spread from person to person. If this has occurred, and the evidence establishes that it is the most probable scenario (i.e. virally contamined *food*), then the Defendant is in no better position (in

terms of the standard of liability) than if the food had been contaminated with a bacterial pathogen from a different source.

4. In reality, the position is infinitely more complicated because a number of frequently encountered gastric illnesses suffered by holidaymakers abroad are caused by a range of other microorganisms which are neither bacteria nor viruses. A good example is giardia, a water-borne 'protozoa' which is caused by, inter alia, faecal contamination of swimming pools. In this situation, despite the 'contamination' of the water, liability is almost certainly fault-based because there is no transfer of goods (see below) and the focus is on the systems in place for filtering and chlorinating the swimming pool water.

Identifying the pathogen

5. In some cases the Claimants will have provided stool samples, either abroad or upon their return to the UK, which test positive for named pathogens. If this is the case any ambiguity is removed and the analysis can proceed to the question of the source of the pathogen (i.e. was it from food/drink or airborne, and if food, was it consumed at the hotel?).

6. In the majority of cases there is no confirmed pathogen, however. This is where expert evidence becomes critical. It is important to note that a consultant gastroenterologist is likely to be instructed to comment upon the gastric illness itself (for quantum purposes), but not all such experts are either comfortable, or consider themselves qualified, to give evidence on the probable pathogen involved. If the gastroenterologist is unable to address the issue, it will normally be necessary to instruct a microbiologist in addition.

7. Not infrequently the expert has relatively little information to go on. Indeed they may, ultimately, not be able to pin the likely pathogen down to a single candidate. However, the critical question will often be (for the reasons set out above) whether the pathogen was viral or bacterial. Evidential clues which point one way or another may be:

a. The nature of the claimant's symptoms. In very broad terms, vomiting tends to be associated with viral illness, whereas diarrhoea occurs in bacterial infection. Similarly, blood in stools is more often encountered with bacterial infection, but the reality is that both types of pathogen produce symptoms which mimic each other.

b. Incubation periods. Most pathogens have known incubation periods. By establishing when the claimant first developed symptoms and working back to the date that they arrived in the foreign country, the expert can determine whether the likely incubation period is consistent with certain types of pathogens.

c. The Claimant's evidence about hygiene levels at the hotel; if the evidence (which will of course ultimately have to be assessed by the court) suggests that there were obvious deficiencies in food hygiene standards (for example staff not using gloves to handle food) the expert may be prepared to conclude that certain pathogens are likely to have been involved since they are known to be transferred in certain ways (e.g. the faecal-oral route).

d. Evidence about outbreaks of illness in the wider resort or community. In some cases the Claimant's illness will be one amongst many. If there is a public health warning affecting the area in question, there may be evidence that a certain illness – probably a virus – has already been identified and this may inform the expert's opinion.

e. Complaints about certain distinct facilities at the Hotel. If, for example, the Claimant falls ill shortly after the Hotel swimming pool is closed due to known incident of faecal contamination this may point towards giardia (a water-borne protozoan) as a possible cause.

Was the food consumed at the hotel?

8. In many cases where a claimant is staying at a hotel on an all-inclusive basis the Court will not require much persuasion that they only consumed food and drink at the hotel,

since this is precisely what they wanted and what they paid for. If this is established by the evidence, and it is also established that the illness was caused by the consumption of contaminated food, basic causation is made out.

9. Invariably, however, there is a spectrum of potential scenarios where the facts are less clear cut. It may be the case that:

    a. The Claimants were staying on an all-inclusive basis but would regularly (or even occasionally) eat and drink out at local tavernas in order to experience the local social scene.

    b. The claimant was staying on a half-board or B&B basis and therefore regularly ate outside the hotel.

    c. Importantly, the claimant was staying on a half-board or B&B basis but paid for additional meals at the same hotel. This *still* raises a causation issue, because the English tour operator is only liable for food and drink provided *as part of the package contract*. Where a claimant buys extra food abroad they do so pursuant to a separate contract with the hotel, in respect of which the tour operator has no liability.

10. In these situations the Court is being asked to determine whether it is *more likely* that the contaminated food was consumed at the index hotel (*and as part of the package*) than elsewhere. In each case, it will be incumbent upon the claimant to adduce evidence which supports this hypothesis. If you represent a Defendant, social media will often provide a fertile source of information in the form of photographs and blogs/posts as to whether the Claimant left the Hotel during the course of the holiday.

