Ministry of Justice
Consultation on Package Holiday Personal Injury Claims
Thompsons Solicitors' response
November 2017

Thompsons is a UK-wide law firm with a network of offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland. As the largest trade union and personal injury law firm in the UK, we specialise in personal injury and employment law for trade union members, their families and private clients. At any one time we will, as a firm, be handling over 50,000 cases.

Thompsons Solicitors has more experience of winning personal injury compensation claims than any other law firm in the UK, whether the injuries were caused by accidents in the home, work accidents, accidents in public places, road crash accidents or holiday accidents.

The firm participates regularly in government consultations on a wide range of issues relevant to our trade union and other clients.

Responses to questions included in the call for evidence are as follows.

Question One

Thompsons Solicitors has run a number of successful gastric illness claims. We haven't done so on anything like the industrial scale that it is suggested they are being pursued, but where we have we have applied our usual assessment of the prospects of success that we apply to any case – has it greater than a 50% chance of success?

In our experience, the success rate of a package holiday claim is lower than in the average Employers' Liability (EL), Public Liability (PL) or Occupiers' Liability (OL) claim (38% to around 45%), due to the problems in terms of gathering evidence from a country other than England and Wales.[1] Comparatively, a greater percentage of gastric illness claims (particularly in relation to all-inclusive holiday bookings) tend to succeed.

It is not our experience that gastric illness claims are intrinsically spurious in nature.

[1] We would be happy to provide information to support this.

The following two examples illustrate that there are genuine claims for gastric illness and denying access to justice for those made ill through no fault of their own because of possible fraud by others would, we suggest, be both unfair and unjust.

Case example:

1: Mr Stephen Abbotts v. TUI UK Limited (Ref: MJD/ABBOTTS/N1530199)

The Claimant claimed damages after contracting Campylobacter during a package holiday with the Defendants in Tunisia from the 23 October 2014 to 2 November 2014.

The Claimant began to feel unwell on or around the 29 October 2014 and symptoms lasted for around seven days, adversely affecting the remainder of the holiday and causing him to take three days off work on his return to the UK.

The Defendant failed to make any decision on liability for the illness, contrary to the spirit of the personal injury protocol that applies to such claims.

A medical report and schedule of loss and damage was disclosed to the Defendant before the issue of proceedings and they offered £1,000 in settlement.

On our advice this offer was not accepted by the Claimant and we issued proceedings.

The defendant failed to file any defence to the action and Judgment was entered against the tour operator.

Following Directions Questionnaires being submitted on behalf of both parties, the Defendant made an increased offer of £1,850, which the Claimant agreed to accept.

Case example:

2: Master Jack Elliot Bland, a minor suing via his mother and litigation friend Mrs Beverley Bland v TUI (Ref: MJD/BLAND/S13K0044)

The Claimant became ill whilst staying at the 5 star Atlantica Aegean Blue Hotel, Rhodes in Greece in August 2013 whilst on a holiday his parents had booked with TUI UK Limited, trading as Thompsons.

The Bland family were on an all-inclusive package and only ate and drank at the Atlantica Aegean Blue Hotel.

On the evening of 22 August 2013 Jack, who was then four, started to complain of a stomach ache and was suffering with a high temperature. He then began to suffer with severe stomach pains, nausea and diarrhoea. These symptoms continued throughout the night.

The following day the claimant continued to suffer with temperature, severe diarrhoea and stomach cramps. He was also feeling very lethargic.

He spent the rest of the holiday in bed.

Jack's mother purchased some medication from the local chemist to assist with his symptoms, however Jack continued to suffer with diarrhoea.

Jack was examined by his GP on return from holiday and stool samples were taken which confirmed that he had contracted salmonella food poisoning. Jack continued to suffer with occasional stomach cramps and diarrhoea for several months and refused to go to the toilet alone.

He remained under the care of his GP for several months whilst tests were carried out to ensure that he had not suffered damage to his internal organs as a result of his illness and fortunately he hadn't.

TUI failed to make a decision on the issue of liability within the six months allowed by the personal injury protocol. On threatening to make an application for pre-action disclosure of food hygiene monitoring documents, an offer of settlement was made without sight of any medical evidence, of £1,500.

Following receipt of medical evidence, the Defendant increased their offer to £3,000 and this was accepted and was, given his age, approved by the court.

Properly managed and defended, a personal injury claim of any kind will only succeed if it can be established that there has been neglect or, in contractual law claims, improper performance by the defendant. If that is accepted as a given, it is difficult to understand why a tour operator is in greater need of protection and assistance to control expenditure of costs than the consumer, when the ultimate cause of the action is a failure by the tour operator to provide proper performance of the holiday contract despite having been paid for that service by the consumer.

