

**THE EFFECTIVENESS OF THE PACKAGE
TRAVEL REGULATIONS 1992 IN
PROTECTING CONSUMERS-WITH
PARTICULAR REFERENCE TO REGULATION
15**

By

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ABSTRACT

This thesis examines the effectiveness of EU Council Directive 1990 and the Package Travel Regulations 1992 that implements the Directive, in providing protection for consumers taking package holidays. In particular regulation 15- regarding the liability of tour operators and their suppliers for the proper performance of the obligations under the contract and or the improper performance of it.

The position at common law will be explored and how the law has developed from a narrow position to offering much wider protection for both regulated and non regulated holidays.

An overview of the benefits that consumers derive from the regulations in general is discussed, followed by a close analysis of regulation 15 and of how the initial view that tour operators would be strictly liable for the performance or improper performance has developed into a fault based liability for particular obligations. The impact of the proposals for a new Package Travel Directive and how it affects the law will also be analysed.

The limitations of the protection afforded by regulation 15 are examined, including looking at what type of services may or may not be covered, and the dynamic and fast evolving issues of local standards and causation which has often led to the failure of claims under regulation 15.

Further limitations on the protection afforded by regulation 15 will be explored for consumers travelling by air or sea, where the International Conventions governing such travel have conflicted with the regulations causing tension within the law for consumers.

Finally, following the analysis of the benefits and limitations of the Package Travel Regulations, the thesis concludes with an assessment of how effective the law is at protecting holidaying consumers.

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ABBREVIATIONS

AC	Appeal Cases
ALL ER	All England Law Reports
CLY	Current Law Year
EJLR	European Journal of Law Reform
ELR	European Law Review
EWCA	Neutral citing England and Wales Court of Appeal
EWHC	Neutral Citing England and Wales High Court
FTLR	Financial Times Law Report
FILJ	Fordham International Law Journal
HLR	Hamline Law Review
IFTTA	International Forum of Travel and Tourism Advocates
IFTTA LR	International Forum of Travel and Tourism Advocates Law Review
ITLJ	International Travel Law Journal
JBL	Journal of Business Law
JPIL	Journal of Personal Injury Law
Lloyds Rep.	Lloyds Report
LQR	Law Quarterly Review
MLR	Modern Law Review
MJECL	Maastricht Journal of European and Comparative Law
NIQB	Northern Ireland Queens Bench
NLJ	New Law Journal
OJEU	Official Journal of the European Union

TLB	Travel Law Bulletin (3 Hare Court Chambers)
TLQ	Travel Law Quarterly
UKHL	Neutral citing United Kingdom House of Lords
UKSC	Neutral citing United Kingdom Supreme Court
WLR	Weekly Law Report

INTRODUCTION

"A journey is like marriage. The certain way to be wrong is to think you control it."-John Steinbeck

"When you travel, remember that a foreign country is not designed to make you comfortable. It is designed to make its own people comfortable."- Clifton Fademan

Taking a well earned holiday abroad is meant to be a pleasurable, exciting and rewarding experience. However, sadly, that is not always the case and many a holiday has been ruined for consumers, who may have parted with an extremely large amount of money and with high expectations, only to be faced with accommodation or facilities that were not as described in the holiday brochure or information supplied online. Worse still, the standards of accommodation and other services supplied may not match those of the United Kingdom and have in many cases resulted in accidents where significant injuries have been sustained. To highlight what rights consumers have when they take holidays and what protection is afforded to them by the law, is the aim of this thesis and in particular regarding the package holiday.

The research methodology adopted as the most appropriate for this relatively new and evolving field of law is the more traditional doctrinal legal research approach, often described as 'black-letter law'. This methodology concentrates on the 'letter of the law' and is essentially a descriptive analysis of a number of legal rules and principles that are found in primary sources. The principle aim of such methodology is to collate, and describe legal rules and to offer commentary on the emergence and significance of the legal sources - statutory, regulatory and case law interpretation- identifying themes emerging in this area. The research involved with this thesis is not, however, isolated to simple descriptive analysis. The thesis also examines the changing socio-economic background, setting the law in context, and in particular how changes in the way holidays are taken has created a need for reform.

In addition whilst the black letter methodology is used, the focus is not only on the aforementioned primary sources - case law, regulations, statutes, - but also academic commentary and the works of practitioners is also introduced to give a novel insight as to how those who practice travel law are interpreting the principles gleaned from the authorities in order to contrast their thoughts with academic writing on the subject.

The lure of hot climates and exotic places as part of a convenient package holiday and within even the most modest of household budgets reached its zenith in the 1980's and 90's. Increased wealth flowing from the 60's consumer boom and improved technology and carrier capacity, enabled greater numbers to be flown to those destinations and thus reducing the cost of holidays. Chapter one will explore how the law responded to the growth in travel abroad, and how the common law developed from an unduly restrictive approach to consumer protection in the early 1980's, to a much wider and consumer friendlier approach by the mid-1990s.

Recognising the significant economic advantages that tourism brings, and the need to harmonise consumer protection laws across Europe, were the two driving forces behind the European Council's Directive of 1990¹ which gave birth in the UK to the Package Travel Regulations of 1992². For the first time a regulatory framework was implemented that governed the inter-relation between consumers on the one hand, and the suppliers of travel services on the other. These issues will be explored in particular in Chapter two of this work and Chapter three will examine in detail what protection regulation 15 especially gives to consumers by holding tour operators responsible for the improper performance or failure to perform obligations under a holiday contract or by their suppliers. Significantly how the regulation enables consumers to bring claims in the UK courts, for the actions of those whom they do not have a direct contractual relationship with such as hoteliers or coach transfer operators, thus avoiding the jurisdictional and cost difficulties of pursuing actions in foreign countries. The ambit of regulation 15 and its scope will also be discussed and how it has been interpreted over the years by the courts. It will be seen that the

¹ Council Directive 90/314 of 13 June 1990 on Package Travel, Package Holidays and Package Tours

² Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288)

protection has not been as wide as first envisaged and its effectiveness has been reduced by the continually evolving issue of local standards governing the standard of the duty of care.

Since the research began, and in recognition of the need to adapt to the changing way consumers take holidays, the European Commission published its long awaited proposals for a new package travel Directive in July 2013³, to widen consumer protection. How in particular this affects regulation 15 will be analysed.

Chapter four will look at how the effectiveness of regulation 15 has been curtailed regarding travel by air or sea, which is governed by International Conventions, whose exclusivity provisions have left courts deciding whether or not claims under regulation 15 provide a parallel remedy to claims under the Conventions or are in fact debarred because of them.

The concluding chapter five will draw together the findings of the research including proposals for reform of the regulations in the digital age to clarify uncertainty for both travellers and tour operators as to what holidays are now protected and aiming to close gaps that have arisen in protecting consumers. Given the growth of the internet and the availability of no frills airlines, many consumers are choosing to travel independently and arranging their own means of transport and accommodation which had led to a significant decline in package holidays.⁴ What consumers may not appreciate is that whilst there may be cost advantages, they may be giving up, perhaps unwittingly,⁵ fundamental protected rights the package travel regulations provide. How the new Proposal attempts to address these issues will also be discussed.

³ Proposal For A Directive of the European Parliament and of the Council for Package Travel and Travel Assisted Arrangements COM (2013) 512 Final 9.7.13

⁴ Though figures published recently by the Office for National Statistics show that almost 15.5 million Britons took such a holiday in 2013, an increase of nearly 7 per cent compared with 2012.

⁵ In a recent survey 67% of EU citizens mistakenly thought they were protected when buying travel arrangements when they were not-European Commission Press Release 12th March 2014

CHAPTER ONE

THE LEGAL POSITION AT COMMON LAW

This chapter will discuss the position prior to the EU Council Directive of 1990 that was implemented by the Package Travel Regulations of 1992, and will examine the common law principles in particular of contract law and tort, and how the common law developed from a somewhat restricted view on liability for tour operators, to a much more consumer friendly position, in line with the thinking behind the regulations. These principles of course still govern the non-regulated holiday and it will be argued that in certain circumstances, the contractual terms in any particular holiday contract may place the consumer in a better position than they might be under the regulations. Importantly, it will be seen how the regulations do not replace the common law but run alongside it.

PRE 1992 POSITION

Prior to 1992 no specific statute or legislation dealt with the nature of the contract between a holiday maker and tour operator, and the latter's consequential obligations when something went wrong with the package. In most cases the tour operator often did not provide the flights, accommodation, meals and so on, but made the arrangements which enabled the holiday to be sold as a package. As now tour operators themselves enter into contracts with the airlines, hotels etc. in the package. The holidaymaker usually has no contractual link with hotels or airliners and so is not in a position to make breach of contract claims against them. They may be able to bring negligence claims against the hotel directly but that depends on the country concerned, quite apart from which an English holiday maker faces obvious difficulties in conducting court proceedings in a foreign country⁶.

⁶ See Nelson-Jones and Stewart, (1993) 44-45

The regulations supplement the pre-existing common law principles and limited consumer protection legislation that had developed over the years in contract and tort, and which are still applicable today for non regulated holidays. For breach of contract claims the express terms in a contract itself may well, under scrutiny, provide a cause of action or the courts may imply terms into the contract either based on the facts of any particular contractual situation, or in law.

Express Terms

Terms actually expressed either orally or in writing will be the subject of interpretation. They may extend liability further than the regulations themselves, and are often to be found in the small print of brochures for example:

“We accept liability for the proper performance of our contract with you and in the event that the services we have promised to supply fall below a reasonable standard, we will pay you compensation. In the event that you or any member of your party suffers death, injury or illness as a result of the negligence of ourselves, our employees or any of our suppliers, subcontractors or agents, we will pay you compensation in accordance with English Law”.⁷

All ABTA members are obliged to include such terms and the extent of such clear terms means that the other party to the contract accepts liability for the negligence of hoteliers, and if negligence can be proved, the claim would simply be couched as a claim for damages under the contract itself regardless of the package travel regulations of 1992. This principle of course applies to all holidays and not just regulated ones.

To illustrate how important the extent of liability imposed by the terms of the contract can be is the case of *Eldridge v TUI UK Ltd*.⁸ A group of holidaymakers stayed at a Majorcan hotel and contracted cryptosporidium (a water-borne pathogen that thrives in swimming pools following faecal ‘accidents’). It was their case that the hotel swimming pool was to blame. They relied on the absolute duty under Spanish Law to keep swimming pools free from pathogens and that the English contract with the tour

⁷ Taken from *Saggerson on Travel Law and Litigation* (2013) 191

⁸ (2010) Unreported

operator incorporated the strict Spanish obligation. The defendant argued that it was contractually obliged only to exercise reasonable care and skill. The judge held that the defendant in its brochure booking conditions made express promises that 'there is a swimming pool' and accepted absolute obligations with the term, 'We have taken all reasonable care to make sure that all the services which make up the holidays advertised in this brochure...are provided by efficient and reputable businesses 'who should follow the local and national laws and Regulations of the country where they are provided.' Thus on a proper interpretation of the contract by its booking conditions the defendant had accepted the absolute obligation contained in Spanish law. The defendant was therefore bound by its English law contract with the consumer to provide a swimming pool that was free from pathogens as required by Spanish law.

Whilst one may expect a greater degree of certainty with express terms, more difficult perhaps are arguments surrounding implied terms of a contract.⁹

Implied Terms

The contents of a contract may in addition contain terms which are implied either because that is found to be the intention of the parties, or by operation of law, custom or usage. The implication of a term in law has been described as simply a way of specifying some of the duties which prima facie arise out of certain types of contracts and courts are guided by general policy considerations of reasonableness and fairness and even a test of necessity, for example a landlord should take reasonable care to keep the common parts of a council block in a reasonable state of repair.¹⁰

In travel law the courts have been prepared to imply terms into contracts favourable to consumers, but typically they are somewhat reluctant to do so where it may involve the imposition of strict or vicarious liability on tour operators where injury has been caused by the fault of others. The long standing authority of *Wall v Silver*

⁹ For a useful exposition of express and implied terms see Furmston (2012) 162-177 and Treitel (2011) 202-221

¹⁰ Treitel 231 see also *Liverpool CC v Irwin* [1977] A.C 239

*Wing Surface Arrangements Ltd. (Trading as Enterprise Holidays)*¹¹ provides illustration.

The claimants booked a fourteen day holiday with Enterprise Holidays with rooms on the 3rd floor. One night a fire broke out at the hotel. The claimants could not use the lift to escape from their rooms so they tried to use the fire escape, which was made out of concrete and ran down the side of the hotel. As the door to it was padlocked for security reasons, the party returned to their rooms and made a makeshift rope out of bed sheets. In using the rope, three of the party fell and were injured; one very seriously. There was no suggestion in the case that Enterprise failed to take reasonable care. They were not at fault and in the absence of any negligence on behalf of the tour operator the claimants pleaded their case on the basis of an implied term factually in the contract that they, “would be reasonably safe in using the hotel for the purpose for which they were invited to be there.” The court rejected that argument and found for the defendants. In applying an objective test the conclusion Hodgson J reached was, “if an officious bystander had suggested either to the tour operator or, I think, to most customers, that the tour operator would be liable for any default on the part of any of these people [hotel keepers, airlines, taxi proprietors etc.] both would, to put it mildly, be astonished.”

The case illustrates the thinking of the courts at that time in marked contrast to the later European Directive on package holidays. *Wall* supported the view that the contract between the tour operator and holidaymaker was one whereby the tour operator undertook to exercise skill and care in making suitable arrangements with airlines, hotels and so on. That was the extent of the duty as it would be wholly unreasonable to saddle a tour operator with an obligation to ensure the safety of all the components of the package over none of which they had any control at all. The court did accept however, there would clearly be some situations in which the tour operator would be liable in negligence to their customers. For instance if a hotel, included in a brochure, had no fire precautions at all or was known to fail to reach the standards required by the law of the country, then the tour operator would be in breach of a duty of care.

¹¹ (1981) Unreported

The narrow position taken by the court in this case unsurprisingly has been subject to criticism:

“Far from being ‘astonished’ to find that the tour operator was liable for the failure to provide safe accommodation facilities, it is submitted that most consumers would be aghast if they were told that there was no implied term in their travel contract to the effect the accommodation allocated to them would be put and kept in a reasonably safe condition. Fortunately for consumers in non-regulated cases, more recent decisions have consigned *Wall* to the museum of cases, ‘not followed’ on one pretext or another.”¹²

Statutory Implied Terms

Section 13 of The Supply of Goods and Services Act 1982 provides that in every contract for the supply of a service and where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. Section 13 was argued in the case of *Wilson v Best Travel*¹³ (a leading case on applicable local standards which shall be referred to again later in Chapter Three). The claimant bought a package holiday from the defendant at a hotel in Greece. One morning he caught his foot in a curtain, tripped and fell through a glass patio door at the hotel. The glass in the door complied with Greek but not British standards of safety. The claimant was seriously injured in particular to his leg due to the fact that the glass fractured into fragments of razor edged sharpness. The issue at stake was what liability should be imposed on the tour operator in respect of the quality of the glass in the patio door. There was no express term in the contract about the quality of the glass and the court was asked to imply a term under section 13. The judge rejected a term that the hotel would be reasonably safe, basing his decision on the judgment in *Wall*. However Phillips, J found that the tour operator was under a duty based upon section 13 to exercise reasonable care in respect of the glass. What this amounted to was that as long as the glass complied with local standards and those

¹² *Saggerson* (2013) at 309

¹³ [1993]1 ALL ER 353

standards were not so low as to cause a reasonable holiday maker to decline to take a holiday at the hotel in question, then the duty was satisfied. In this instance the tour operator was not held liable.

The high point of common law liability is the decision of the Privy Council in *Wong Mee Wan (administratrix of the estate of Ho Shui Yee) v Kwan Kin Travel Services*¹⁴. The claimant's daughter purchased a package holiday from the defendant, a Hong Kong Company and the case was not covered by the regulations. The holiday consisted of a tour of China and included accommodation and transport. The highlight of the tour was a visit to a lake and crossing it by boat. The defendant had subcontracted the performance of the tour to others who in turn organised for her to be ferried across by third parties in a speed boat. Due to the negligence of the boat driver, the speed boat collided with a junk and sank. The claimant's daughter was drowned. The defendants were held liable for her death. The question for the court had been did the defendant undertake no more than that it would arrange for services to be provided by another as its agent (where the law would imply a term into the contract that it would use reasonable care and skill in selecting those other persons), or did the defendant itself undertake to supply the services when, subject to any exemption clause, there would be implied into the contract a term that it would, as supplier, carry out the services with reasonable care and skill.