11. In those cases where the only other possible cause of the illness is food consumed outside the hotel altogether, the claimants will need to give clear evidence of visibly poor hygiene standards that they observed at the hotel (i.e. undercooked, raw or cold food, serving food leftover from one say to the next, lack of gloves etc) and contrast it with evidence of the apparently good quality of food that they consumed from outside

the hotel (for example because it appeared well cooked etc). The court must be given a *reason* to prefer the hotel as the likely source of illness.

12. In cases where the court has to determine whether it was food eaten at the hotel as part of the package, or food eaten at the hotel pursuant to a separate contract, which was the likely source of illness, the argument is more difficult. However, it may be that the all-inclusive food was, for example, served from the buffet where significant hygiene lapses were observed, whereas the food purchased separately at the hotel was either pre-packed (e.g. sandwiches) or cooked satisfactorily in front of the claimants (eg BBQs).

Food poisoning – strict liability

13. Where there is no dispute that the gastric illness was caused by the consumption of food and drink at the hotel as part of the package the issue is whether the mere fact that the food was contaminated is sufficient to establish a breach of duty/contract, or whether it is still necessary for the Claimant to prove that the food came to be contaminated as a result of the Hotel's (and therefore the Defendant's) failure to exercise reasonable skill and care.

14. The Defendant's argument on this issue arises from the court of appeal decision in Hone v Going Places (2001) EWCA Civ 947. In delivering the leading judgment, Longmore LJ said:

"In the absence of any contrary intention, the normal implication will be that the service contracted for will be rendered with reasonable skill and care. Of course, absolute obligations may be assumed. If the brochure or advertisement, on which the consumer relies, promises a swimming-pool, it will be a term of the contract that a swimming-pool will be provided. But, in the absence of express wording, there would not be an absolute obligation, for example, to ensure that the holiday-maker catches no infection while swimming in the swimming-pool. The obligation assumed will be that reasonable skill and care will be taken to ensure that the pool is free from infection"

15. The reference to an ‘infection’ is significant, according to Defendants. It demonstrates that even though the pool water was contaminated, and caused illness, this is not enough by itself. Instead, it is argued that the Claimant must prove fault.

16. However, in most food poisoning claims the Holiday is provided on an all-inclusive basis. The price paid by the claimant therefore entitled him/her to food and drink which was supplied *under the terms of the contract*. Although the preparation of the food may well have been a ‘service’, this resulted in the supply of a fungible end-product or ‘goods’, namely the food itself.

17. Critically, section 1(3) of the Supply of Goods and Services Act 1982 provides that a “*a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and…whatever is the nature of the consideration for the transfer or agreement to transfer”*.Accordingly, the fact that the package contract as a whole, or even the accommodation element thereof, may have comprised a mixture of goods and services does not mean that the contract cannot also be one for the transfer of goods.

18. Pursuant to section 4 of the Supply of Goods and Services Act 1982, there is an implied term, as a matter of law, that the relevant goods will be of a ‘satisfactory quality’ and fit for purpose.

19. In this author’s view, food which is contaminated with some form of illness-inducing pathogen is self-evidently not of a satisfactory quality, irrespective of where in the world it is produced. It should be capable of being eaten without causing gastric illness. An application of this principle in the domestic setting is Lockett v Charles (1938) 4 All ER 170 and, to a lesser extent, Frost v The Aylesbury Dairy Company (1905) KB 608.

20. In Antcliffe v Thomas Cook (2012), a County Court decision, the Defendant sought to argue that it was necessary to establish fault in food poisoning claims. HHJ Worster disagreed, and stated as follows:

104. This is not a case involving the description of an article or whether or not something is saleable. It relates to the safety of something eaten on holiday. I can see that the reasonable holidaymaker to the Dominican Republic might decide to run the risk of picking up a stomach bug, but I do not accept that he (or she in this case) would regard the food which made him ill as meeting a satisfactory standard. I can see that food which might not taste that good or be poorly presented might still be of a satisfactory quality on a holiday such as the Antcliffe's took. As Mrs Antcliffe said, it was only a three star hotel. Indeed, Mr Young accepted that Mr Candlin's point may have some validity if the food upset a tender stomach, or was "not very nice". But the circumstances of this case are of a different order. He submits that it is self evident that this food was not fit for human consumption, and cannot be of satisfactory quality.

105. The inescapable fact is that this food was contaminated with ETEC or salmonella which was capable of causing some quite serious illness. It is very hard to see how the reasonable man could begin to regard that as being of a satisfactory quality. I find that the food was not of satisfactory quality, and that the Defendant is in breach of contract. The contract has not been properly performed. It follows that the Claimants establish liability.

