Case Comment

Japp v Virgin Holidays Ltd

personal injury - liability - negligence
(CA (Civ), Richards L.J.; Tomlinson L.J.; Lewison L.J., November 7, 2013, [2013] EWCA Civ 1371)

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Subject: Personal injury. **Other related subjects:** Hospitality and leisure. Negligence
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Case: Japp v Virgin Holidays Ltd [2013] EWCA Civ 1371; [2014] P.I.Q.R. P8 (CA (Civ Div))
J.P.I.L. C9 In September 2008, Mrs Moira Japp was on holiday at the Crystal Cove Hotel, Barbados. She had gone onto the balcony of her hotel room to read a book, closing behind her the sliding glass balcony doors. When the telephone in her room rang a short time later, she got up from her chair and made to go back to the room, but she walked into the closed doors. The glass shattered, causing lacerations to her body. She subsequently brought a claim for damages for personal injury against the tour operator, Virgin Holidays Ltd.
The hotel was constructed in 1994. It was described by the hotel manager as a four and a half star hotel with between 50 and 60 rooms. He was not aware of any similar accidents at the hotel. The focus of the case at trial was on whether the glass in the balcony doors complied with local safety standards. The glass actually used was ¼ inch annealed float glass. The claimant's case was that safety glass should have been used.
H.H. Judge Hayward found that the Barbados National Building Code 1993 was applicable. The code stated that safety glass should be used in doors. The judge concluded that the hotel had breached the code at the date of construction and at the date of the accident, as it had a continuing duty to have regard to safety issues and to update facilities. H.H. Judge Hayward gave judgment in her favour (subject to a 20 per cent deduction for contributory negligence) in the sum of £19,200. Virgin appealed against the judge's finding of liability.
It was common ground that Virgin owed Mrs Japp the same duty of care as the hotel, by reason of the Package Travel, Package Holidays and Package Tours Regulations 1992,[1] and that the relevant safety standards were those applicable locally rather than British standards.
The Court of Appeal had to determine whether:

- the duty of care fell to be considered by reference to custom and practice at the date of the accident, rather than the date of construction of the hotel;
- the hotel owed a continuing duty to update the fabric of the premises as custom and practice developed; and
- the judge was wrong to find that it was custom and practice at the date of construction to comply with the code.

The Court of Appeal confirmed that where the question was whether a structural feature of a building complied with local standards, the starting point was the standards applicable at the date of design and construction. In this case that meant those applicable at the date when the balcony doors were installed. They accepted that there would be circumstances where changing standards made specific provision for further action to be taken in relation to a structural feature of an existing building. However, subject to that, there was no duty to engage in a constant process of updating existing buildings by rebuilding or refurbishment to reflect changes in standards.[2]
In this case, the code was directed at the standards to be observed at the time of design and construction. None of its material provisions required changes to be made to the structure of existing buildings. They held that the judge had been wrong to look at the matter in terms of compliance with local standards 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. Virgin therefore succeeded on the issues of principle raised by the first two questions.
That left the matter of custom and practice. The Court of Appeal held that it was plain that the experts at trial looked at the position from the date of construction of the hotel to the date of accident, including the relevance of the code throughout that period. The judge had

preferred the views of the cla*J.P.I.L. C10* imant's expert who had stated that in 1994 it was the custom and practice in the Barbados building industry to follow the code. The judge's decision that the doors had not complied with local standards at the date of installation was therefore inevitable, and meant that Virgin's appeal was dismissed.

Comment

Since the introduction of the Package Travel, Package Holidays and Package Tours Regulations 1992 the tour operator is:

"liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by [the operator] or by other suppliers of services." [3]

This is more onerous on the operator than the pure contractual obligation under the Supply of Goods and Services Act 1982, which simply required the exercise of reasonable care to exclude from the accommodation offered any hotel whose characteristics were such that guests could not be accommodated in reasonable safety.[4]

With the tour operator being directly liable under the Regulations for improper performance of the contract by the hotel, the focus can be on the exercise of reasonable care in the operation of the hotel itself rather than the selection of the hotel.[5] This widening of the duty makes the standards applicable to the premises all the more important and gives tour operators every incentive to ensure that the standard of care is not further extended as contended for by the claimant in this case. Although ultimately dismissing the appeal by Virgin Holidays on a point of fact, the judgment will no doubt have come as a relief to the appellant as the points of principle upheld by the Court of Appeal curtailed any wider ramifications on the tourism industry and beyond.

