

## BURDEN OF PROOF FOR FOOD CONTAMINATION CLAIMS: HOW MEDICAL EVIDENCE CAN FAIL CLAIMANTS

On 18 September 2019, DJ Hale sitting in Nottingham County Court heard the case of (1) Jayne Shaw and (2) Ivan Shaw v Global Travel Group (unreported), finding in favour of the Defendant. The decision highlights the observations of the Court of Appeal in *Wood v TUI* [2017] EWCA Civ 11 in so far as it is not enough to invite the court to draw inference from the mere fact that the claimants had been suffering from sickness. The burden of proof must be discharged on the balance of probabilities taking into consideration available medical evidence.

The Defendants were represented in the Nottingham County Court by Max Archer of 12 King's Bench Walk who was instructed by Harnita Rai of Miles Fanning Legal.

### BACKGROUND

The Claimants had booked a 7 day package holiday with the Defendant at the Thapsus Club Hotel Club in Tunisia (the "Hotel") in 2015, which included meals on an all-inclusive basis, flights and transfers.

Whilst on holiday, the Claimants became unwell and alleged that their illnesses were caused by pathogenic microorganisms which they attributed to allegations that the food/drink at the Hotel was of poor quality due to poor hygiene. The Claimants alleged their illnesses were as a result of the Defendant's negligence under regulation 15 of the Package Travel Holiday and Package Tour Regulations 1992 and section 49 of the Consumer Rights Act and also raised arguments that the food/drink was not safe for consumption under section 4(2) of the Supply of Goods and Services Act 1982 and/or in the alternative section 14(2) of the Sale of Goods Act 1979, sections 9(1), (2) and (3) and/or sections 10(1), (2), (3) and/or 11 of the Consumer Rights Act 2015.

The Claimants sought to rely on allegations that the food buffet area was prone to flies and birds, that systems were not in place to maintain cleanliness and that at times the food appeared to be undercooked. The Court heard oral evidence from the Claimants and written evidence from the Claimant's medical expert Mr Thomson, the Hotel's Hygienist, Director, Doctor, Chef, Restaurant Manager, Bar Manager and Assistant Maintenance Manager. There was no evidence of other guests falling ill at the hotel, in oral evidence the First Claimant mentioned that another guest had become ill, though it was conceded that this was likely to be a result of overindulgence. This stood in contrast to the Claimant's medico-legal report, which specifically cited other guests being ill. A stool sample had been taken from one of the Claimants after her admission to hospital during her illness, the result tested negative.

### ARGUMENTS RAISED

Defendant's Counsel relied on the observations of the Court of Appeal in *Wood v TUI* [2017] EWCA 11 in so far as it is not enough to invite the Court to draw an inference from the mere fact of the Claimants' sickness and pointed out the difficulty of proving that the food/drink was not of satisfactory quality in the absence of any other hotel guest falling ill. As regards the Claimants' expert's reference to another person falling ill during a coach trip excursion, during cross examination, the First Claimant said that this may have been a result of that person having overindulged. There was no allegation made that this person had become ill from the Hotel's food/drink.

The Defendant's averred that its' witness evidence indicated that reasonable systems and procedures were in place to maintain cleanliness/the management of the Hotel and it was averred by the Defendant that it was for the Claimant to prove that these systems/procedures had not been followed, which it argued they had not, nor had they determined a link between any failure on the Hotel's part and their illness.

The Defendant questioned the reliability of the medical evidence of Mr Thomson and brought attention to his reliance on the fact that 80% of cases are explained by bacterial infection to come to the conclusion that the Claimants' illnesses would also have been caused by the same. Much was also made of Mr Thomson's failure to exclude other causes, counsel

forensically demonstrated the extent to which the expert had failed in this regard, showing that the underlying issue was the mistaken starting point that correlation and causation had been equated.

## THE DECISION

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Whilst DJ Hale accepted that the Claimants holiday would have been ruined as a result of their illness and agreed that it was a natural reaction for them to attribute this to the food/drink consumed at the Hotel he concluded that this was not sufficient to discharge the burden of proof on the balance of probabilities.

Whilst he acknowledged that some attempts had been made by the Claimants' expert to rule out causes, the evidence presented did not go far enough to rule out parasitic or viral cause nor did it rule out waterborne transmission or fully explore person-to-person transmission. As such, the evidence submitted by the Claimants did not rule out any other competing cause. He specifically agreed that it was impermissible to come to a conclusion on causation based on probabilistic reasoning, ie the fact that 80% of cases are said to be caused by foodborne pathogens. This is a useful indication, many medico-legal reports in sickness cases fall into this error.

Since the Claimants' claim focused on allegations concerning the food/drink at the Hotel no other sources outside of this, such as contamination in the swimming pool or transmission from another guest at the hotel could be relied on to prove illness.

The claim was dismissed.

If you would like any further information regarding this matter, or would like to discuss any matters with our litigation team, please contact:

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