106. The same result would follow from the implication of a term that the food be reasonably fit for purpose under the same Act. Food is commonly supplied to be eaten. If it makes you this ill, can it be said to be reasonably fit for purpose? In my judgment no it cannot. Frost v The Aylesbury Diary Company Ltd is an old case, but if milk were supplied today containing the germs of typhoid fever, the supplier would be held liable even though the germs could not be discovered save by prolonged investigation.

21. This line of reasoning is consistent with decisions from other jurisdictions, where the issue has been considered by the Higher Courts. In Gee v White Spot (1986) 32 DLR 238 the Supreme Court of British Columbia in Canada held that where the Claimant had suffered botulism poisoning after eating in the Defendant's restaurant:

"Although the sale of a meal or food in a restaurant will normally carry with it the privilege of using the restaurant, nevertheless the contract entered into between the customer of the restaurant and the operator of the restaurant is primarily for the purpose of consuming food or a meal, and is therefore, in my respectful opinion, a contract for a sale of goods. The service component offered with the meal or food is no different from a host of other transactions where the primary purpose is for the sale of goods"

22. Accordingly, whilst there is still no binding authority on this issue, the weight of the case-law supports the argument that contaminated food gives rise to strict liability provided that it can be proved that it came from the hotel and formed part of the package contract.

Food poisoning – fault-based liability

23. But does it matter? If the Court does accept that the claimant contracted gastric illness as a result of ingesting contaminated food, it is reasonably arguable that the doctrine or rule of '*res ipsa loquitur'* applies. This is because, in the ordinary course of events, properly cooked and prepared food should not cause a person to become ill. The control and preparation of the food is entirely in the hands of the Hotel and it is very difficult for a claimant to adduce any evidence over and above the mere fact of illness itself and observations of the standard of food at the point of service. Only the Defendant can produce detailed evidence about the 'behind the scenes' systems in the kitchen and other preparation areas. Accordingly it is certainly arguable evidential burden will be cast upon the Defendant.

24. This argument is easier to establish if a known pathogen can be identified, since certain pathogens should be killed by being heated to a certain temperature. Nonetheless, it is critical to corroborate it with evidence from the claimant about visible examples of poor health and hygiene standards at the hotel. Since this same evidence will be used to point the finger at the hotel rather than an outside source in any event (in terms of establishing causation) it is makes good sense to ensure that it is given in sufficient detail to apply to both issues.

Local standards

25. As long as there remains no binding authority on the question of whether liability for illness caused by contaminated food is strict or fault-based, it is prudent (and arguably necessary) to obtain a report on local safety standards in the country in question. The Court of Appeal has recently[1] reiterated that it is incumbent upon a claimant to prove a breach of the local safety standard in order to establish liability in most cases. Where the country in question is part of the EU there are invariably lengthy and comprehensive statutory obligations placed upon hotels and other establishments which produce or serve food to follow high standards of hygiene. Many of these are derived from EU regulations or directives. Accordingly, even though the standard of liability under English law is 'reasonable skill and care', more often than not the

[1] Lougheed v On the Beach (2014) EWCA Civ 1538

application of the local standard in EU food poisoning cases leads, in effect, to the imposition of an even higher standard.

26. The more problematic cases are those which involve more exotic destinations where food and hygiene standards are much lower. Nonetheless, it is usually possible to identify an expert (if necessary, a local lawyer) to explain that basic hygiene standards (for example those derived from the *codex alimentarius*) should be followed.

Beware the Athens Convention

27. Illness which is contracted during the course of international passage by sea within the scope of the Athens Convention is subject to the exclusive regime of the Convention. Article 3 requires claimants to prove fault, irrespective of the nature of their illness. Accordingly, claims based upon food poisoning contracted from food and drink consumed on the ship must demonstrate that the food/drink became contaminated due to inadequate hygiene practices and/or some sort of failure by kitchen or other staff to exercise reasonable care. In cases of identified pathogens this may be more straightforward (for example, most microbiological experts would accept that properly cooked food should not contain salmonella – since it should have been killed – meaning that if the food is so contaminated, fault can reasonably be inferred). However, in those cases where no pathogen is identified claimants will face an uphill struggle, not least because the documentation relating to a ship's health and hygiene systems tends to be far superior to that which is disclosed from foreign hoteliers.

Non-food related viral illness

28. There will be some cases where the evidence points squarely to the source of the illness as a viral outbreak – the most common being *norovirus*. This sort of case raises significantly different issues in terms of liability which are beyond the reasonable scope of this paper. Suffice it to say that liability is not strict and the focus is on the prevent of the spread of infection (POSI) from one hotel or cruise guest to another, often by means of quarantine, deep cleaning, enforced use of hand gels etc. The same is true of illness caused by giardia in Hotel swimming pools.