Due to the wording of the brochure which emphasised very much the role of the defendant's involvement throughout the detailed itinerary the court was able to find it liable as references to 'we' and 'our staff' throughout the tour operator's brochure appears to have sealed the defendant's fate. Had it not been so worded, the decision may have been different but the Privy Council found the defendant liable as it was an implied term of the contract that those services would be carried out with reasonable skill and care. The court held further that the term did not mean, to use the words of Hodgson, J in *Wall* that the defendant undertook an obligation to ensure 'the safety of all components of the package'. It was a term simply that reasonable care and skill would be used in rendering the services to be provided under the contract. The trip across the lake was clearly not carried out with reasonable skill and care as no

¹⁴ [1995] 4 ALL ER 745

steps were taken to see that the driver of the speedboat was of reasonable competence and experience and the defendant was therefore liable for breach of contract.

The judgment, whilst acknowledging that regulation 15 of the Package Tour Regulations 1992 did not apply to this contract, suggested that the regulation helped to shed some light as to whether or not an unreasonable burden would be imposed if the contract were held to contain a term that reasonable skill and care would be used in respect of the services provided by themselves or by someone on their behalf. Their Lordships were satisfied that it was not imposing on the tour operator a burden which was 'intolerable' as the Court of Appeal thought nor was it wholly unreasonable, as Hodgson, J. had thought in *Wall*.

It would seem that by the time the regulations were being implemented, the courts were moving away from the overly narrow and less consumer friendly view of *Wall*, and paving the way for and acknowledging the sea change that the pro-consumer package travel regulations would epitomise. This wider consumer protection supplemented the common law in the form of Council Directive 90/314 EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours, and the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) that implemented the Directive, described by Oughton and Lowry (1997) as the 'most important development in relation to holiday law.'¹⁵

¹⁵ at 239

CHAPTER TWO

THE PACKAGE TRAVEL DIRECTIVE AND THE PACKAGE TRAVEL REGULATIONS-AN OVERVIEW

This Chapter will examine why the Package Travel Regulations came into force in 1992, and the thinking behind the introduction of them. The Council Directive in 1990 highlighted a number of reasons why it was thought necessary to impose common standards in relation to package holidays throughout the European Union, as outlined in the preamble to the Directive. These themes will be explored along with the Articles within the Directive, which were implemented in the United Kingdom by the Regulations, and will be discussed briefly in this chapter, with emphasis and discussion of case law to illustrate some of the more salient Regulations. The chapter will conclude with analysis of the recent proposals for a new Directive, recognising the need for change brought by the digital age.

[Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours](#)

The preamble to the Package Travel Directive refers to the fact that national laws of Member States concerning package travel, showed many disparities, and national practices were markedly different. This was giving rise to obstacles to the freedom to provide services in respect of package holidays, and distortions of competition amongst operators established in different Member States.

Common rules it was felt, would contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States. Community consumers would also benefit from comparable

conditions when buying a package in any Member State. This has been referred to as the tension in EU consumer legislation by Stuyck (2013)¹⁶ between two sometimes conflicting goals: fostering the confidence of business in the internal market by removing existing obstacles, and fostering consumer confidence and protection by guaranteeing a high level of consumer protection, which is a fine balance to be struck.

The Council acknowledged the economic importance of tourism¹⁷ and that harmonisation of legislation on packages was needed-it being a fundamental part of tourism. The package travel industry in Member States would be stimulated to greater growth and productivity if at least a minimum of common rules were adopted in order to give it a Community dimension. Recognising that not only would this benefit Community citizens buying packages organised on the basis of those rules but it would also attract tourists from outside the Community seeking the advantages of guaranteed standards in packages.

Disparities in rules protecting consumers in different Member States were felt to be a disincentive to those consumers, especially as the Council recognised that the special nature of services supplied in a package generally involved the expenditure of substantial amounts of money. The consumer therefore should have the benefit of protection and irrespective of whether they are a direct contracting party. There were a number of matters in particular that needed to be addressed:-

- The organiser of the package and/or the retailer should be under obligation to ensure that in descriptive matter relating to packages which they organise and sell, the information given is not misleading, and that brochures made available to consumers contain information which is comprehensible and accurate.
- Consumers need to have a record of the terms of the contract and all terms of the contract should be in writing or other such documentary forms, and shall be comprehensible and accessible with copies given to consumers.

¹⁶ 20 MJECL 385 at 402

¹⁷ A market that is an important source of growth for the European economy employing some 9.7 million people, and involving 120 million consumers who buy customised travel arrangements and 1.8 million businesses that operate in the tourism sector, Gaydazhieva (2013), 1

- The consumer should be able to transfer to a third party a booking made by them for a package.
- The price should not be subject to revision except where expressly provided for in the contract.
- The consumer should be free to withdraw before departure from a package travel contract. There should also be a clear definition of the rights available to the consumer where the organiser cancels before departure.
- If after departure there occurs a significant failure of performance of the services contracted, the organiser should have certain obligations to the consumer.
- The organiser and /or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract, and liable in damages to the consumer for failing to perform or the improper performance of the contract, unless the defects are attributable neither to any fault of theirs nor to that of another supplier of services.
- Such liability should be limited in accordance with the international conventions governing such services, in particular the Warsaw Convention (1929) for carriage of passengers by air, Athens Convention (1974) for carriage by sea, Berne Convention (1961) for carriage by railway and the Paris Convention (1962), on liability for hotel-keepers. Other than for personal injury, it should be possible to limit liability under the contract, provided the limits are not unreasonable.
- Arrangements should be made for the information of consumers regarding the handling of complaints.
- Organisers and/or retailers should be under obligation to provide sufficient evidence of security in the event of insolvency.
- Member States should be at liberty to retain more stringent provisions relating to package travel for the purpose of protecting the consumer.

ARTICLES 1-10

The ten Articles within the Directive expand on the general principles outlined in the preamble and state the purpose of the Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale.¹⁸

Package is defined as the pre-arranged combination of not fewer than two of the following namely transport, accommodation or other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty four hours or includes overnight accommodation. Further definitions are given to the meaning of, 'organiser', 'retailer', 'consumer', and 'contract'.¹⁹

The descriptive matter concerning a package must not be misleading and brochures be accurate about price, destination, type of accommodation, meal plan, itinerary, general information regarding passport and visa requirements and health formalities. Also outlined are provisions relating to methods and timing of payments, minimum number of persons required for the package and deadlines for information to be given to consumers when informing them of cancellations.²⁰

An onus is placed on the organiser/retailer to provide details of passport and visa requirements before the contract is concluded, along with details of times and places of intermediate stops and transport connections. It also covers the details that must be given of local agencies and emergency contact numbers along with provisions regarding minors and insurance policies covering cancellation and repatriation. Many of the issues in the preamble regarding the supply of detailed information on the terms of the contract, which must be in writing, the price, transfer of the package, timings for cancellations and withdrawal by either party and rights to repayment or offer of an alternate holiday and/or compensation are also defined. Likewise the

¹⁸ ARTICLE 1

¹⁹ ARTICLE 2

²⁰ ARTICLE 3

position after departure, and what the rights are for a consumer where a significant proportion of services are not provided.²¹

The Directive further outlines how Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser/retailer or by other suppliers of services without prejudice to the right of the organiser/retailer to pursue those other suppliers of services. No liability follows if there is no fault attributable to them or their suppliers because of a failure attributable to the consumer. Nor of a failure by a third party unconnected with the provision of the services contracted for and which are unforeseeable or unavoidable. They will not be liable either due to force majeure or an event the organiser/retailer, with all due care could not have foreseen or forestalled. However, in the case of the latter two points the organiser/retailer shall be required to give prompt assistance to a consumer in difficulty.²²

As regards damages arising from non-performance, or improper performance, Member States may allow compensation to be limited in accordance with the international conventions governing such services. For damage other than personal injury, compensation may be limited under the contract so long as it is not unreasonable.²³

An obligation is also placed on consumers that they must communicate any failure in the performance of a contract on the spot to the supplier of the services and to the organiser/retailer in writing or any other appropriate form at the earliest opportunity. This obligation must be stated clearly and explicitly in the contract.²⁴

In cases of complaint, the organiser/retailer or their local representative must make prompt efforts to find appropriate solutions.²⁵ Matters regarding issues of

²¹ ARTICLE 4

²² ARTICLE 5

²³ ARTICLE 5

²⁴ ARTICLE 5

²⁵ ARTICLE 6

security and insolvency are detailed.²⁶ Member States are also able to adopt more stringent provisions to protect consumers,²⁷ and Member States shall bring into force measures necessary to comply with the Directive before December 31st 1992,²⁸ and the Directive is addressed to the Member States.²⁹

In summary, by harmonising the laws relating to package tourism throughout the Member States, the Directive's purpose was twofold namely to equalise the competitive position of tour operators, and to strengthen consumer protection. However, balancing these two criteria can be problematic and for an analysis of harmonisation which can lead to 'unnecessary legal fragmentation as a result of uncritical reliance on the one-size fits all approach', and how to minimise that, see Niglia (2010)³⁰

The authors of *Saggerson*³¹ believe that by regulation the European Union would bring uniform standards in respect not only of the rights but the remedies that should be available to consumers in the event that something goes wrong. More recent Directives which resulted in the Denied Boarding Regulations, not only build on the earlier Directive and package regulations by standardising remedies but specify in great detail what the remedies for breach are that will apply to all Member States.³² The Directive can be regarded perhaps as the forerunner of a number of Directives described by Collins (2010) as providing, 'increasingly comprehensive consumer protection measures...gradually transforming the legal framework that regulates everyday transactions in all Member States'³³. He continues that ultimately, given the divergencies in national legal traditions and practices, complete uniformity seems an unlikely outcome. Nevertheless with the recent proposals for a new Directive

²⁶ ARTICLE 7

²⁷ ARTICLE 8

²⁸ ARTICLE 9

²⁹ ARTICLE 10

³⁰ 17 MJEL 116 at 128 in which she refers to methods of 'adopting' rules to fit where prospects of transplanting successfully are doubtful or 'downsizing' by not inserting any rule prone to encounter entrenched and unworkable resistance.

³¹ at 1

³² Directive (EC) No 261/2004, Articles 4 and 7 enable passengers delayed or denied boarding on aircraft depending on flight distance, compensation of 250 Euros, 400, or 600, given effect into UK law by the CIVIL AVIATION (Denied Boarding Compensation and Assistance) REGULATIONS 2005/ SI 2005/95

³³ 73 MLR 89

(discussed later), his commentary on other recent Directives is equally applicable to the proposals, namely that sceptics regarding the ability of the institutions of the EU to deliver on its goals may discover that the Directive (on Unfair Commercial Practices) marks a turning point that will confound their criticisms.³⁴

This harmonisation of remedies ensures that service providers throughout the European Union operate on a reasonably equal footing. The provision of harmonised remedies in Member States, make it easier for consumers to take action in respect of poor services and that in itself is likely to lead indirectly to a reduction in the number of occasions on which the consumer would have cause to complain against the tour operator. Putting it bluntly, the easier it is for the consumer to take action and succeed against a tour operator in respect of travel related service complaints, the more likely it is that the tour operators or organisers will themselves exert pressure on *their* subcontractors to deliver a reasonable product.³⁵

The 1990 Directive certainly had a significant impact on European law. Serrat (2010) regards the Directive as becoming crucial for consumer rights and the aim of recent changes he believes is to provide a stronger framework for contract law in Europe.³⁶ Zunarelli (1993/4) describes the then new legislation as proving innovative in legally qualifying the positions of all subjects involved in package travel and of having a dramatic impact on Italian Jurisprudence, representing a notable improvement in the protection of the consumer/traveller. Though the Directive, he continues, accomplishes the aim of harmonising legislation within the Member States it by no means intends to be exhaustive.³⁷

The Directive was implemented by the British Parliament passing the Package Travel Regulations, despite, according to some, 'a considerable body of opinion that a

³⁴ At 118

³⁵ *Saggerson* at 2

³⁶ 12 EJLR 388, at 391

³⁷ 17 FILJ 489 and 499 although he is critical of the ambiguity in the wording of some of the Articles such as 'inclusive price' and the issue of joint or several liability in the context of retailer/organiser is open to various interpretations. The choice of the Italian government was to find the organiser liable for the entirety of the performances comprising the package and has regarded the retailer simply as the mandatory agent of the consumer, unlike the UK, although there appears to have been little litigation on the issue of joint and several liability of the 'parties to the contract' ie retailer and tour operator, so far.

statute would be most appropriate to consolidate all legislation relating directly or indirectly to the package holiday industry, the UK government did not pursue this path.³⁸ Instead regulations were chosen as the appropriate method of implementation.

The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288)

The regulations in essence imply terms into holiday contracts dealing with issues arising prior to departure and once in resort. Various terms are defined and follow closely the wording of the Articles. In particular 'other party to the contract' refers to the organiser, retailer or both. The definition of 'consumer' in regulation 2 gives a very wide meaning including not only the principal contractor but also 'other beneficiaries' in the party and any consumer not involved in the original contract where the holiday has been transferred to them at a later date. In addition the definition of what constitutes a 'package' is virtually word for word the definition in Article 2 and that the submission of separate accounts for different components shall not cause the arrangements to be other than a package. Additionally, the fact that a combination is arranged at the request of the consumer and in accordance with their specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged.³⁹

The importance of whether or not the holiday is a 'package' and thereby regulated has been litigated on numerous occasions and highlights just how fundamental this point is. Disputes have arisen over what constitutes part of the pre-arranged combination of services offered at an inclusive price, especially over matters involving excursions. If booked at the time the contract is made where the tour operator is contracting with the consumer as principal it will be a regulated package. If as agent, once in resort, then the excursion may not form part of a regulated package.

³⁸ Nelson-Jones and Stewart (1993) at 4

³⁹ Regulation 2

In *Mason v Titan Travel Ltd.*⁴⁰ an excursion was clearly not part of a regulated package holiday where the brochure advertising the holiday to Canada not only advertised the canoe trip (in which the claimant was capsized due to an overhanging branch) as a voluntary add on at a separate price, but had expressly stated in clear distinctive lettering in the brochure that it was not part of the package holiday.

Arguments over the definition of 'package' have become more acute as the traditional package holiday booked at a travel agent on the street has declined whereas stand alone holidays and bookings over the internet, have spread. As recently as 2011 the Court of Appeal was embroiled in the thorny issue of what constituted a 'package' in *Titshall v Qwerty Travel Ltd.*⁴¹ Mr. Titshall booked a last minute holiday through Qwerty Travel for a holiday in Corfu. He suffered serious injuries when, as he attempted to open a sliding glass patio door, the glass shattered. Mr. Titshall claimed the door was defective, this was denied and defended on the basis he was drunk and arguing with his partner and fell through.

A preliminary point however, was argued in that Qwerty claimed that it did not owe any obligation to him over and above that 'commensurate with its role as retail agent for the suppliers of accommodation at the hotel.' They said that he had not purchased a package within the meaning of the regulations, from them. They argued that two separate contracts had been entered into. One with First Choice for the supply of return flights. Another with 'Hotels4U.com' for the supply of seven nights' accommodation. Mr. Titshall had booked the holiday during a short telephone call with a clerk employed by Qwerty. Unfortunately neither could remember the details of what had been said and no copy of his invoice was available although Qwerty had generated a 'customer statement', providing a breakdown of the costs of the flights, accommodation and three 'service fees'. There was no evidence of what the 'service fees' related to.

The claim was dismissed after a judge found that as a preliminary issue, Qwerty were not a party to the holiday contract because Mr. Titshall had purchased two services at the same time, but had done so separately. He appealed on the basis that

⁴⁰ (2005) Unreported

⁴¹ [2012] 2 ALL ER 627 (CA (Civ Div))

the holiday had been sold at an inclusive price. Qwerty argued that a pre-arranged combination of services had been sold or offered for sale separately at separate prices and that the price necessarily had to be an aggregate price and so was not a package.