The concept that the polluter pays, that a defendant should pay the costs of an action where fault is established, has been seen as desirable in all personal injury claims for decades. It is, we suggest, not acceptable, to change that principle in order to protect tour operators against litigation when the consequence of doing so may well be to encourage them – knowing the risk of being sued is reduced - to take shortcuts so as to increase profit margins which would adversely affect the health of guests and reward poor performance.

Surprisingly and disappointingly, rather than look into all the reasons for an increase in volumes of gastric illness claims the government has seized upon a single or possible cause, namely an increase in the number of ‘spurious’ claims. Whilst blaming fraud fits the mantra adopted by the government in their proposed whiplash reforms, it completely ignores multiple potentially relevant factors including:

1. The impact of claims management companies and their marketing campaigns, leading to greater consumer awareness about the potential to pursue such actions under the Package Travel Regulations. Interestingly, the proposed reforms would do nothing whatsoever to deter claims management companies who advertise aggressively to secure business and typically charge panel solicitors a percentage of their marketing costs in return for a corresponding percentage of case referrals. Instead, it would impact on consumers who suffer genuine illness through no fault of their own.

2. The interaction between Section 4 of the Supply of Goods and Services Act 1982 and package holidays. Until recently, it was successfully argued that section 4 of the 1982 Act created strict liability for gastric illness arising from the provision of food or beverages that were not of satisfactory quality during a package holiday contract: **Hutchinson & Others –v- First Choice [2006];** followed by **Kempson & Kempson –v- First Choice** [**2007],** and then **Antcliffe & Others –v- Thomas Cook [2012**]. However, the situation has been addressed by the Court of Appeal in the case of **Wood & Wood –v- TUI Travel Plc [2017],** reported 16 February 2017. Clause 29 of that judgment makes it clear that strict liability does not apply to sickness claims and that it has to be established by the claimant that other holidaymakers were similarly affected in the same resort.

   Given that the Court of Appeal has taken steps to resolve the issue complained of their clear lead should be allowed to impact on case numbers. There is no need for political intervention when the judiciary has already stepped in to clarify the law.

   In any event the reality faced by claimants is that:

   a. The burden of proof rests with the claimant;

   b. The normal rule of proportionality guards against unreasonable costs being incurred;

   c. If tour operators keep good evidence of food hygiene standards, the claim will fail more often than not; and

   d. Criminal sanctions already exist where fraud can be established.

3. It being widely understood (and it surely must be for tour operators to prove otherwise) that payments made to hotels and other service providers that provide food and beverages to consumers in resort have not increased or kept pace with inflation in the countries they operate within. That has led to pressure on service providers to reduce overheads in order to maintain profitability in some cases by cutting corners with food hygiene, food preparation standards and cleanliness.

4. The proposal that there should be Fixed Recoverable Costs (FRC) should be set in the context that whilst the majority of gastric illness claims may involve transient illness lasting a few days to a week or so, there are a small percentage of claims that carry life changing

consequences. The existence of this risk is made clear in Chapter 6, G, B (i) of the Judicial College Guidance Notes which reads:

"Severe toxicosis causing serious acute pain, vomiting, diarrhoea and fever, requiring hospital admission for some days or weeks and some continuing incontinence, haemorrhoids and irritable bowel syndrome, having a significant impact on ability to work and enjoyment of life."

It would be an over-simplification to say that such serious claims would fall outside the scope of the portal system. In reality, they are more likely than not to be submitted within the portal structure and as such likely to be dealt with by fairly junior and inexperienced executives and resolved on a full and final settlement basis within a period of less than six months. At six months severe cases would not be immediately distinguishable from an illness of lesser severity.

Again, unless tour operators can prove otherwise it is understood that they tend to choose to self-insure to a significant level prior to insurance cover taking over. This may increase pressure on them to a) settle without properly challenging claims they believe may be spurious (which in turn encourages further spurious claims) and b) feel a more immediate impact on their bottom line which must encourage them to 'shout wolf' about fraud or anything else that will reduce case volumes.

If there is any serious prospect that claims against tour operators should come within the portal (which we would oppose) then the following - which have not been considered in the consultation document - must be excluded unless and until they have been the subject of proper consideration:

1. EL claims where the accident occurred outside England / Wales
2. Product liability claims
3. Claims under the Consumer Credit Act
4. Montreal Convention claims (international carriage by air)

5. Athens Convention claims (international carriage by sea, currently Admiralty Court matters are inception due to the requirements of the Civil Procedure Rules)

6. Berne Convention claims.

At the very least, in respect of claims outside England and Wales, we would suggest that the definition clause at 4(3) (7) of the Protocol would need to be amended as follows:-

"4.3 This Protocol does not apply to a claim— (7) for personal injury arising from an accident or alleged breach of duty occurring outside England and Wales, save those arising as a result of gastric illness that was occasioned during the course of a package holiday arranged by a tour operator that have their registered office address in England and Wales"

The amendment proposed within the consultation to paragraph 6.10(b), so as to extend from "the next day" to three days the time within which an insurer must send to the claimant an electronic acknowledgment after its receipt by the insurer, may not be practicable, given that many claims against tour operators are not notified to their insurers (indemnity issues arise). In any event any change to 6.10(b) or 7.32 must be limited to package holiday gastric illness claims.