The Court of Appeal held that the services were being offered for sale as components of a combination and not sold or offered for sale separately, but at the same time. It was plain that no explicit suggestion had been made to the claimant that either the flights or the accommodation were available for separate purchase. Secondly, the treatment of the service fees seemed to supply a clear, unifying feature connecting the provision of one service with the provision of the other. The service fees must have been partly presented as the price for putting together the package, not as the cost of some separate service, available in its own right, which would have been an incoherent suggestion. Qwerty were therefore held, on the preliminary issue at least, to be liable to Mr Titshall for the proper performance of the obligations under the contract. Harvey (2012)⁴² succinctly comments that, 'the modern age of the internet in particular and its increased ability to tailor make holidays has led the current challenge in these claims. Is what has been provided a holiday that comes within the regulations? Is it a package?' (See later discussion on the new Proposals).

The Regulations came into force in the UK from December 31st 1992.⁴³ They provide that descriptive matters relating to packages must not be misleading, closely following Article 3, and introduce a misrepresentation liability for breach of contract which includes false and inaccurate information, but also true information that gives a false impression.⁴⁴ There may also be cases where truthful information is given but it will be a question of fact and degree as to whether it is misleading, which may sometimes be problematical. Clearly tour operators will want to convey to potential consumers their holidays on display in as aesthetically pleasing light as possible, counter balanced though is that consumer expectations will inevitably be high. Oughton and Lowry (1997) make the point that most of the problems associated with the consumer as a holidaymaker relate to their expectations. The main difficulties arise

⁴² Case Comment (2012) JPIL 79 at 80

⁴³ Regulation 3

⁴⁴ Regulation 4

where the consumer has booked a foreign holiday on the strength of statements made by the tour operator in a holiday brochure only to find that the holiday promised is not what has been delivered.⁴⁵ Somewhere in the middle may be a 'grey area'. What may be regarded as 'mere puff', ('stunning vistas' or 'breathtaking views' for example), advertising on the one hand, may be seen as a factually misleading representation on the other. Are such statements terms of the contract or merely commendatory statements which do not give rise to any liability, that is statements on which no person could claim to rely on such as 'Persil washes whiter than white'?⁴⁶ Woodroffe and Lowe (2013)⁴⁷ argue that it is difficult to know where to draw the line between a) a mere puff, and b) a representation or term, and to illustrate their point cite the often quoted case of the car dealer who described a car as 'a good little bus' when it had a steering defect, being liable for breach of contract⁴⁸. As is often the case it may all come down to context and reasonableness, each case turning again on a question of fact and degree.

By way of illustration in a holiday context, in *Mawdsley v Cosmosair Plc*⁴⁹ the tour operator's brochure advertised a hotel in Turkey and included information that it had a 'lift in a main building that was suitable for parents with young children'. The claimant booked a half board holiday for herself and her young family at the hotel and was injured when she fell down a set of 39 steps, leading to the hotel restaurant which was on a mezzanine floor not served by the lift that stopped on all the other floors in the main building. At the time of her fall she was manhandling two toddlers and a pushchair down the stairs. Her claim in part was brought on the basis under regulation 4 that the information in the brochure was misleading. The Court of Appeal in dismissing the tour operator's appeal declared the description was misleading. They agreed with the trial judge that, 'if you say there are lifts in the main building, it clearly implies that that will provide access to everything...It was misleading to say that there was a lift in the main building because the lift only gave access to all the floors bar the restaurant.'

⁴⁵ At 239

⁴⁶ See Oughton and Lowry further 241

⁴⁷ At 30

⁴⁸ *Andrews v Hopkinson* [1957] 1 QB 229

⁴⁹ [2003] ITLJ 23

In contrast in *Hoffman v Intasun*⁵⁰ the claimant bought a 'Club 18-30' holiday. In the brochure, holiday reps. were described as 'the life and soul of the party, hard working, good timing, trouble shooting, guitar playing, beach partying, smooth operators.' The court held that such a general description could not possibly fit all reps who might be employed by Intasun. There could be no conclusion other than this statement 'was a puff'. The fact that a particular rep. did not play the guitar or was not a 'smooth operator' could not form the basis of an action for breach of contract or misrepresentation.

Elements of Articles 3 and 4 regarding the essential information requirements in brochures are combined and also it is a criminal offence to breach such requirements,⁵¹ and all particulars in brochures are implied warranties.⁵² There is a requirement that certain information must be provided before the contract is concluded (see Article 4 above), again making it an offence not to comply,⁵³ and such information must be provided in good time before the start of the journey.⁵⁴ Again following the Articles closely the contents and form of the contract are to be in writing and a written copy must be supplied to the consumer.⁵⁵ It is also an implied term in the contract that a consumer may transfer their booking where they are prevented from proceeding with the package⁵⁶ and the regulations prevent price revision in the contract save in specified circumstances that are outlined in the regulations.⁵⁷

Significant alterations to essential terms by the tour operator prior to departure enable the consumer to withdraw without penalty from the contract,⁵⁸ and the rights and remedies for withdrawal from the contract by the consumer pursuant to regulation 12 or cancellation by the tour operator include a substituted package or repayment⁵⁹. After departure, where a significant proportion of the services are not

⁵⁰ (1990) Unreported

⁵¹ Regulation 5

⁵² Regulation 6

⁵³ Regulation 7

⁵⁴ Regulation 8

⁵⁵ Regulation 9

⁵⁶ Regulation 10

⁵⁷ Regulation 11

⁵⁸ Regulation 12

⁵⁹ Regulation 13

provided, this will result in suitable alternative arrangements being provided, or if not then suitable transport back and where appropriate compensation.⁶⁰

Perhaps one if not the most important regulation covering liability of the other party to the contract (the tour operator in effect), for proper performance of obligations under the contract, or improper performance, by themselves or their suppliers, is regulation 15, which will be discussed, and the case law on it analysed in depth in the next chapter.

The regulations also deal with security in the event of insolvency, bonding, insurance and monies in trust respectively, criminal offences arising out of breaches, and enforcement.⁶¹ Also defences, liability of persons other than the principal offender and time limits for proceedings are further set out⁶² and no contract shall be void or unenforceable, and no right of action in civil proceedings in respect of any loss, shall arise by reason of the commission of offences under regulations 5, 7, 8, 16 or 22.⁶³ Implied terms in the contract will be enforceable.⁶⁴

Impact of the Regulations

One cannot overstate the impact the Package Travel Regulations have had on English contract law. They do not usurp the common law and are ancillary to it. The regulations have also certainly brought into sharp focus the dynamics of the relationship between consumer and tour operator, as recognised in the preamble of the EU Directive, and provide a structure from which claims can be made alone or in conjunction with common law claims, without the restrictions of privity, agency and third party contractual principles. They introduced a degree of certainty and clarity as to the responsibilities and obligations tour operators have towards consumers. As Grant and Mason (2012) explain, what has happened is that a large number of additional rules have been created which operate alongside the ordinary law of

⁶⁰ Regulation 14

⁶¹ Regulations 16-23

⁶² Regulations 24-26

⁶³ Regulation 27

⁶⁴ Regulation 28

contract and impact upon it to a greater or lesser degree. To illustrate this they discuss three general principles in contract law namely offer and acceptance, privity of contract, and frustration;

“ Thus, on the one hand, the rules on offer and acceptance have not been changed, but an operator has to be much more alert to the rules because a number of regulations require him to provide information to clients before the contract is made-on pain of committing a criminal offence (reg.7) or of running the risk that a client can withdraw from the contract (reg.9). By contrast, the existing law on privity of contract is greatly changed because the Regulations provide that persons other than the immediate parties to the contract⁶⁵ acquire rights under it and can sue⁶⁵However, the regulations do introduce a new concept to package holidays-the concept of *force majeure*. *Force majeure* resembles frustration of contract in many ways but there are significant differences-not only in its application but also in the consequences that flow from it. The result is not entirely clear but in our view the effect of the *force majeure* rules is to render the rules on frustration largely redundant.”⁶⁶

The importance of the regulations can be seen in the case of *Josephs v Sunworld Ltd (t/a Sunworld Holidays)*⁶⁷. This involved a claim for numerous breaches of the regulations. The claimant booked a holiday in the Algarve for himself, his wife and two young children aged five and eight, at the Vale do Lobo Villas. The holiday was booked six months before departure at a cost of £2,933.60. On arrival, they were

⁶⁵ As a general exception to the principle of privity of contract, the common law has long recognised that holiday contracts should be treated differently see *Jackson v Horizon Holidays Ltd.*[1975] 3 ALL ER 92. In that case the Court of Appeal wrestled with the problem of whether Mr Jackson could claim damages not only for himself but also his wife and twins for a disastrous holiday in Ceylon involving very poor accommodation and facilities. The Court of Appeal held that he could indeed claim for the distress caused to his family. *Jackson* was followed in *Kemp v Intasun Holidays* [1987] 2 F.T.L.R. 234 where Mr Kemp was also able to sue on behalf of himself and other members of the family. However, they could not sue in their own right. As Grant and Mason also point out *Jackson* is a means of avoiding the full rigours of the privity of contract rule, ‘but it is not a full-blown exception to it’.-245. It would seem therefore that the common law rule has now been overtaken and arguably replaced, if not extended by the Package Tour Regulations so far as package holiday contracts are concerned as the definition of ‘consumer’ in the regulations extends to transferees, members of a family, or other party members. A forerunner it would seem to the Contracts (Rights of Third Parties) Act 1999 whereby two new exceptions to the privity rule apply to a third party in any contract under section 1(1). A third party may in his own right enforce a term of the contract if (a) the contract expressly provides that he may or b) the term purports to confer a benefit on him.

⁶⁶ 28-29

⁶⁷ [1998] CLY 3734

allocated a villa at another resort, Vale De Garro, which was a 15 minute drive from the resort they had booked. The accommodation was terraced and in close proximity to a main highway and had confined grounds. It had a small swimming pool which the claimant stated was overfilled with chemicals. Further allegations involved a failure to provide barbecue utensils, the television remote control did not work, the sun loungers were broken, balcony doors did not lock, the bed linen was not changed for the duration of the holiday and the fridge and kettle did not work. Further, a new hotel was being constructed at the rear of the property. The claimant had expected exclusive accommodation of a high standard in the resort Vale Do Lobo which would, according to the brochure, "stand in its own (usually enclosed) grounds with mature gardens and lawns and many will be on small exclusive estates." In addition a car hired broke down but the tour operator failed to offer any assistance. The claimant brought an action against the tour operator for breach of contract.

The tour operator was found to be in breach of contract and of the Package Travel Regulations. In particular regulation 4 because the descriptive matter in the brochure was misleading. Regulation 12 because there had been a significant alteration to central terms due to the change in resort. Regulation 13 because the claimant had not been offered the alternative of continuing with the holiday and claiming compensation or returning home. Regulation 14 regarding the standard of accommodation, as a significant proportion of the services were not provided and the aspects of the villa were not as indicated. Regulation 15 (1) as the tour operator, the court held, was strictly liable for the problems that had occurred with the holiday, and 15(7) due to its failure to assist the claimant in difficulty following the breakdown of the hire car even though the car had not been hired through the tour operator as they must provide every assistance even if the loss suffered was due to another party. Damages of £1,500 were awarded in respect of diminution in value of the holiday together with £ 500 general damages for distress and inconvenience. It is difficult to imagine a case involving many more breaches of the regulations given the range of breaches in this case.

Whilst the above case demonstrates how effective the regulations are in outlining what rights the consumer has and how they can be enforced, changes in the

way holidays are traditionally taken have impacted on those rights. Many consumers no longer book through a high street travel agent after poring over brochures, and prefer to book on line sometimes through different organisers of the holiday, as a package or separately. It has become unclear which holiday contracts are protected and which are not, creating a climate of uncertainty and a need for change. It is nearly a quarter of a century since Directive 90/314/EEC was introduced and much has changed since then.

Recent Developments

In view of this uncertainty, in 1999 a European Commission staff working paper⁶⁸ reviewed the way Member States transposed the provisions of the Directive into national law. The Commission identified flaws with the Directive that has allowed a very large margin for interpretation resulting in wide differences between the Member States in the protection actually afforded to consumers. Examples of unclear terms include the meaning of 'pre-arranged combination', and 'sold or offered for sale at an inclusive price'. The paper noted that it is unclear whether or not tailor made holidays are covered by the Directive⁶⁹ and the status of fly/drive holidays is also uncertain.⁷⁰ In response to requests from a number of bodies, industry and consumer groups for modernisation, the European Commission presented a Final Proposal for a revised Directive on 9.7.13.⁷¹ The Proposal has been described as creating a legal framework for new ways of travelling by taking some features of the online contracting process into consideration.⁷²

In the Context section it is recognised that the structure of the travel market was much simpler in 1990 than today, the internet did not exist and it remained unclear to what extent modern ways of combining travel services were covered by the Directive which has led to legal grey areas. Significant differences remain in the laws

⁶⁸ (SEC (1999) 1800)

⁶⁹ Though see the ECJ decision in *Club Tour Viagens E Turismo SA v Garrido (Case C-400/00) OJ C 144 10* which decided not only brochure package holidays but also those organised at the request and in accordance with the specifications of a consumer came under the protection of the Directive.

⁷⁰ See further Kilbey (2000) ITLJ 18 and under the new proposal will form part of the package.

⁷¹ Proposal For A Directive Of The European Parliament And Of The Council On Package Travel And Assisted Travel Arrangements COM (2013) 512 Final

⁷² Serrat (2014) 1 at 3

transposing the Directive, due to its minimum harmonisation approach, and the broad discretion given to Member States with regard to liability of parties, along with ambiguity in the text. The development of online sales and the liberalisation of the airline sector have changed the way in which consumers organise their holidays, leading to different ways in which traders assist consumers in customising combinations of travel services, in particular online. There is much ambiguity it was felt in many Member States as to whether such combinations fell under the scope of the Directive and whether traders involved in putting together such combinations are liable for the performance of the relevant services especially in the online environment. This it was felt caused uncertainty for traders and consumers.

Some of the provisions of the Directive had become outdated or otherwise created unnecessary burdens such as the information requirements for brochures. It was also felt that legal fragmentation through numerous discrepancies in the laws of Member States generates additional costs for business wishing to trade cross border.

The objectives of the revised proposal are to enhance the functioning of the Internal Market and to achieve a high level of consumer protection through the approximation of rules on packages and other combinations of travel services. Also to clarify which combination of travel services are protected under EU package travel rules, replacing unclear and outdated provisions. The revision is also part of a comprehensive review of the consumer acquis over the last decade, involving a number of Directives⁷³ aimed at providing EU wide consumer rights.

Eight options were considered ranging from maintaining the status quo, to repeal of the Directive and self-regulation by the industry. Option six was chosen and entails:-

A legislative revision which would keep the main structure of the existing Directive, whilst clarifying its scope through the explicit inclusion of 'one-trader' packages and revising several provisions. The revised Directive would apply to travel

⁷³ Concerning Unfair Contract Terms, Unfair Commercial Practices, Consumer Rights, Electronic Commerce, Airline Passenger Rights.

services which are combined for the same trip or holiday on one website or at one high street agent. There will be a gradual approach and cover:

'Multi-Trader' *packages* ie combinations of travel services through different traders showing certain features associated with packages, which would be subject to the same regime as other packages (including full liability for the proper contractual performance and the obligation to procure insolvency protection).

'Multi-Trader' *assisted travel arrangements* ie those combinations of travel services which do not display the typical features of packages (such as an inclusive price) and are hence less likely to mislead consumers. This would involve a lighter regime consisting of insolvency protection and an obligation to state in a clear and prominent manner that each individual service provider is responsible for the correct performance of the services. Here the retailer will have to ensure in the case of their own insolvency or any of the service providers that travellers receive a refund of prepayments and where relevant be repatriated.

The proposed Directive it is believed will thus clarify and modernise the scope of travellers' protection when purchasing combinations of travel services for the same trip or holiday by bringing in its scope different forms of online packages and assisted travel arrangements. It will ensure that travellers are better informed about the services they are buying and grant them clearer remedies if something goes wrong. At the same time by reducing legal fragmentation and strengthening mutual recognition of insolvency protection, the proposals will minimise obstacles to cross-border trade and reduce compliance costs for traders wishing to operate cross-border and ensure a level playing field in the travel market (for those covered by the Directive and those who are not). Specifically the proposal's context section declares that it does not interfere with general national contract law and the Directive will ensure a coherent set of rights and obligations, whilst allowing Member States to integrate these rules into their national contract law.

Overview of the Proposals

Subject-matter, scope and definitions (Articles 1-3)

Article 1 sets out the subject matter of the Directive, and in particular the 'achievement of a high level of consumer protection'. Article 2 determines its scope and Article 3 deals with definitions. The range and scope have already been discussed above and clarification and wider protection is now given for online purchases. Combinations provided which meet the 'package' criteria are fully liable and can be achieved in six ways:

- (i) Travel services (now including car hire thus clarifying the fly/drive issue) put together by one trader, including at the request or selection of the traveller.
- (ii) Irrespective of whether separate contracts are concluded with individual service providers, purchased from a single point of sale within the same booking process.
- (iii) Offered or charged at an inclusive or total price.
- (iv) Advertised or sold under the term 'package'.
- (iv) Combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services.
- (vi) Purchased from separate traders through linked online booking processes where to conclude details are transferred between traders.

Retailers through linked booking processes facilitating additional travel services in a targeted manner, or where the traveller contracts with the individual service providers but where the defining features of a package are not present are known as - 'assisted travel arrangements' and carry the lesser level of liability. Here the retailer has the burden of ensuring insolvency cover and the duty to inform the traveller that only the individual service providers are liable for the performance of the service. Managed business travellers are however, excluded, as are stand-alone contracts for a single travel service, packages and assisted travel arrangements covering a period of less than 24 hours unless overnight accommodation is included.

Instead of consumer the word 'traveller' is employed and defined as any person seeking to conclude or is entitled to travel on the basis of a contract concluded within the scope of this Directive. 'Organiser' is defined as a trader who combines and sells packages either directly or through another trader (so there can be more than one 'organiser' responsible for the same package) and are liable for the performance of the package (Articles 11 and 12), for providing assistance to the traveller (Article 14) and procuring insolvency protection (Article 15). Retailer as 'a trader other than the organiser who sells or offers for sale packages or facilitates the procurement of travel services which are part of an assisted travel arrangement by assisting travellers in concluding separate contracts for travel services with individual service providers. Retailers and organisers are both liable for providing pre-contractual information (Article 4). Retailers are liable for booking errors (Article 19) and retailers who facilitate the procurement of assisted travel arrangements are obliged to procure insolvency protection (Article 15). 'Lack of conformity' means lack of and improper performance of the travel services included in a package.

From an industry point of view, what has been described by Mason (2013) as the 'massively widened definition of a package that now takes centre stage' means in practice that many more bookings, or combinations of services will become packages. The industry will have to be very clear about liabilities when working together to sell holidays and formal agreements containing indemnities will become more common. Many businesses he suggests, which did not previously have the obligations that came with being an organiser will have those, from bonding to liability.⁷⁴

*Information Obligations, Conclusion and Content of the Package Travel Contract
Articles 4-6)*

Specific pre-contractual information which organisers and retailers have to provide are set out in Article 4. Article 5 regulates the conclusion of the package travel contract and Article 6 contains provisions on the content and the presentation of the contract or its confirmation, as well as on documents and information to be provided before the start of the package.

⁷⁴ (2013) TLQ 193 at 200

Changes to the Contract Before the Start of the Package (Articles 7-10)

Compared with the original Directive these are very similar though Article 10 contains additional termination rights for travellers before the start of the package, a 'very welcome novelty' according to Serrat (2013)⁷⁵.

Performance of the Package (Articles 11-14)

These articles contain rules on the organiser's liability for the performance of the package (Articles 11-13) and the obligation to provide assistance to the traveller (Article 14). In contrast to the original Directive only the organiser is liable for the performance of the package thereby aiming to avoid a doubling of costs and litigation. Articles 11 and 12 provide for the remedies available to the traveller in the event of lack of conformity, including the lack of performance and the improper performance of the services. These are similar to Articles 5 and 6 of the original Directive but are presented in a more systematic fashion, providing certain clarifications and closing certain gaps. Article 11 lays down the obligations to remedy the lack of conformity and to make suitable alternative arrangements for the continuation of the package where a significant proportion of the services cannot be provided. It is clarified that the latter obligation applies where the traveller's return to the place of departure is not provided as agreed. Where this is impossible because of unavoidable and extraordinary circumstances, the organiser's obligation to bear the cost for the continued stay is limited to EUR 100 per night and three nights per traveller (in line with the proposed amendment to the Denied Boarding Regulations for flights).

Article 12 contains provisions on price reductions related to lack of conformity and to alternative arrangements resulting in a package of lower quality, as well as on damages, which includes (following the *Leitner*⁷⁶ case) compensation for 'non-material' damages-namely loss of enjoyment. Article 13 provides that travellers can address complaints or claims to the retailer which will be regarded as complying with any time-limits. Organisers under Article 14 are obliged to provide assistance to travellers who are in difficulty.

⁷⁵ IFTTA Conference Charles University of Prague

⁷⁶ See next Chapter

Insolvency Protection (Articles 15 and 16)

The original Directive created a general obligation for the organiser and/or retailer to provide insolvency protection so as to ensure the repatriation of passengers and the refund of advance payments in the event of insolvency which often led to duplication of costs. Under Article 15 only package organisers, and retailers who facilitate the purchase of 'assisted travel arrangements' are subject to this obligation, with mutual recognition of insolvency provisions in the member States (Article 16).

Information Requirements For Assisted Travel Arrangements (Article 17)

To ensure legal certainty and transparency for the parties, retailers offering assisted travel arrangements have to explain to travellers in a clear and prominent manner that only the relevant service providers are liable for performance of the services and that travellers will not benefit from any of the Union rights granted to package travellers, except the right to a refund of pre-payments and where relevant, to repatriation in case the retailer itself or any of the service providers become insolvent.

General and Final Articles (18-29)

These Articles speak for themselves and cover a range of items needed to finalise the Directive.

Reaction to the Final Proposals

On December 11th 2013, the European Economic and Social Committee welcomed the proposal and 'applauds the move towards more transparency'.⁷⁷ However it recommended that inter alia packages and assisted travel arrangements lasting less than 24 hours should be included in the scope, that 'reasonable' fees for cancellation be more clearly defined and that EUR 100 compensation is insufficient and reduces current consumer rights. The new definition has a broader scope and the Committee believes an additional 23% of holiday makers will be covered. The broader definition of package travel clearly addresses issues raised by customised travel

⁷⁷ 5.6.2014 OJEU C170/73

packages which were not covered by the 1990 directive, despite consumers being generally under the impression they were. Transparency for consumers aims to avoid the recurrence of past instances when consumers may have been misled in believing they were protected. Also the requirement to reprint brochures has been repealed and will save the industry EUR 390 million per year. The EESC recognised the significant impact of the new proposal on consumers and on business that will result in stronger consumer protection and savings for the industry.

Under the heading ‘Stress-free holidays for 120 million consumers-European Parliament backs rules on package travel’, the European Commission press release⁷⁸, outlining the aim of the reform as to make sure that all those buying customised holidays are suitably protected in the digital age, (either when booking packages or new forms of linked travel arrangements), was decidedly upbeat. Glenn (2014)⁷⁹ from an industry point of view reports of widespread criticism of the proposed changes amongst travel organisations within the UK and across Europe. Companies which operate websites allowing consumers to customise their own holidays, whether solely on one website or by linking through to multiple third party providers, will be affected by the changes.

“The new regulations will have the potential to place onerous responsibilities and increased liability on them which they would not have been subject to previously.”

Status of Proposed New Directive

For the Proposal to become law the European Parliament and the Council of Ministers will have to agree on the final text of the Directive in the ordinary legislative procedure. As at 2.6.14 Glenn further writes that the Directive is currently with the Council for consideration and a final decision is not yet forthcoming. It had been hoped that the Council would reach a decision prior to the European Elections in May 2014. The elections now passed, he believes the Directive may be delayed further. If the Council accepts the Directive as is it will be adopted into law. However, should the Council choose to make revisions these will be required to be passed to the Parliament

⁷⁸ March 12 2014 MEMO/14/184

⁷⁹ Brechin Tindal Oatts Solicitors website 2.6.14

for a second reading. According to Glenn the new Parliament could make substantial changes and if this occurs European political commentators have stated the Directive would be unlikely to be approved before the end of 2015 and not likely to be incorporated into UK law before 2017.⁸⁰

It would thus appear for the moment at least the 1990 Directive will continue to remain the law and perhaps the most significant protection for consumers within is the liability of tour operators (and or travel agents where appropriate) for the actions of their representatives, employees, subcontractors or agents for the services provided, under regulation 15. These range from transport and accommodation to excursions in resort, and concern the performance or improper performance of the contract. This protection and how the Proposals affect regulation 15 will be explored further in the next chapter.

⁸⁰ See note 79

CHAPTER THREE

REGULATION 15

In this chapter regulation 15, and how central it is to the regulations will be analysed in detail. Initially thought to impose a regime of strict liability on tour operators for the actions of all their employees, agents and subcontractors-as some believe was the intention of the Directive, - the chapter will demonstrate what appears to be a two tier approach adopted by the courts in the UK on the issue of strict/fault based liability. Ironically for aspects of the contract that deal with safety of consumers (such as food hygiene or the operation of hotels) a fault based liability is imposed. Only if there has been a failure to exercise reasonable skill and care will liability be found. On the other hand strict liability is enforced for arguably more innocuous terms of the contract that are breached, such as failure to provide a particular facility that was advertised or requested at the time of the contract.

The boundaries and limits of what and where liability under regulation 15 lies will also be discussed, as not everything that goes wrong on a package holiday will be covered. Also examined will be the long standing issue of what standards the actions of tour operators and their suppliers, will be judged by. The local standards debate continues to occupy the courts and has done for quite some time. This interesting line of cases is possibly one of the most dynamic areas of travel law development.

Regulation 15

Many writers agree that regulation 15 is such a radical and fundamentally important piece of package travel law, and it is worthy of outlining in full:-

Liability of other party to the contract for proper performance of obligations under the contract.

Regulation 15 –(1) The other party to the contract 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 that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because-

- (a) the failures which occur in the performance of the contract are attributable to the consumer;
- (b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or
- (c) such failures are due to-
 - (i) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or
 - (ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

(3) In the case of damage arising from the non-performance or improper performance of the services involved in the package, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services.

(4) In the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable.

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.

(6) The terms set out in paragraphs (7) and (8) below are implied in every contract.

(7) In the circumstances described in paragraph (2)(b) and (c) of this regulation, the other party to the contract will give prompt assistance to a consumer in difficulty.

(8) If the consumer complains about a defect in the performance of the contract, the other party to the contract, or his local representative, if there is one, will make prompt efforts to find appropriate solutions.

(9) The contract must clearly and explicitly oblige the consumer to communicate at the earliest opportunity, in writing or any other appropriate form, to the supplier of the services concerned and to the other party to the contract any failure which he perceives at the place where the services concerned are supplied.

STANDARD OF LIABILITY

At the time the regulations came into force it was believed that regulation 15 imposed on tour operators a form of strict liability to the consumer for incidents arising out of the provision of package holiday services, unless the tour operator was able to invoke one of the statutory defences in regulation 15(2)(a)(b)or(c).

In *Hone v Going Places Leisure Travel Ltd.*⁸¹ At the hearing in the High Court Douglas Brown, J. stated,

⁸¹ [2001] EWCA Civ 947

“In both the House of Commons and the House of Lords, government ministers used the same language: ‘Regulation 15 is important and makes the organiser or possibly in certain circumstances the retailer, strictly liable for the performance of the contract’ ”.

Authors of text books at the time also believed this, arguing that the aim of the E C Directive was to hold the tour operator responsible for all elements of the package and that primary liability for anything which went wrong would rest with them. In other words, the tour operator should face strict liability for any of the services, facilities or goods to be supplied as component parts of the package and would not be able to mount a defence on the basis that the services, facilities or goods were supplied by others over whom they had no control. Given that the Explanatory Note to the regulations stated that the other party to the contract should be strictly liable to the consumer for the proper performance of the obligations under the contract, it is perhaps understandable why Nelson-Jones and Stewart (1993) wrote:

“There is no precise definition or categorisation of ‘the obligations which exist as regards performance of the package itself...It is the writers’ view that the liability contemplated by regulation 15(1) is strict liability for anything which goes wrong with the package, subject to the limited defences set out in Regulation 15(2).”⁸²

Zunarelli (1993/4) writes that the Community Legislators adopted a policy that, despite some ambiguities in the text, appears closer to the principles of strict liability or according to a formula very popular among Italian lawyers of liability ‘for entrepreneurial risk,’ whereby fault is presumed unless a number of limited exceptions apply.⁸³ Silingardi (1996) refers to a form of ‘presumed responsibility’ unless the provider of the service can establish one of the defences.⁸⁴ For McDonald (2003)⁸⁵ it is clear that liability is strict as fault is not mentioned as an element in establishing a failure or improper performance but is mentioned as an element in establishing the defences available and was clearly in the minds of the Directive’s framers.

⁸² At 47

⁸³ 17 FILJ 489

⁸⁴ 20 HLR 611 at 616

⁸⁵ ITLJ 211

The authors of *Saggerson* however, note the strict liability view of regulation 15 did not find favour with the English judiciary whom in cases decided by reference to regulation 15 clearly felt that the strict liability approach overstated the level of consumer protection that was offered by the regulations.⁸⁶ The proper approach to regulation 15 they argue requires careful consideration of the underlying contractual obligations, their nature and extent, in order to determine whether there has been a 'failure to perform' or 'improper performance.'

Regulation 15 imposes on 'the other party to the contract' as defined in regulation 2, (which in itself has proved problematic in some Member States-see further Zunarelli)⁸⁷ in favour of the consumer (which includes the principal contractor as well as other beneficiaries and transferees) liability for the failure to perform or improper performance of the obligations *under the contract*, in other words not everything that goes wrong during the course of a package holiday gives rise to liability. This is so regardless of whether the tour operator itself or other suppliers of contract services actually provides or carries out the service or facility about which complaint has been made. In summary the operator is liable for the damage caused by the failures or improper performance not only of its own staff, but also of carriers and hoteliers, as well as other package service providers such as transfer coach companies or the providers of pre-arranged inclusive excursions.

Liability does not necessarily involve proving that the tour operator is itself at fault for what has gone wrong. Provided that the failure or improper performance is in respect of an obligation under the contract, the tour operator is the primary target for the consumer's recovery of damages;

⁸⁶ At 175

⁸⁷ Zunarelli at 499 writes that the concept regarding organisers and retailers positions has not been expressed appropriately and is open to various interpretations. One interpretation provides the Member States with the legislative choice between a policy of joint and several liability and a policy of liability for failure to perform or improper performance by either the organiser or the retailer (*not both* and the choice of Italy), thus not properly fulfilling the Directive's goal of protecting the consumer.

“The intention of the regulators was clearly to provide the consumer with the most accessible target for complaints. The intention also being to avoid the practical and other difficulties associated with suing a party based overseas.”⁸⁸

It is arguably this last point, namely the ease with which consumers can bring actions against tour operators without the worry and obstacles of suing in a foreign jurisdiction, along with the extended parties the tour operators are now responsible for, that makes regulation 15 such an important piece of legislation.⁸⁹ Though not being overly consumer friendly as such and imposing strict liability for everything (as discussed further below), the regulation nevertheless provides consumers with the advantages of *extending liability of tour operators* to cover the shortcomings of agents, suppliers and subcontractors for whom it may not have been liable under ordinary common law principles of contract law. It might be said, therefore, that regulation 15 imposes a framework of extended ‘vicarious’ liability, the tour operator is liable for damage caused by the failures of a wider class of persons than its employees.

However, it will be necessary to examine the scope of contractual terms to see the extent of the contractual obligations. For example off-package services may not be covered, only then may it become apparent whether some terms carry a strict or fault based liability .

STRICT/FAULT BASED LIABILITY-THE CURRENT POSITION

This debate has largely been resolved by the Court of Appeal decision in *Hone v Going Places Leisure Travel Ltd.* (referred to above and discussed further below.) The position now appears to be that a contract for the provision of a package holiday contains a variety of terms. Some of these terms give rise to strict obligations, whilst

⁸⁸ *Saggerson* 176

⁸⁹ Though it is recognised under Regulation (EC) No. 44/2001 the Brussels Regulation in matters relating to consumer contracts (however, only within EU Member States) the consumer has a choice and may also bring proceedings for breach in the courts of the place either where he is domiciled or in the place where the other party to the contract is domiciled. In his article identifying the gap existing in the EU’s consumer protection regime, despite the existence of four separate pieces of European legislation, including the Brussels Regulation, for holidays purchased separately over the internet, Kilbey (2005) ELR 129 identifies a difficulty. The consumer protection provisions do not apply to contracts for transport unless as part of a contract that also provides accommodation (Reg 15(3)). The consumer here would have to sue in the courts of the Member State of the party being sued.

others only require that reasonable care should be exercised, whoever delivers the service.