To respond to a claim notification form in a gastric illness claim within 120 days may not be capable of being met by tour operators. With the current system, they enjoy a six month protocol period and often complain that they are unable to get instruction from resorts because they close in the winter season. The imposition of this time frame is likely to increase litigation by virtue of persistent breach of the protocol period by Defendants.

Question Two

No.

In paragraph four of the consultation document, it is suggested that the Package Travel, Package Holidays and Package Tours Regulations 1992, it is relatively straightforward to bring a claim against a tour operator in England and Wales for personal injury that occurs as part of a holiday contract entered into with a UK based tour operator.

Paragraph nine of the consultation paper on page two states that the costs of pursuing a Package Holiday claim rests predominantly with the tour operator, who liaise with their representatives in resort when investigating the claim.

Both statements are fundamentally wrong.

Whilst *commencing* a claim in England against a tour operator is no more complex than starting any other personal injury proceedings, successfully *prosecuting* such a claim is an entirely different matter.

The burden of proof in such claims is stacked heavily against the claimant. Multiple complexities arise including:

1. The obligation to establish that what was purchased by the consumer constituted a package holiday;
2. That the act or omission that is the subject of the complaint fell within the scope of matters that were contemplated and were included within the package holiday;
3. There was improper performance of the holiday contract; assessed by reference to Regulations, local standards, customs or practices that exist in the jurisdiction (country) in which the harm was suffered (breach of local standards, rather than English standards); and
4. The specific breach alleged caused the injury.

Tour operators regularly adopt a passive stance in such claims and demand that the Claimant satisfy these burdens of proof, established by the lead authorities including **Wilson –v- Best Travel Ltd [1993] 1 All England Reports 353** and **Codd –v- Thomson Holidays [2000] EWCA CIV 5666**.

In order to discharge these burdens in accident claims, there is a need for expert evidence on liability detailing the local standards and how they were breached. There is also a need for witness evidence in support which often must come from the resort itself where invariably

language barriers exist, necessitating the use of translators or bilingual and often dual qualified lawyers.

Claimants also face costs for site visits, even assuming these are capable of being arranged with the consent and cooperation of the hotel or other service provider.

The package travel regulations were created precisely because parliament recognised that the consumer required a greater level of protection due to their vulnerability when travelling to a country which is unfamiliar to them, yet these proposals seek to tip the scales away from the vulnerable.

There was good reason for the consumer to be protected and we would suggest that nothing has fundamentally changed to alter the need for that protection.

In practical terms:

1. The consumer does not have the same resources as tour operators;

2. The package travel regulations make it obligatory for the tour operator to investigate and satisfy themselves that the service provider has complied with relevant regulations, local standards, custom and practice in the resort for the type of service being supplied before contracting. That means they already have evidence about compliance, or otherwise, and should have easy access to the majority of the information they require as soon as an accident is reported to them. The consumer on the other hand will have no personal knowledge of such matters;

3. The tour operator is able to contract with service providers of their choosing. The consumer by contrast has no such control;

4. The tour operator will have a history of operating in the resort and have existing commercial relationships with lawyers and others agents in the jurisdictions. The consumer has to start from scratch to identify appropriate local agents;

5. Knowing the benefit to the local economy of the tour operators, including potentially to their own business, local agents such as lawyers may be hesitant to act against them or those that are may be of poorer quality or standing;

6. Tour operators and representatives based in resort often speak the language of the county in which the accident has taken place. Consumers frequently have to rely upon translators; and

7. Package holidays are marketed as a more affordable option and are, as a result, often attractive to those with tight household budgets, including the retired. Whereas in other areas of society these groups are recognised as being more vulnerable and requiring additional support here, it is being proposed that protections for the vulnerable consumer be reduced and opportunities for the powerful trader to deny and delay be enhanced.

Imposing fixed recoverable costs is likely to erode existing levels of consumer protection.

Contrary to the position that exists in EL/PL/OL claims arising out of accidents occurring in England and Wales; the inherent claimant/defendant imbalance is not readily capable of being addressed by instructing an experienced Solicitor. Whilst specialist Solicitors, such as Thompsons, have a greater depth of knowledge about the types of issue that arise in such actions, no individual lawyer can claim to have the answers to all the potential issues that may arise in a claim from a holiday abroad, including but not limited to:

1. The date of construction of the premises in which the accident took place;

2. The dates of any material alterations that may have been carried out at those premises and which affected the area in which the accident took place;

3. The building regulations enforced within the country being visited when the accident took place; and

4. The local standards, customs or practices that are relevant to the locality in which the accident occurred and that apply to the facts of the accident.