For instance promises that certain facilities will be available (such as air-conditioning, swimming pools and other leisure facilities) or based on specific descriptions (for example the hotel is within a certain distance of the beach), means the obligation is strict to provide those services. Failure to perform the term in a contract for a pool (that may have been closed) will place strict liability on the tour operator for damage that results such as loss of enjoyment and the cost of going elsewhere for a pool of similar standard. To illustrate in *Forsdyke v Panorama Holiday Group Ltd.*⁹⁰ a holiday was booked for a hotel specifically with a heated pool as the claimant's wife had an arthritic hip and had limited movement. The pool was cold. The court held the principal purpose of the holiday was to swim in a heated pool and that was made clear at the time of the booking. Mr. Forsdyke was therefore entitled to damages for diminution in value of the holiday and for distress.

On the other hand there will be obligations under the holiday contract that require no more than the tour operator or its' suppliers exercising reasonable skill and care. For example a hotel will often have gardens and footpaths and a hotelier cannot be expected to warrant that every inch is flat or blemish free. In *Thompson v Thomson Holidays Group Ltd.*⁹¹ the claimant fell into a sunken footpath adjacent to a garden path at a hotel in Cyprus and fractured her foot. It was argued that under regulation 15 there was a failure to warn of this hazard in the form of a fence and that the path should have been moved to a safer place. The defendant maintained that the sunken footpath had been there for many years without incident, that Cypriot regulations required the hotel to have a footpath and it was consistent with other such footpaths in Cyprus. In dismissing the claim, the judge concluded the accident occurred because the claimant was not looking where she was going. It was an isolated incident, Cypriot regulations had been complied with and it was in keeping with local customs. Neither the positioning nor construction constituted any breach of duty, nor was there an obligation to issue warnings about such incidental property features that formed part

⁹⁰ [2002] CLY 2321

⁹¹(2005) Unreported

and parcel of many holiday resort hotels. Thus it seems the obligation in such circumstances requires only that reasonable care be exercised by those in charge of the operation of the hotels as to the maintenance, cleaning and repair of paths and terraces. So long as there is a reasonable system of repair and maintenance, the obligation is fulfilled.

The issue of strict and fault based liability has also been raised in food poisoning cases. In *Martin v Thomson Tour Operations Ltd*⁹² involving a case of food poisoning on a Nile cruise, the court made it very clear in denying the claim that in the absence of any express term the contractual duty owed by the tour operators and their suppliers, was to exercise reasonable care and skill to provide food fit for human consumption, and nothing in regulation 15(2) required a finding that the contractual duty to supply food for human consumption was strict. However, there is now some support for a strict liability approach to food poisoning package holiday claims. In *Kempson and Kempson v First Choice Holidays and Flights Ltd*.⁹³ the claimants suffered gastric illness caused by salmonella from food served at a Corfu hotel. Expert evidence confirmed the proper cooking of eggs and poultry would destroy the salmonella and the judge found that there had been a failure to cook the food properly. As to the extent of liability under regulation 15 there was clear evidence that reasonable care and skill had not been exercised in food preparation and the claimants were entitled to recover damages. However, the claimants also argued their claim on the basis of a strict liability argument under section 4(2) of the Supply of Goods and Services Act 1982, which implies into a contract the supply of food and drink must be of satisfactory quality, a strict duty of care liability. The trial Judge remarked obiter that the defendant's contractual obligations required it to provide satisfactory, safe food, which was a strict obligation. Young (2008)⁹⁴ welcomes this clarification of the law relating to food poisoning claims in package holiday cases. There is a perfectly valid reason he argues, for drawing a distinction between the obligations of a tour operator as regards the provision of services generally on the one hand, where a duty to exercise

⁹² [1999] CLY 3831

⁹³ (2007) Unreported

⁹⁴ (2008) TLB 3

reasonable skill and care is the appropriate standard of care. On the other hand as regards the provision of food and drink it is appropriate to impose a higher standard;

“This higher standard does not impose an excessive burden on hoteliers or tour operators, because hoteliers are already subject to the same standard under the terms of the European Food Safety Directive and tour operators can protect themselves by means of an indemnity from hoteliers or through suitable insurance arrangements.”

However, generally it would seem that in summary, liability of tour operators under regulation 15 in the absence of strict contractual obligations, is a liability in contract for the ‘negligence’ of its’ suppliers and subcontractors ... Without proof of fault against the service provider, there is no improper performance of the holiday contract, and therefore no liability for the tour operator’.⁹⁵

The importance of contractual obligations that apply strict liability as distinct from obligations that only require the exercise of reasonable care and skill is now subject to authoritative guidance in *Hone v Going Places*.⁹⁶ Here the claimant booked a package holiday to Turkey. On the return flight to Manchester the plane was diverted to land in Istanbul due to a bomb scare. He was injured to his back when disembarking and was struck from behind by his wife and also hurt further when helping the passenger in front of him. He sued claiming that there was inadequate supervision of the evacuation and no proper instruction given as to the use of the chute. It was argued that regulation 15 imposed ‘absolute’ liability on the other party to the contract and thus liability for the injuries sustained. Douglas Brown J. at first instance held that if the objective of the regulation was to impose strict liability then by its

⁹⁵ *Saggerson* 184

⁹⁶ For a critical response to *Hone* see Young (2007) TLB 2 who argues that English courts are in error over their interpretation of regulation 15 and that it does impose on the tour operator strict liability subject only to the defences. He argues that the intended purpose of the Directive was to impose strict liability on tour operators for *any* incident that results in illness or injury to the holidaymaker whilst staying in the accommodation provided by the tour operator. He cites the case of *Leitner vTUI Deutschland GmbH* [2002] ALL ER (EC) 561 as authority for the ECJ to overrule a case decided under national law. Austria did not recognise damages for loss of enjoyment and this had been denied to the claimant. The ECJ however, held that Article 5 of the Package Travel Directive conferred on consumers just such a claim and held the Austrian courts were wrong. He too cites the Explanatory Notes to the Package Travel Regulations: “They provide that the other party to the contract ...should be strictly liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be provided by that other party or by other suppliers of services.”

drafting this had not been achieved. Much clearer words would be required to impose strict liability in all circumstances on organisers and retailers.

The judge felt that proof of fault was required and the claimant had failed to establish this accident was anyone's fault. The claimant had not in fact provided any expert evidence to the effect that the evacuation procedure fell short of that to be reasonably expected. Of interest, the judge referred to a potentially helpful way of looking at this argument by suggesting that an 'improper performance' under regulation 15(2) would relate to the 'reasonable care' terms of the contract and a 'failure' to perform the contract would relate to the strict liability terms of the holiday contract. In other words, the contract is *improperly performed* where there is a failure to exercise reasonable skill and care, whereas one *fails* to perform an obligation under the contract where a promised facility or service is simply not delivered.

On appeal, Langmore LJ, in dismissing Mr. Hone's appeal dealing with the issue of strict liability stated:

"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 promises a swimming pool, it will be a term of the contract 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 pool. The obligation will be that reasonable skill and care will be taken to ensure that the pool is free from infection. A similar term will be implied in relation to transportation in the absence of any express wording viz. that reasonable skill and care will be exercised."

Thus once fault has been established for the failure or improper performance, it would seem, adopting the *Hone* principle, the tour operator will be liable unless one of the defences applies, but there will be no liability otherwise. Some of the terms in the contract may impose strict liability obligations, and some the exercise of reasonable skill and care. Of course this is not unique to travel law, other areas of contract law have this distinction but the logic behind the *Hone* argument has not

been without criticism. Grant (2001)⁹⁷ questions why the distinction? Why is it that strict liability, a higher burden, is imposed in respect of the provision and adequacy of a swimming pool but a lesser obligation in respect of the safety-which is surely more important? To put it more bluntly he says, why does the tour operator warrant the existence of the pool but not its safety? McDonald (2003) suggests the decision stands on its head the very idea that the basis of liability under the Directive is strict liability, operating under assumptions correct under national contractual principles but failing to take into account the different interpretive approach required under Community law.⁹⁸ Tonner (2005)⁹⁹ in his comparison of the decision in *Hone* and the German case of *Reitunfall II*¹⁰⁰ argues that it is generally understood by European lawyers that the tour operator is strictly liable to properly perform the contract and that the Directive has to be interpreted according to the aim of the Directive-namely a consumer protection measure:

“The judges applied regulation 15 as a national provision but they disregarded the European origin of the provision and so did not apply European rules of interpretation.”

In the German equivalent of the *Hone* case involving a horse riding accident whilst on an excursion, the decision in favour of the consumer was based on the German legal assumption of absolute obligation, with the burden of proving lack of fault on the other party to the contract. In the *Hone* case Tonner suggests, the German court would have had no problem in imposing an absolute contractual obligation on the tour operator for safe disembarkation in emergency cases and would apply the rule of the reversal of proof concerning fault.

Nevertheless certainly in the UK it would seem, to borrow a phrase, ‘The terms of the contract are therefore now king’¹⁰¹ and that once the obligations under the contract have been established, the tour operator cannot escape liability by blaming his sub-contractors, as the claims are above all in contract but in some instances

⁹⁷ (2001) JBL 253

⁹⁸ (2003) ITLJ 211 at 225

⁹⁹ (2005) ITLJ 203 at 205

¹⁰⁰ (2004) 11.9.11 X ZR 119/01

¹⁰¹ Mason (2001) JPIL 396

elements of negligence or fault based liability needs to be established by the claimant. For example in *Williams v First Choice Holidays and Flights Ltd.*¹⁰² the court held that the standard of care, whether derived from contract or negligence, in the circumstances of the present case¹⁰³ is that the defendants owed a duty to take reasonable care of their clients' safety, and as the systems in place in that case were held to be sufficient, the defendant's could do no more than they reasonably did and were not strictly liable for the injury caused.

Finally it has to be acknowledged that behind the decisions of the courts may be policy issues and conflicting interests. There will always be an imbalance in the holiday contract between the consumer holidaymaker on the one hand, and the professional tour operators on the other. Clearly the consumer must be protected as far as possible to address this issue which ultimately may come down to tour operators protecting themselves through insurance and indemnities from their suppliers. However, economics must also at some point be factored into the equation. Too strict a regime imposed on hard pressed tour operators with ever decreasing profit margins can have the knock on effect of increasing prices and passing the burden on to consumers who may well look elsewhere for cheaper and more competitive deals. Goh (2002)¹⁰⁴ wrote of a then recent trend (which continues), in terms of EU legislation and decisions that enhance and protect the rights of consumers. However, he warns, striking a balance between consumer rights and industry interests is never an easy task but in doing so the issue of costs cannot be overlooked:

“Consumer protection has a price and the costs of excessive consumer protection will simply be passed back onto consumers.”

¹⁰² (2001) Unreported

¹⁰³ Involving a serious injury to the claimant's ankle at a 'Greek Night' in Corfu consisting of a meal, free wine and plate smashing, when a shard of glass from a dinner plate rather than the special plaster plates used for the purpose hit her. The wine had been watered down and only free with the substantial meal, the reps had supervised the party, and the plate smashing was well away from the normal restaurant area. There had been several warnings not to throw proper plates, and the claimant was on her own admission tipsy when standing nearby watching.

¹⁰⁴ 152 NJ 1338

The above considerations have been explored elsewhere¹⁰⁵ and are beyond a more detailed analysis in this thesis, but may well explain the rationale behind the apparent first blush approach that regulation 15 imposed a purely strict liability regime to what appears to be a 'half way house' approach by the courts following the decision in *Hone*.

THE RANGE AND SCOPE OF REGULATION 15

Liability under regulation 15 will not extend to every aspect of what happens on a holiday, for instance excursions not booked at the time of the contract. A consumer may be on a package holiday yet receive injury not by anything forming part of it. For example ski packs sold by a tour operator on the transfer coach on route to a hotel do not form part of the package holiday contract as they are not part of the pre-arranged combination of components sold at an inclusive price in the UK as required by regulation 2. Thus in *Gallagher v Airtours Holidays Ltd.*¹⁰⁶ a skier whom was seriously injured as a result of skiing off piste due she claimed to the negligence of the instructor, was unable to make out a claim under the regulations as the pack had been sold to her on the coach after arrival.

However, whilst a claim may fail in contract, there may be a separate and additional cause of action in tort. In *Parker v TUI Uk Ltd.*¹⁰⁷ the claimant sustained injuries in an accident that occurred just after she had completed a toboggan run in Austria. At the time she was on a package holiday supplied by the defendant but had purchased a ticket for the toboggan excursion separately in resort. The defendant's reps had accompanied Mrs Parker and others on the bus which took them to the tobogganing event. The reps had briefed the participants on the bus and at the top of the mountain that at the end of the run there was a flashing red light at which point they must dismount their toboggans and walk the rest of the way down the mountain. The reps spread themselves out among the participants during the event. The accident occurred when the claimant remounted her toboggan at the end of the run and careered into straw bales which were hard and frozen. It was argued that the

¹⁰⁵ Harris, Ogus and Phillips (1979) 95 LQR 581

¹⁰⁶ (2000) CLY 4280

¹⁰⁷ [2009] EWCA Civ 1261

defendant was negligent because they had not provided reps to stand at the end of the toboggan run. If they had been there, they could have helped her down to the bottom of the mountain or at least stopped her from remounting the toboggan. It was argued by the defendant that they owed no duty of care to her but this argument was robustly rejected by the Court of Appeal. It found there was a duty of care, which had been created by the *assumption of responsibility* on the part of the defendant- specifically that local reps had accompanied Mrs Parker and others on the run and had given them instructions and directions as to how to complete the run safely. Mrs Parker's appeal failed for other reasons but Johnson (2011/12)¹⁰⁸ argues that nonetheless, Parker is clear authority for the proposition that in certain circumstances, regardless of the contractual nexus between a tour operator and holidaymaker, a tour operator may owe a duty in tort to the holidaymaker. The advantage of this from the holidaymaker's point of view is that if the excursion contract is with the local supplier, he or she has a remedy with the tour operator. The case reflects an important development in travel law in that it opens up the potential for claims to be brought against a tour operator in tort for its negligence or that of its local suppliers, whereas previously claims have been almost exclusively contractual in nature.

Contrast the more colourful facts of *Harrison v Jagged Globe (Alpine) Ltd.*¹⁰⁹. In 2004 Sir Ranulph Fiennes contacted the defendant (specialists in mountaineering expeditions) to request that it assist him with an assault on Everest. It was arranged that he would take a two week intermediate training course in the Alps and thereafter an expedition to assist with acclimatisation and assessment of his reaction to altitude, a private version of the Cotopaxi trip in the Andes advertised in the defendant's brochure. He declined the offer of a leader but was provided with local guides, who were to assist with acclimatisation, altitude training and climbing techniques. He invited the claimant to join him on the Cotopaxi expedition. In order to obtain publicity for the Everest expedition Sir Ranulph and the defendant had arranged for a film crew to film part of the expedition. To make it more interesting he asked the local guides to assist in 'staging' a fall down a crevice and subsequent rescue. The claimant agreed to

¹⁰⁸ (2011/12) TLB 9

¹⁰⁹ [2012] EWCA Civ 835

appear as the fallen mountaineer. During the course of two jumps she was injured. The trial judge found the provision of assistance with staged falls did not form part of the package as it was arranged long after the contract had been concluded. However, the guides provided by the defendant had assumed responsibility for the staged falls in agreeing to assist with them, and in doing so had imposed a tortious duty on the defendant to provide this assistance with reasonable care and skill. Relying on *Parker* he found the defendant in breach of that duty for both falls though reducing the damages for the second fall by 40% for the claimant's negligence in failing to question the guides more closely regarding the execution of the fall.

However, the Court of Appeal gave short shrift to the notion that the tour operator should be liable for the negligence of the local guides, when they were providing services not contracted for as part of the package. It was held the tortious duty did not extend beyond the parameters of the contract. The claimant had not contracted with the defendant for the provision of staged falls, and so when the guides provided her with assistance with the falls, they were acting on their own behalf and not on behalf of the tour operator, and the appeal was allowed. Prager¹¹⁰ (2012) reconciles these two apparently conflicting decisions by pointing out that there is a difference as the tour operator in *Parker* was vicariously liable for the actions of its employees, the reps (whom it must be remembered had assumed a responsibility). The position is very different however, where a tour operator deals with a local independent subcontractor:

“If it sub-contracts for the provision of services to a reputable person or company, so long as those services do not form part of the package, and so long as the tour operator has not contracted as agent for an undisclosed principal, it will not be liable for any ‘casual’ or non-systematic negligence on the part of the local provider.”¹¹¹

The consumer is thus left in such circumstances with the unappealing course of action of suing the local supplier, in a foreign jurisdiction and subject to local law and standards, not to mention the cost implications. Prager concludes that it may be that

¹¹⁰ (2012) TLQ 172

¹¹¹ At 173

more needs to be done to educate consumers in the difference between the protection afforded in cases arising out of package holidays on one hand, and activities booked off package, on the other and that the [then] forthcoming overhaul of the Package Travel Directive may be a good opportunity for the relevant parties to address this issue.

Turning back to the issue of the range of regulation 15, and how its scope may be reduced geographically, if not otherwise, is the case of *Jones v Sunworld Ltd*¹¹². Here the claimant and her husband holidayed in the Maldives. She brought an action for damages for nervous shock and post-traumatic stress arising out of the accidental death of her husband. He had drowned whilst in a lagoon and wading in shallow water when he suddenly experienced a ten foot drop. It was claimed that the lagoon was a hazard and the tour operator had been under an implied contractual duty to use reasonable care and skill to warn them of the hazard. The hotel was advertised in the brochure from which the holiday was booked as having the advantage of a lagoon. It was argued that the contractual services provided by the tour operator extended to taking steps to ensure the accommodation and facilities (including the lagoon) had been such that guests could stay there and use the facilities in reasonable safety. In the event that the failure to warn was a failure on the part of the resort rather than the tour operator (who would have been vicariously liable) the claimant relied on regulation 15.

The court held that the tour operators were not liable. A beach or a lagoon *could* fall within the ambit of a package (depending on the wording in the brochure and the terms and conditions) involving a duty to warn. The lagoon, though a natural phenomenon, was an integral part of the resort. It would be artificial to draw a line in the sand along the water's edge to mark off the 'resort' area and hence the 'package' parameter. However the court felt that the tour operators were not obliged to assess the safety of the lagoon in the same manner as it had assessed the safety of the buildings and paved area, which could easily be inspected. Given the nature and size of the lagoon, they were not under any obligation to survey it to discover features that might have a bearing on safety. They had not given the impression that guests could

¹¹² [2003] EWHC 591

wade anywhere in the lagoon. Adult holiday-makers had to be taken to know that the seabed was not even and that it may contain pools and undulations.

In contrast it was held in *Martens v Thomson Tour Operations Ltd.*¹¹³ that where the claimant in the dead of night fell down an unguarded well right outside the gate of his holiday campsite, the tour operators were liable. Though the well had nothing to do with the campsite, it constituted a known hazard of a serious nature in the hours of darkness and likely to be encountered by tourists staying at the campsite. A warning should have been issued as part of the proper performance of the contract. Likewise a warning should have been given in *Djengiz v Thomson Holidays Ltd.*¹¹⁴ The claimant booked an all inclusive holiday in the Dominican Republic. The brochure promised that a programme of activities would form part of the package. On the final day he took part in a game of beach volleyball organised by the resort complex staff. The game formed part of a programme of events advertised daily. The volleyball pitch was located on a beach adjacent to the resort complex but was actually owned by the local authority and it had a concrete base with a light covering of sand. The claimant jumped for the ball and fell on his side, injuring himself. He sued claiming that a warning ought to have been given by the hotel or displayed at the volleyball pitch to alert holiday-makers to the concrete base.

Thomson argued that while it had by its standard booking conditions contractually accepted liability for personal injury caused by negligence of its suppliers, it only extended to services they had arranged. The location was off the resort complex and not owned nor run by them. In addition the volleyball game was not one booked for and paid in advance. It was not mentioned in the brochure and thus did not form part of the holiday contract for the purposes of regulation 15. The court held they were liable as the game was organised by the resort entertainment staff, though the beach was not at the resort, the game was a service arranged by the resort and impliedly part of the entertainment promised in the brochure. It was a service organised by Thomson or its' supplier and failing to warn of the concrete base was negligent.

¹¹³ (1999) Unreported

¹¹⁴ [2000] CLY 4038

Finally, liability will not extend under regulation 15 for latent defects either. Thus the claim failed in *Moncrieff v Cosmos PLC*¹¹⁵ when a ceiling in a hotel in Cyprus collapsed causing injury. The latent defect in the structure had been caused by earthquakes in 1998 and no reasonable inspection would have identified the problem. A latent defect in the mast of a yacht which broke and fell on the claimant's head in *Jay v TUI UK Ltd.*¹¹⁶ did not give rise to liability either as no reasonable yacht surveyor would have been expected to identify the latent defect in the mast.

LOCAL STANDARDS¹¹⁷

Establishing a breach of regulation 15 also involves the issue of what standards those allegedly in breach by failing to perform or improperly performing the obligations under the contract are to be judged by? To begin we must return to the starting point of *Wilson v Best Travel Ltd*¹¹⁸ where the claimant tripped and fell through glass patio doors at a hotel in Kos sustaining serious lacerations. The hotel had to comply with local Greek regulations, and the glass fitted did. However, it was not safety glass which explained why the injuries caused by the jagged glass had been so severe, but safety glass was not required to be fitted in Greek hotels by Greek regulations.

The plaintiff called an expert with long experience in the glass industry who confirmed that toughened safety glass was a requirement to be fitted to meet British Standards regulations. Thus standards currently applying in Britain in the interests of safety had yet to be adopted in Greece and the court felt that had the incident occurred in England it was arguable that the hotelier would be held liable for breach of the common duty of care imposed by s 2(2) of the Occupiers Liability Act 1957. The question for the court however, was, what is the duty of a tour operator in a situation such as this? Must they refrain from sending holidaymakers to any hotel whose characteristics, in so far as safety is concerned, fail to satisfy the standards which apply in Britain?

¹¹⁵ 2006 Unreported

¹¹⁶ 2006 Unreported

¹¹⁷ For an extended version of this section see Green (2013) 5 TLQ 271

¹¹⁸ [1993] 1 ALL ER 353

Phillips J. held they did not, and that save where uniform international regulations apply, 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 court took the position that all civilised countries attempt to cater for these hazards by imposing mandatory regulations and that 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, the duty of the tour operator does not extend to boycotting 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 (for example say no fire alarms or safety exits).

The principle established by the case of *Wilson* has proved an extremely fertile ground for litigation in the ensuing years and was followed in *Codd v Thomson Tour Operators Ltd.*¹¹⁹ The claimant was aged 10 at the time and caught his finger in the door of a lift in a hotel at Majorca whilst on holiday. One of the doors to the lift had jammed and when pulled, closed very quickly catching the finger, resulting in serious injury. The defendant had provided evidence that, in accordance with Spanish law, the lifts at the hotel were inspected on a monthly basis by managers and regularly by engineers. The lifts were also working satisfactorily prior to and after the accident. There was no evidence to suggest the engineers or the hotel had failed in their duty to keep the lifts properly maintained. The claimant argued that the British standards of maintenance and upkeep should have been applied, and that the onus was on *the defendant* to establish that they had not been negligent and not on the claimant to establish that they had. The Court of Appeal held that whilst the law in England applied to the case in establishing negligence, there was no requirement that a hotel in Majorca is obliged to comply with British safety standards. This was not a case in which it was appropriate to say the tour operator or hotel was liable for the accident without proof of negligence. In order to succeed *the claimant* needed to prove that the hotel management was negligent either in relation to the maintenance of the lift or in relation to the safety procedures, and this had not been established.

¹¹⁹ [2002] CA B2/1999/1321

Wilson was again followed in *Moore v Thomson Tour Operations Limited*¹²⁰.

The complainant slipped on wet marble steps at the front of a hotel in Rhodes sustaining injury. The defendant argued that the steps must have complied with the local building regulations as otherwise they would not be able to operate the hotel and they had the appropriate certification. HHJ McKenna agreed stating that many hotels in the region had similar marble and found there had been no breach of local standards so far as the construction of the steps was concerned and therefore no liability.

The principles above have become even more entrenched following the High Court decision in *Holden v First Choice Holidays & Flights Ltd.*¹²¹ The claimant whilst on holiday fell from the third step of a flight of stairs which led from the hotel ground floor down to the lower ground floor restaurant in her hotel in Tunisia, fracturing her left thumb and right wrist. She claimed that the steps were wet and slippery, and that the defendant was in breach of contract. The defendant accepted that the Package Travel Regulations did apply to the contract. At trial evidence was produced by the defendant that the hotel had an appropriate cleaning system in place at the time of the accident and that spillages were swiftly dealt with. In addition, the restaurant manager stood at the doorway of the restaurant preventing people from taking drinks into and out of the restaurant.

In upholding the defendant's appeal Goldring J. held that it was for *the claimant* to prove that the hotel was in breach of local safety standards. Significantly, the claimant had not adduced any evidence of the applicable local standards (a theme running through much of the case law in this area)¹²² which proved fatal to her case. It

¹²⁰ (2002) Unreported

¹²¹ (2006) Unreported

¹²² See further the numerous illustrations on this point in *Saggerson* 211-213 and in particular the telling quote from the Judge in *Gallagher v Airtours Holidays Limited* [2000] CLY 4280, "I have no expert evidence to advise or help me as to whether or not the activities of [the skiing instructor]...on that day did, in the eyes of a properly qualified professional, fall below the standard of care to be exercised by a reasonably prudent ski instructor of the variety of which he was. The burden of proof lies on the party who brings the action. It is plain from what I am going to be referring to in my judgment that there is no such expert evidence. It is a complete mistake to think that the court possesses any expertise in this field whatsoever. I am a judge. It is a basic principle that the claimant bears the burden of proof in a civil action. The standard of proof is the balance of probabilities. It is unfortunate if a claimant comes to court without the requisite evidence...[Counsel for the Claimant] has sought to persuade me that the matter was so obvious that the case was proved. But, with respect to him, I beg to differ".

was not for the defendant to prove anything and the appropriate legal standard, in the absence of evidence, could not be inferred from what the hotel did or did not do in practice. *Holden* made it clear that the evidential burden was on the claimant, and it was not sufficient, as had occurred in some cases, for them to rely on the defendant's pleadings of what systems it had in operation and then to suggest that as they had not complied with those systems, they were thus in breach of the duty of care, what has been referred to as the 'evidential own goal.'¹²³ Though it has to be noted that defendants cannot simply lie back and do nothing either for if they become too complacent about evidence, particularly from decisions in the higher courts, they may face a *res ipsa loquitur* style argument akin to the slip and trip case of *Ward v Tesco Stores Ltd*¹²⁴

PROOF OF LOCAL STANDARDS

The approach of the court in *Holden* raised some very real financial and theoretical problems, for example in many cases the question of what the local standard is may not be readily ascertainable. Unless there are local regulations drafted very clearly which require strict compliance as Saxby (2007) rightly points out there is likely to be genuine dispute as to whether any given system or structure meets local requirements. How and where and at what cost are claimants to get such evidence? Often the appropriate expert will be a local lawyer according to Saxby but the practical and financial difficulty is obvious and the position very untenable in the majority of low cost claims. As a matter of principle too, he argues further, that it will be seen to be plainly unsatisfactory where both claimant and defendant in response, are required to obtain competing foreign expert reports for an English judge to routinely be asked to determine which of the two he prefers, whilst nominally considering breach of an English contract and applying the English law of negligence.¹²⁵

Post *Holden* it has been accepted by the courts that the burden of proving local standards rests with the claimant, and of concern as Dowd (2010) makes clear it has been a powerful case relied on by tour operators, resulting in the dismissal of many

¹²³Prager (2006) 3 ITLJ,131-135

¹²⁴[1976] 1 ALL ER 219 (CA)

¹²⁵(2007)TLB 7-9

claims.¹²⁶ For a while the issue of proof of local standards often requiring expert evidence was the subject of a flurry of cases, with the higher courts at times deciding lack of such evidence would prove fatal to a claim, yet other decisions appearing to down play the importance. Mason and Prager (2008) for instance describe *Holden* as being enforced with rigour in the county courts and of it not being uncommon for claims to fail because the claimant has not provided any evidence of local standards. Disturbingly they found that rather dogmatically the courts were dismissing cases notwithstanding overwhelming evidence that hotels had breached what might be thought to be minimal English standards and cite an example of one case where a submission of no case to answer had been successfully upheld because of the lack of evidence of local standards.¹²⁷ They also highlight the case of *Drabble v Sunstar Leisure Limited*¹²⁸, a Court of Appeal decision. Whilst on holiday in Turkey the claimant walked into a glass partition separating the bar from the lounge. The glass shattered causing lacerations to the hand and knee. The glass was not safety glass and was 4mm annealed glass. The claim was brought under regulation 15 and section 13 of the Supply of Goods and Services Act 1982. There were expert engineers for both sides. The claimant's expert provided evidence that Turkish building standards were at least as advanced as the UK and therefore ought to have installed safety glass. The defence expert stated that the 4mm glass was common place in Turkey although 80% of Turkish hotels had stickers warning of the presence of glass, at eye level. The claim was dismissed and the Court of Appeal held that it was for the claimant to prove absence of stickers, not for the defendant to prove presence. Keene LJ felt there was no good reason for departing from the normal principle by suggesting it was for the defendant to prove compliance with local standards,

“Quite frankly given the failure to prove the absence of a warning sticker, there is no realistic prospect of establishing such a breach of duty.”

Mason and Prager conclude from this robust approach that the Court of Appeal has no intention of revisiting the issue of the burden of proof in package travel cases in

¹²⁶ (2010) TLQ 83 at 85

¹²⁷ 4 ITLJ,149-153

¹²⁸ (2008) Unreported

the foreseeable future and that *Holden* is firmly entrenched in English law, and likely to remain so. Despite it would seem contrary decisions which have decided the opposite. For example in a Northern Ireland case, *Griffin v My Travel UK Limited*¹²⁹ the High Court took a very different view about the lack of evidence concerning local standards. In this case the claimant received injury to his foot whilst on holiday in Rhodes. His bed was not sufficiently attached to the wall and was moved by the maid when cleaning. When he went to pull the bed sheet back it dislodged and fell onto his foot. His claim was in negligence for breach of the duty of care and breach of contract as under the terms of the contract the tour operator agreed liability for injury caused by the negligence of staff or suppliers, and under regulation 15.

The defendant argued that the claimant had not proved that there had been a lack of reasonable care and skill and in particular had provided no evidence of local regulations or standards relating either to the design or maintenance of such beds. Mc Closkey J. on a review of the authorities held that *Wilson*, (a pre regulation case), as the Court of Appeal in *Evans v Kosmar Villa Holidays*¹³⁰ held, did not purport to be an exhaustive statement on the issue and that the formulation of the tour operator's duty, as set out in *Wilson* was 'unjustifiably narrow, and properly analysed, was probably not intended to constitute an all encompassing exposition.' Relying on the judgment of Richards LJ in *Evans* (see further below) in which though the claimant lost on causation, the court held that compliance with local safety regulations is not necessarily sufficient to fulfil that duty,¹³¹ Mc Closkey J. therefore held that failure by the tour operator to exercise reasonable care and skill in the provision of services to the consumer *could* be established even where there is no evidence of non-compliance with the local safety standards and regulations. Compliance with such regulations would not 'necessarily be determinative of the question of liability.' It has been argued

¹²⁹ [2009] NIQB 98

¹³⁰ [2007] EWCA Civ 1003

¹³¹ For a critical response to the decision in *Evans* see Mason, (2007) ITLJ 193. In this article Mason suggests that whilst *Holden* represented a high water mark for defendants it remains to be seen whether its wings have been clipped by *Evans* and the decision of the Court of Appeal 'opens up a whole new area of uncertainty and controversy.' The decision has created uncertainty by raising questions about what is meant in practical terms by saying *Wilson* is not an exhaustive statement of the duty of care? In what circumstances could there be compliance with local standards but still owe a duty to do more? Mason concludes that although *Evans* has opened up room for arguments and uncertainty, it will be extremely rare that the decision in *Wilson* proves to be an inadequate test.

by Dowd (2010) that *Griffin* may cause tour operators to fear that the decision opens the door to more claims which can be brought without the claimant being exposed to the costs of obtaining a foreign expert on local standards of engineering evidence.¹³² However, he also makes the point that whilst *Holden* may have been viewed by over-eager defendants as a 'knock out' blow it was never an impediment to a claim in every case. Holiday claims are fact specific and circumstances can arise where the question of compliance with local standards and regulations does not assist in determining the duty owed and whether the duty was breached. Local standards are but one of several matters which should be considered by a court in assessing whether there has been a breach of contractual duty.