Solicitors who practice travel / consumer law and who face a denial of liability often require assistance to prove it in the form of expert evidence which is costly in itself but also they have to

deal with the Defendant's invariable challenge to that evidence. The cost of a liability expert's report varies significantly between jurisdictions and depends upon the nature of the claim. Time needs to be expended by the UK based lawyer identifying suitable experts, instructing them (including explaining to them the obligations of the Civil Procedure Rules), and considering the draft report (including its CPR compliance). Language barriers and methods of communication often add an extra layer of complexity.

We have already stated above that the success rate of package holiday claims is lower than in the average EL, PL or OL claim and imposing FRC will only compound those issues and deny access to justice to genuine claimant's. In our view the imposition of FRC in this type of claim, particularly at the levels contemplated in the consultation paper (PL, OL and EL levels with no consideration for the additional costs involved in prosecuting the claim) would no longer make the claims commercially viable.

The imposition of FRC could also damage the travel industry in England & Wales and mean the only beneficiaries will be rogue operators.

Tour operators are already facing stiff competition in the marketplace from suppliers who encourage consumers to book direct. The revised Package Travel Regulations open up the possibility of encouraging more direct booking with suppliers or agents, most of whom will not be tour operators and as such will carry no responsibility for the health and safety of consumers travelling on such holidays.

Such a move goes against current advice to consumers in England and Wales, which is broadly to book holidays through a recognised tour operator with a registered office address in this jurisdiction. This is deliberate to ensure:

1. Protection in the event of holiday cancellation;
2. Protection in the event of operator liquidation;
3. Provision is made for repatriation if something happens to the provider of services when the consumer is abroad; and

4. The right action for remedy arising from the breach of the holiday contract in England and Wales (as opposed to being forced to pursue a remedy in the Foreign Jurisdiction in which the accident or illness occurred).

An erosion of these protections will reduce reasons for the consumer to continue to book holidays through tour operators and runs the risk of tragic and unintended consequences.

The risk of these proposals is that package holiday providers will cut costs to compete whilst those who book direct will not have the same rights and support increasing the risk of death caused by accidents or gastric poisoning.

Question Three

This is directed at tour operators.

Question Four

There are alternative solutions to the perceived issue that would not have the same detrimental effect for consumer rights, including:

1. Do nothing and / or allow **Wood & Wood –v- TUI Travel Plc [2017]** to have its intended effect. This judicial solution rather than political knee jerk reaction will by itself – if the tour operators and their insurers defend claims relying upon it rather than simply paying out to get rid of claims - significantly reduce the volume of gastric illness claims pursued against tour operators; and

2. Investigate the expenditure by tour operators on food hygiene issues and payments made for food and beverage services over the last five years. By doing so, if the government was seriously interested in protecting the consumer, they would be able to determine if there are causes, other than “an increase in spurious claims” to explain an increase in the number of claims.

If FRC is really the only ‘solution’ being contemplated (despite our detailed concerns above), then any changes must be limited to gastric illness claims alone. This is because of the easily identifiable key variables in gastric illness claims which do not exist in accident claims which are much more fact specific or individual. The key variables include:

1. The type of holiday that was contracted for (all inclusive, bed and breakfast etc.);
2. The duration of the holiday;
3. The date of the onset of the symptoms;
4. The type of symptoms suffered;
5. Whether any pathogen was identified;
6. If so, what that pathogen may have been;
7. Whether food was eaten other than at the resort;
8. If the consumer took any excursions outside the resort; and
9. If there were non-resort excursions if food or beverages were consumed during the excursions.

If there is to be FRC then there has to be greater transparency about the enquiries made by tour operators regarding regulations, local customs and practice. Without this, the consequence for the consumer made ill through no fault of their own will be costs so disproportionate that tour operators will have no imperative to keep up standards as they are unlikely to face any claims.

If FRC are to be imposed, the burden of proof should be reversed, requiring tour operators to demonstrate that they *did* comply with Regulations, local standards, custom and practice in the resort. This is already the case in Spain where it is for the hotelier, or other service provider, to show that they did all that was reasonably practicable to prevent the accident or illness from occurring.

It is essential in any event, FRC or not, that there is regulation requiring all UK based tour operators to have illness in a resort documented. Too often our clients tell us that they

attempted to report their illness to the hotelier and / or representative of the tour operator in resort but nothing was written down. The reason for the failure to record complaints may be that local suppliers face an increase in their PL insurance premiums for the following period, or in certain jurisdictions such as Spain, it may also be seen to encourage a claim being pursued. Whatever the reason, it is to be deplored.

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