The state of ebb and flow in the law on this issue and its fluctuating development is perhaps one of the most fascinating and interesting areas of travel law. The law is still developing, and as recently as November 7th 2013 in the Court of Appeal decision of *Japp v Virgin Holidays Ltd.*¹³³ HHJ Hayward at Brighton County Court in October 2012, awarded £24,000 in damages (less 20% for contributory negligence), to the claimant who walked quickly through closed glass patio doors to answer a ringing phone in her apartment at the Crystal Cove Hotel in Barbados. The glass shattered as it was not safety glass and she sustained deep lacerations. Virgin Holidays appealed and Lord Justice Richards confirmed that the courts have been consistent in following the approach in *Wilson* as to the applicability of local standards, though he acknowledged the legal framework had been altered to some extent by the Package Travel Regulations 1992, in particular regulation 15, as the focus is now on the exercise of reasonable care in the operation of a hotel itself rather than in the selection of the hotel as had previously been the law.¹³⁴ At the heart of the issue of local standards in this case was the Barbados National Building Code 1993 Edition in which it stated safety glass shall be installed. The balcony doors at the hotel, which was constructed in 1994, did not comply with the Code.

¹³² (2010) TLQ 83 at 86

¹³³ [2013] EWCA Civ 1371

¹³⁴ See *Wall v Silver Wing Surface Arrangements Ltd.* in Chapter 1

It was argued by the defence expert that the Code was merely voluntary and not legally binding. The Judge at first instance, however, held that the Code did reflect the custom and/or standard to be expected, but went further, holding that a hotel runs the risk of being held liable if it breaches the Code or, as there is a continuing duty to have regard to safety issues, fails to update to comply with it. The Code was not complied with when the hotel was built and by the time of the accident in 2008, the hotel should have been updating to comply with the Code, and were therefore liable to Mrs Japp for her injuries. Virgin holidays appealed.

There were three grounds of appeal:-

- (i) The Judge was wrong as a matter of law to find that the duty of care fell to be considered by reference to custom and practice at the date of the accident, rather than at the date of the construction of the hotel.
- (ii) The Judge was wrong as a matter of law to find that the hotel owed a continuing duty to update the fabric of the premises as custom and practice developed.
- (iii) The Judge was wrong as a matter of fact to find that the custom and practice at the date of construction of the hotel was to comply with the Code, this finding not being justified on the evidence before him.

Lord Justice Richards agreed that the Judge was wrong to hold that the question of compliance with the duty of care in relation to the balcony doors fell to be considered by reference to standards prevailing at the date of the accident, rather than the date of installation. To hold otherwise would mean hoteliers under a continuing duty to tear out and replace all features of their premises that do not comply with developing standards and that was too onerous a duty, absent any local standards requiring them so to do. Further the Judge was wrong to look at the matter in terms of compliance with local standards as at the date of the accident in 2008, or in terms of a duty to update the hotel so as to comply with developing standards. So far so good for the appellants as the Court of Appeal upheld grounds (i) and (ii).

However, the appeal was dismissed entirely on the basis that it was common ground the balcony doors at the hotel did not comply with the Code at the date when

the hotel was constructed in 1994 and that the Code represented the 'local standards'. The lower court having received two expert reports, one from a chartered builder and surveyor based in Barbados for the claimant, and one from an attorney-at-law with a firm of international legal consultants in Barbados, unsurprisingly preferred the claimant's expert. His report included an unqualified statement that, "it is the custom and practice by professionals in the industry to follow the Code". The expert also stated the provisions were an 'essential minimum' and the glass in the door was known to be very dangerous and not fit for purpose. It was somewhat inevitable the Court of Appeal found, that the Code represented the 'local standards' and the hotel had not complied with them.

Lord Justice Richards nevertheless held that the appeal has served to establish an important principle in the appellant's favour on the question of whether, in relation to a structural feature such as the balcony doors, the duty of care falls to be considered by reference to local standards at the date of construction/installation, or at the date of accident. The decision has brought a little clarity on that particular aspect of the issue of local standards and has reinforced the *Wilson* line of authorities that hotels and apartments must comply with the local standards prevailing-at the time of construction at least. If they do not then hoteliers and ultimately the tour operator, will be liable.

The question hanging over the case remains though, what if the premises did comply with the local standards at the time, but several decades ago? Is there no obligation then to upgrade say electrical wiring that may be of some antiquity? Perhaps those hotels may fall into the *Wilson* category of being so unreasonably unsafe as no consumer would venture to stay? Of course from a practical and cost point of view one can see the argument about it being too onerous to constantly update. On the other hand however, what price safety? Counsel for the appellants in this case was quoted at the time the judgment was reserved, that exporting English standards of reasonableness abroad is going to create great difficulties for the tourist industry and lead to a lack of clarity, as some nations are more risk averse than others. It remains to be seen whether or not the decision in *Japp* has brought any real clarity to this constantly developing area of travel law.

The application of the law on local standards can also be seen in decisions often involving the issue of causation, where the courts have either determined local standards to be irrelevant and simply sidestepped the issue, or found that even where there has been a breach, inability to prove causation has been fatal to a claim.

CAUSATION

There have been a number of tragic cases involving life changing injuries where claimants have entered the shallow end of swimming pools that has seen the courts continuing to wrestle in particular with the local standards, regulations, customs and practices of foreign countries, when examining the question of liability. The following cases where claims were brought for breach of express terms in the contract and improper performance under regulation 15, are by way of illustration.

In *Singh v Libra Holidays Ltd.*¹³⁵ the claimant whilst holidaying in Cyprus sustained complete tetraplegia, when after a night out drinking he dove into a pool and hit his head. Although there were 'no diving' signs they were inadequate and did not comply with local Cypriot regulations. There was inadequate supervision of the pool it was also argued. The court held however, that the breach of duty made no material contribution. The claimant was the author of his own misfortune as he accepted he did not need a sign nor anyone to tell him not to dive in the shallow end of a pool. In a similar case, *Healy v Cosmosair Plc & Others*¹³⁶ the claimant whilst holidaying in Portugal, lost his footing and fell into a pool hitting his head on the bottom. He argued the tiles breached local standards as they were not non-slip. The court held again there had been improper performance but the claimant had failed to prove he had been on a wet tile.

Such cases demonstrate how the arguments involving local standards and sometimes clear breaches of them, become somewhat redundant, when claimants have failed to jump over the hurdle of causation. This point is clearly demonstrated in *Evans v Kosmar Villa Holidays* as referred to above. The claimant whilst on holiday in Corfu in the early hours of the morning dove into the shallow end of the small

¹³⁵ [2003] (QB) ALL ER D 319

¹³⁶ [2005] EWHC 1657 (QB)

swimming pool and hit his head on the bottom sustaining serious injuries which resulted in incomplete tetraplegia. There were signs, though partially covered by foliage. The defendant's case was that the duty of care did not extend to guard against an obvious risk such as diving into a small pool which the claimant accepted he was previously aware of such risk. The Court of Appeal, relying on *Tomlinson v Congleton Borough Council*¹³⁷ held that Kosmar was under no duty to warn him against such a course of action or to take other measures to prevent it. His dive and its terrible consequences were matters for which he must take full responsibility.

Thus it would appear that in some cases the issue of local standards may in fact recede into the background where regardless of whether there had or had not been compliance, there will not be a breach of the duty of care where a person takes in effect such a patently obvious risk,¹³⁸ and as also seen even where there is negligence and a breach of the duty of care, the claimant must also prove on the balance of probabilities that the injuries are *caused* by that breach.

The issues concerning strict/fault based liability, the scope of regulation 15, local standards and causation continue to occupy the courts and are likely to do so in the future, largely unaffected by the new proposals. The range of its applicability, given the wider definitions over what is a package and liability resting with the organiser is, however, likely to have a significant impact on the protection afforded.

Impact of the New Proposed Directive

Article 11 states that the *organiser* is responsible for the performance of the travel services included in the contract, irrespective of whether those services are to

¹³⁷ [2004] 1 AC 46. Involving a lake in a country park where swimming was prohibited and prominent warning signs were displayed. The complainant dived in and broke his neck. He claimed damages but failed in the House of Lords who held that there was no breach of the duty of care where the claimant had taken such an obvious risk of his own free will, that the claimant chose to do and not out of the state of the premises.

¹³⁸ See also *Clough v First Choice Holidays and Flights Ltd.* [2006] EWCA Civ. 15 where the claimant slipped and fell from a wall into a swimming pool in Lanzarote and broke his neck. The wall should have been coated in non-slip paint. He had consumed a large amount of alcohol and his feet were wet. The judge took the view that given the combination of water and suntan oil mixture it was inevitable the wall would be slippery, even with non-slip paint. Had the claimant not taken so much alcohol he may not have gone on the wall but if he had would probably have been able to avoid the consequent fall and the claim was again dismissed on causation.

be performed by the organiser or by other service providers. If any of the services are not performed in accordance with the contract, the organiser shall remedy the *lack of conformity*, unless this is disproportionate. Where a significant proportion of the services cannot be provided the organiser shall make suitable alternative arrangements at no extra cost for the continuation of the package including where the traveller's return to the place of departure is not provided. If it is impossible or not acceptable (the traveller may reject if not comparable to what was originally agreed), the organiser shall provide transport to the place of departure and where appropriate compensation (within the limitations referred to in Chapter 2). If the alternative arrangements result in a package of lower quality the traveller is entitled to a reduction and damages where appropriate (as set out in Article 12).

Article 12 is a more complete regulation and clarifies issues on claims for damages and compensation. Compensation for lack of enjoyment or 'non-material' damage is expressly stated. Save for personal injury the parties can limit the level of compensation. Article 12(3) outlines the circumstances where the traveller is not so entitled. They include lack of conformity caused by the traveller, third party, or unavoidable/extraordinary circumstances. Also where the traveller fails to inform the organiser without undue delay of any lack of conformity on the spot if that requirement is stated in the contract and is reasonable. Limitations under the International Conventions are also outlined.

Article 13 enables the traveller to complain and message the retailer over the performance of the package who shall forward them on to the organiser. The obligation to provide assistance in Article 14 are clarified and include providing appropriate information on health services, consular assistance, long distance communication and alternative travel arrangements.

Serrat (2013) suggests the proposal has clarified some points, such as suitable alternative arrangements are to be made where the return to the place of departure is not provided as agreed. Reasons for rejecting the alternative arrangements proposed (because they are not comparable to what is in the contract). Transport back is required only if the package includes the carriage of passengers. A More complete

regulation on compensation for damages and the extent of the obligation to provide assistance is clarified. However, he also points out that some obscurities still remain such as the reworded defence of 'unavoidable and extraordinary circumstances'. The traveller's duty to inform the organiser without undue delay of any lack of conformity, and exoneration if not. What he refers to as the organiser's 'right to cure' the lack of conformity unless disproportionate (a term that may require clarification in the future) and the link between disentitlement to a price reduction or compensation and the defences in regulation 12 (3). He concludes that some issues on performance of the contract in the proposal are far from being in line with the European approach to contract law.¹³⁹

Padfield (2013)¹⁴⁰ outlines a number of points where the new Articles differ from the current regulations including obligations on the 'organiser' rather than the 'other party to the contract'. The party selling the package to the consumer is responsible to remedy things when they go wrong. It could be for a travel agent to put things right where they may be quite remote from what is happening. Serrat (2014) is also critical of the wording here:

"Does it mean that the organiser will be in the firing line when things do not go as planned? In our opinion, here a several liability between the organiser and the retailer, i.e. where each company is liable to the traveller only for the part of the damage attributable to him, should have been established regarding the performance of all the obligations arising from the contract and not the execution of the services only".¹⁴¹

Serrat also points out that retailers are liable for booking errors (Article 19) but there appears to be an anomaly in that different distribution of liability between organiser and retailer depends on the particular obligation the liability arises from.

Other terms that may also be in need of clarification, Padfield argues, include 'Unavoidable and extraordinary' circumstances which could mean the tour operator is more liable than now. The new provision enables organisers to exclude liability if there

¹³⁹ Concluding remarks at IFTTA Conference

¹⁴⁰ (2013) TLQ 217

¹⁴¹ IFTTA LR April, 7

is no timely complaint, which may fall foul of unfair contract term provisions, especially in cases involving personal injury. Clarification may be required over terms such as 'lack of conformity', and what is 'disproportionate' when it comes to operators remedying any lack of conformity.

In this chapter we have seen how important regulation 15 is to protect consumers from the improper performance or failure to perform the obligations under the contract by tour operators and their suppliers. It is recognised that where contractual terms are wide and clear, there may be no need to rely upon regulation 15 and the claim may be for simple breach of contract. As such it may be argued that in common law jurisdictions like the United Kingdom this regulation in particular adds nothing more-the result of a 'one size fits all' piece of European law grafted onto common law and non-common law jurisdictions alike. However, the wide definition of 'consumer' in the regulations provides rights not only for the principal but also to those who may not even have been party to the original contract (transferees, other members of the party etc.).

Whilst initially it was thought tour operators would be held strictly liable for the services they and their suppliers provide, this is not always so and is often dependent upon the particular terms of the contract and the interpretation given by the particular Member State. The protection of regulation 15 does not apply to every aspect of the package holiday and its applicability will again depend on the structure of the 'package' in question. Its applicability can also be reduced by a defence under the 'local standards' principles, and the unwary may be surprised at the concept that although an English tour operator provides a contract governed by English law, the standards of the duty of care under that contract will be judged by the local laws, regulations and even customs of the country where the holiday takes place. The case of *Holden* has been described as 'a thorn in travel practitioners' side' by appearing to condemn claimants to the time consuming, costly and often wholly disproportionate task of obtaining 'expert' evidence to deal with any issue that might touch on whether the local supplier had complied with its obligations.¹⁴² Nevertheless, it would appear that the courts have brought a more common sense and fair approach in more recent

¹⁴² Deal (2008) TLB 5 at 6

decisions by either sidestepping the point or finding the issue irrelevant to a particular case. The recent attempt to clarify the law by the Court of Appeal, may in fact raise even more issues on the subject.

We have also seen how the new proposals on the performance of the contract have clarified some aspects but have equally raised other issues. In the next chapter it will be seen that the applicability of regulation 15 can be further reduced for package holidays involving travel by air and sea, due to international conventions (limitations on damages which have been retained and clarified in regulation 12 of the new proposal) and the sometimes novel jurisdiction arguments raised by tour operators.

CHAPTER FOUR

CONVENTIONS V COMMUNITY LAW - THE INTERNATIONAL DIMENSION

Consumers on a package holiday will inevitably be taken to their holidays abroad as part of the package either by air transport or by ship, or increasingly on a cruise. This Chapter will examine how far regulation 15 offers protection, particularly as the carriage of passengers is governed by International Conventions placing limitations on liability and the extent of damages to be awarded. The Package Travel Regulations themselves allow for the tour operator to incorporate the limitations of the Conventions within holiday contracts, but what if the contract is silent on the matter? The exclusivity provisions contained within them suggests that the Package Travel Regulations may be excluded. It will be discussed that this is a somewhat grey area which has led to tension between national laws which give effect to the Conventions, and also EU law, which it has been argued in at least one authority, should take precedence.

AIR TRAVEL

The Convention that governs the unification of rules relating to international carriage by air for those countries party to it, is now the Montreal Convention 1999, formerly the Warsaw Convention 1929 as amended by The Hague Convention 1955. The Convention is given effect in English law by virtue of the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order.¹⁴³

Liability is governed by Article 17.1 which provides:

¹⁴³ Order 2002-SI 2002/263

“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

This is a strict liability Article subject to certain defences and limitation on liability provisions, unlike the partially fault based liability of certain obligations in regulation 15. However, the courts have narrowly interpreted the meaning of ‘accident’ which must be triggered by an event external to the passenger and be unexpected, for example the House of Lords have decided that deep vein thrombosis is not an ‘accident’ within the meaning of Article 17.¹⁴⁴ There have been a number of ‘slip and trip’ claims that have been dismissed due to an overly restrictive interpretation of ‘accident’ and psychiatric harm or mental injury is not covered. Another extremely important distinction between the Convention and the common law or regulation 15 is that the time limit for bringing an action under Article 35 is only 2 years and not the normal 3 years for personal injury. If this is missed the claim fails outright.

As far as death or bodily injury is concerned there are now effectively no limits to liability but there are regarding liability for checked baggage (strict liability) and unchecked baggage (fault based). It is a very modest sum of 1000 Special Drawing Rights (equivalent to about £800 - £1,000) unless a passenger makes a special declaration of interest and has paid a supplementary sum.

Exclusivity Principle

More controversially under Article 29 any action for damages, however founded, whether under the Convention or in contract or tort, can only be brought subject to the conditions and such limits as are set out in the Convention. The issue of exclusivity has been determined by the House of Lords in *Sidhu v British Airways*.¹⁴⁵ In that case action was brought exclusively under the common law for negligence when the claimants on their way to Kuala Lumpur in 1991, via Kuwait, were taken captive by invading Iraqi troops when in the transit lounge. There had not been an ‘accident’ nor

¹⁴⁴ *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72

¹⁴⁵ [1997] AC 430

had there been physical, though certainly there was psychological, harm. It was argued the airline should not have allowed aircraft to land in Kuwait at a time of expected conflict. The action was also commenced outside the 2 year period. The House of Lords held that the Convention's certainty and uniformity would be undermined if the national courts were allowed to provide a residual remedy under the common law that was not a remedy provided for by the Convention and the claim therefore failed.

The principle of exclusivity it has been argued is to prevent a wide range of claims against airlines unless they fall within the substantive scope of the Convention.¹⁴⁶ Quality complaints about the amount of leg room, customer service and noise created by fellow passengers and the standard of food served on board have all been dismissed. In *Gonzor v ITC*¹⁴⁷ the claimant was a wealthy businessman travelling in first class. He complained that his transatlantic flight, which the airline had promised on its website would be a haven of tranquillity, was ruined by a noisy and unruly family with young children sitting in adjacent seats. Since this did not constitute an 'accident' and was not a case of damage or delay, the claim was dismissed. Clearly Article 17 straightjackets somewhat death or personal injury claims and can prevent an action in negligence at common law as we have seen. However, it is hard to see why a claimant could not bring an action under the Package Travel Regulations if it had been part of a package and not a stand - alone flight, for failing to perform or improperly perform the obligations under the contract as required by regulation 15. However, unlike claims at sea, reference to 'however founded' in Article 29 would debar such a claim (see further below).

This point has not been directly decided by any authority relating to the Package Travel Regulations, though the decision in *Hook v British Airways*¹⁴⁸ offers an interesting corollary. The claimant suffered from mobility and learning disabilities and sued BA for damages for injuries to his feelings when failing to make reasonable efforts to meet his seating needs under EC Reduced Mobility Regulations and Civil Aviation

¹⁴⁶ *Saggerson* 514

¹⁴⁷ (2008) Unreported

¹⁴⁸ [2011]EWHC 379 (QB),[2012] EWCA Civ 66

disabled person regulations.¹⁴⁹ He argued that an international treaty cannot overrule fundamental European Union law rights. The High Court rejected this argument as did the Court of Appeal and upheld the exclusivity decision of *Sidhu*, confirming that if the Convention did not provide a remedy in damages, there was no remedy. Thus a potent reminder, according to Stevens (2011/12)¹⁵⁰, of the exclusivity of the Convention regime and of the importance of *Sidhu*. He also points out that the decision is thought provoking in its consideration both of the inter-relationship between the Convention's exclusivity principle (as part of the Community legal order which had already ratified the Convention in an earlier 1997 Regulation¹⁵¹), and other Community legislation, as well as UK regulations. It may be that the application of the Convention will necessarily be a fact sensitive issue, 'dependent upon the particular contractual obligations undertaken by the airline in question in any given case'.¹⁵²

CARRIAGE BY SEA

The transport of passengers by sea is now governed by the Athens Convention 2002, which came into force on April 23rd 2004, and revises and updates the Convention of 1974. The Convention holds the Carrier to be liable for the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, to a limit of 250,000 units, subject to limited exceptions. If the loss exceeds that limit the carrier is further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier. If the loss was not caused by a shipping incident, the carrier will be liable if the incident was caused by the fault or neglect of the carrier, the burden of proving that being on the claimant.¹⁵³ All carriers are now subject to compulsory insurance to cover that of the damage limits¹⁵⁴ and there is no liability for valuables unless lodged for safekeeping and

¹⁴⁹ Regulation (EC) No. 1107/2006 Article 10 Schedule II, and Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 SI 2007/2895, Regulation 9

¹⁵⁰ (2011/12) TLB 4

¹⁵¹ Regulation (EC) 2027/97 (as amended by Regulation (EC) 889/2002

¹⁵² *Saggerson* 517

¹⁵³ Article 3

¹⁵⁴ Article 4

limitations apply on the extent of damages.¹⁵⁵ The total extent of liability for death or personal injury is 400,000 units¹⁵⁶ though the parties can agree to higher limits.¹⁵⁷

Under the Athens Convention, unlike the Montreal Convention, psychiatric damage is included which as Grant and Mason (2011) point out may be important to passengers affected by the sinking of the *Costa Concordia* in January 2012.¹⁵⁸ Reference is also made to 'incident' which is much wider and obviates the need to straightjacket matters into the qualifying 'accident' definition in the Montreal Convention.

The revised Convention now substantially raises the limits of liability (the levels of damages having been previously restricted) for the death of or personal injury to a passenger on a ship. Again there is a limitation period of 2 years¹⁵⁹ and, as with the Montreal Convention, the Athens Convention applies to the exclusion of other remedies.¹⁶⁰ However, whereas Article 29 of the Montreal Convention provides exclusivity for 'any action for damages, however founded', the Athens Convention applies only to an action for damages 'for the death of or personal injury to a passenger or for the loss of or damage to luggage,' and is not therefore absolute. It is still possible for regulation 15 to be argued in a claim against a carrier for a quality complaint (unlike *Gonzor* above for travel by air), or for loss of enjoyment, outside the ambit of the Athens Convention.

Whether regulation 15 is overridden by the exclusivity provisions of the Athens Convention for more substantive claims is open to debate and there are opposing first instance authorities that demonstrate the tension between International Conventions and EU law given force by domestic laws. This is of some considerable importance given the more restrictive limits on not only damages, but also limitation periods that may and have been missed. In *Norfolk v MyTravel Group Plc*¹⁶¹ the claimant brought her claim within three years for personal injury, thus within the period under English

¹⁵⁵ Article 8

¹⁵⁶ Article 7

¹⁵⁷ Article 10

¹⁵⁸ At 384

¹⁵⁹ Article 16

¹⁶⁰ Article 14

¹⁶¹ [2004] 1 Lloyd's Rep. 106

law, when she slipped on water in a lift, but outside the two year limit under the Athens Convention. The court held that the claim was time barred and it was dismissed. In contrast a very different view was taken by the court in *Lee and Lee v Airtours Holidays Ltd.*¹⁶² The claimants suffered psychiatric illness and the loss of valuables when their cruise ship caught fire and sank. The contract was silent on incorporation of the Convention. The judge held that the limitations in the Athens Convention on damages relating to the lost valuables did not bar their claim to recover the full amount of their loss and that regulation 15 of the Package Travel Regulations provided a *parallel remedy*, despite the exclusivity principle of the Convention it would seem.

Nevertheless, the consensus amongst writers in this area is that the decision in *Lee* (where *Sidhu* had not been brought to the court's attention) was mistakenly decided.¹⁶³ That the Conventions do override the Package Travel Regulations, and the decision in *Hook* referred to above would tend to support that view. It is arguable though that regulation 15 should run parallel to the Convention for substantive claims. The authority of *Sidhu* was decided before the Package Travel Regulations were brought in. Uniformity of rules for international travel are laudable for the vast majority of stand-alone flights or sea voyages but do they not run a coach and horses through important consumer laws which reflect the sea change of protection afforded by the law now to consumers, of which those Conventions pre-date? Harding and Prager (2010) make the valid point that when the Athens Convention was ratified originally in 1974, the travel law landscape looked very different:

“The ‘package holiday’ was still in its infancy, and the desire of the European Parliament for harmonisation and uniformity was not as strongly felt as it is today. When the Package Travel Regulations 1992 came into force, they created a regime which was unashamedly consumer-oriented and which did not, and does not, sit easily alongside the restrictive, pragmatic provisions of the Convention.”¹⁶⁴

¹⁶² [2004] 1 Lloyd's Rep. 683

¹⁶³ Both the authors Grant and Mason in *Holiday Law*, and the authors of *Saggerson* agree.

¹⁶⁴ TLQ 22

The authors acknowledge that the position has been complicated by the two diametrically opposed first instance decisions of *Lee* and *Norfolk* referred to above. A definitive higher court decision is perhaps needed to clarify this point.

What this chapter has demonstrated is that whilst in certain ways the international Conventions which govern the transport of passengers by air and sea, may provide greater assistance to consumers, such as the strict liability provisions in the Montreal Convention, they can also be restrictive. Narrow interpretations of what constitutes an 'accident', limitations on damages, and tighter limitation periods would appear to fly in the face of the wider consumer protection ethos behind the European sourced Package Travel Regulations. In the context therefore of package holidays at least, would the Conventions be so undermined by a parallel remedy as held in *Lee*? Arguably they would not and the recent decision of the Supreme Court in *Stott v Thomas Cook Tour Operators Ltd*,¹⁶⁵ whilst upholding once again the exclusivity principle in a disability claim, suggests the time may have come for change. Giving the main judgment Lord Toulson declared that, "There is much to be said for the argument that it is time for the Montreal Convention to be amended."¹⁶⁶

¹⁶⁵ [2014] UKSC 15

¹⁶⁶ For a more detailed analysis of the case and in particular the judgment of Lady Hale who is extremely critical of the present status of the law, see further Green (2014) 6 TLQ 114

CHAPTER FIVE

CONCLUSION

The Package Travel Regulations 1992 are a product of their age in that they provided holidaymakers at the peak of the package holiday boom, for the first time, with regulated consumer protection and key rights enshrined in the 1990 Directive. They were introduced, however, in a pre-digital, pre internet time and a need for reform to accommodate the changes in how consumers now take their holidays has arisen.

The current regulations ensure that consumers receive essential information before and after signing a package travel contract. Regulating what happens if there are changes to the package travel contract and also ensuring consumers receive a refund of pre-payments, and repatriated in the event of the organiser and or retailer's insolvency.

They hold tour operators and or retailers responsible for the proper performance of the package, even if the services are provided by subcontractors. This 'extension of liability' is regarded by Silingard (1996) as perhaps the most important aspect of the need to provide the consumer with greater protection.¹⁶⁷ So important that he believed the 1990 Directive was a decisive leap forward in quality, the development of tourism and the elimination of barriers to travellers within the EU, thereby changing the mentality of those organising tours and improving standards in the market. However, the importance of the right in particular under regulation 15, for a consumer to pursue a claim in the UK against either a tour operator or travel agent if there has been a failure or improper performance of the obligations under the contract, cannot be underestimated.

That is not to say there are no limits to this fundamental consumer right. For as has been shown there may not be a need to plead breach of the regulations where,

¹⁶⁷ 20 HLR 611 at 616

particularly with the larger tour operators, terms of the contract may be so wide and favourable to the consumer that it is clearly a simple breach of contract claim. With smaller operators however, the position may not be so clear.

Whilst not only extending the protection to consumers who may not even be a party to the contract (thus potentially negating any common law claim), the regulations have also brought into sharp focus the responsibilities and obligations tour operators have towards consumers, of their products and services. The regulations have certainly clarified, as far as package holidays go, what rights consumers have and helped to ensure tour operators 'up their game' particularly regarding regulation 15 and safety standards. This may go some way to explaining why tour operators were more ready to settle a class action by 600 holiday makers for £1.7 million, than to fight it in court after a disastrous holiday in Turkey resulted in gastric illness purportedly brought on by unclean water in the swimming pool and very poor standards of hygiene in the toilets and kitchens.¹⁶⁸ Clearly the reporting of such cases in which reference was made to European law holding tour operators responsible for the fault of others, sends out a message and warning to tour operators that holidaymakers cannot be subjected to such poor conditions without there being severe consequences.

Notwithstanding fundamental consumer rights afforded by the regulations, it has also been shown in this thesis that regulation 15 has not been as widely interpreted in the UK as at first thought. It is clear that whilst some initially believed this was a strict liability provision, proof of fault is required for the more serious failures to perform or improper performance of obligations. An explanation for that appears to be that there will never be complete harmonisation given the European Directive is transposed onto existing national legal regimes (some more heavily based on common law contractual principles than others) and raises the issue of what interpretation is to be given by each Member State's judicial system. It has been suggested in the case of *Hone* that, unlike in Germany, the European consumer oriented origin of the Directive has not been followed by the national UK court. Italy it has also been shown has a different approach to the issue of joint and several liability

¹⁶⁸ Reported in the general media February 2014

which is narrower than that in the UK, albeit there appears to have been little litigation over the meaning of 'parties to the contract'.

The issue of local standards also continues to occupy the courts and this dynamic aspect of travel law is likely to be re-visited in the future. The courts have followed a restrictive path on occasions, further narrowing down the ambit of both the common law and the regulations although not in every case, which has led to a very fluid development of the law that is unlikely to be affected by the new proposals.

It has also been shown that in the absence of any higher authority directly involving the regulations, the tensions within the law for travel by air and at sea remains. The consensus appears to be that if there is a conflict the International Conventions exclude claims under the regulations, despite one authority that suggests they are not mutually exclusive and provide parallel remedies. Given the Conventions pre-date the more consumer oriented regulations by many years, there may be an argument that there should be parallel remedies and exclusivity principles are now outdated.

Despite these curtailments to the scope of regulation 15, this thesis has demonstrated the fundamental rights the Package Travel Regulations afford consumers when purchasing a package holiday and that the proposals for a new Package Travel Directive, has clarified and extended considerably the ambit of those who may previously have been excluded from what Serrat (2013) describes as a 'guaranteed high level of traveller protection'.¹⁶⁹

In the global media and digital age, consumers have become more aware of their rights, particularly as publications and media programmes on those rights continue to flourish. It may well have been that consumers when booking online thought they were protected, when in fact they were not. The new Proposals go a long way to close that gap. The recent upward trend in package holidays referred to in the introduction may prove the point that experience of stand-alone adventure may have lost its appeal. The reality of the protection afforded to package holidaymakers which is absent for the non-package traveller perhaps is beginning to sink in. Whilst the

¹⁶⁹ Concluding lecture remarks at the IFTTA Conference.

industry may lament the extension of traveller protection and the added financial burden imposed on them (which may ultimately push prices up), nevertheless the consumer is in a much stronger position than ever before.

The last thing that a consumer wants when the services provided under a package holiday go wrong, and sometimes disastrously so, is the worry and expense of bringing claims in foreign jurisdictions against those service providers used by tour operators. Regulation 15 takes that concern away by enabling the consumer to bring proceedings against a readily identifiable defendant and in their own jurisdiction.

The original Directive, and the regulations that ensued, have been subjected to litigation concerning ambiguities and interpretation particularly over the definition of package and the extent and range of regulation 15. The New Proposals endeavour to clarify such issues and close gaps that have developed due to the changing way consumers now take holidays—vastly different from the early 1990's. The wide definition in the Proposals of 'package' leads one writer to suggest that the second tier of protection discussed, namely Assisted Travel Arrangements will be applicable in only very limited circumstances.¹⁷⁰ Although one of the options considered by the Commission for implementation was perhaps too radical, due to the economic implications if nothing else, namely extending the protection to all including stand alone holidays, some writers suggest that overall the new provisions do not seem radically different from those we have got used to working on over the past twenty years. That whilst important advances and clarifications have been made by the Proposals which will improve issues on performance of the package, other issues over remedies for non performance and terminology, if not revised, are likely to keep litigators occupied for some time yet.¹⁷¹ Whether that is so remains to be seen, for just as 'parties to the contract' has not occupied the courts greatly so the definition of 'organiser' in the New Proposals may not either.

Undoubtedly there will be challenges ahead once the new Proposals are implemented, just as the original Directive has been litigated over. Nevertheless, the protection afforded to consumers by the existing regulations generally and in

¹⁷⁰ Mason, (2013) TLQ 193 at 200

¹⁷¹ Padfield (2013) TLQ 223, Serrat (2014) IFTTA LR April, 1

particular by regulation 15 will be spread much wider by the new Proposals. They have been a very positive response to the changing package holiday scene, and also reflective of the wider European Union consumer acquis, effectively providing many more package holidaymakers than before, with clear and strong consumer rights.

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