The decision confirms that in accidents involving the safety standards of premises, the duty of care must be considered by reference to custom and practice at the date of construction, rather than the date of the accident, and that generally no continuing duty exists to update premises as custom and practice develops. This is essentially an important restatement of established principle, and is relevant to all claims regarding the standards of premises, including those under the Occupier's Liability Acts.

Relevant date of consideration/Continuing duty

It has long been held that in overseas holiday cases the relevant standards of accommodation are measured against local standards, not those applicable to buildings in the United Kingdom. This was common ground between the parties in the present case. The factual dispute in question surrounded the applicability of a non-legally binding Code of Practice. It was accepted that the premises in question did not comply with the Code, and the issue was whether, at the time of construction, it was local custom and practice to follow it.

The claimant's contention was that the standard of construction of the glass door was to be assessed by reference to local standards *as at the date of the accident* since the claim was in contract and the relevant date was that of the alleged breach. By way of response to the appeal she also alleged that even if the construction was in accordance with local standards, that would not be sufficient to fulfil the duty of care as the glass door did not comply with the relevant Barbados Building Code, and the danger created by plate glass doors ought to have been well known when it was installed.

The reasoning of the trial judge was quoted in the judgment of Richards L.J.:

"Although there is no statutory requirement for hotels to carry out works to comply with the [Barbados Building ***J.P.I.L. C11*** Code] or update to comply with the Code, in my judgment if the hotel in question fails to do so then it runs the risk of being held liable in the event of an accident occurring because of a breach of that code and a failure to update to comply with it."

When pressed by counsel for Virgin to clarify whether he was referring to the date of construction of the building, or the date of the accident, the trial judge stated: "It seems to me that there is a continuing duty on a hotel to have regard to safety issues and if necessary update facilities."

The trial judge's approach was rejected by the Court of Appeal and their Lordships confirmed that the starting point must be the standards applicable at the date of construction.

The existence of a continuing duty to update premises was also rejected save for circumstances where "changing standards make specific provision for further action to be taken in relation to a structural feature". The exact wording of the judgment on this point

leaves some uncertainty as to when such a duty might arise. For instance it is unclear whether "changing standards" refers exclusively to legally enforceable rules and regulations, or whether non-obligatory codes of practice could give rise to a duty of care in certain circumstances. Similarly it is unclear whether "specific provisions" would need to be phrased in mandatory terms to impose a duty. The example given in the judgment itself—regulations relating to removal of asbestos—is perhaps suggestive of a higher threshold.
As for the claimant's contention that there was a breach of duty even if the glass door complied with custom and practice at the time of manufacture the appellant claimed that such a conclusion would involve an impermissible undermining of the general rule laid down in *Wilson v Best Travel Ltd* that, at least in the case of structural features, it is necessary to prove non-compliance with local standards in order to establish a breach of duty. Given the finding of fact that the local standards were breached however, the Court of Appeal considered it unnecessary to consider this point further.

Expert evidence

At the appeal it was accepted by Virgin that their expert, a personal injury lawyer from Barbados, could not speak with the experience and expertise of the claimant's expert, an experienced surveyor. In relation to the former the judge at first instance stated:
"She is a personal injury lawyer with some experience of accidents happening in hotels. She has no real experience of the building industry, she made very limited enquiries of those who are involved and such enquiries really only revealed what we already know, namely the Code is not mandatory."
Their Lordships accepted that it was open to the judge below to prefer the evidence of the claimant's expert, and the lesson here is that on issues of foreign architectural custom and practice the court will probably prefer evidence from a professional in the field rather than a lawyer.

Practice points

- Where there is an issue concerning the safety standards of premises, the duty of care must be considered by reference to custom and practice at the date of construction.
- Generally there is no continuing duty of care to update premises as custom and practice develops.
- A duty of care to update might arise where changing standards or regulations make specific provision.
- Where there is a question of custom or practice in a foreign jurisdiction, expert evidence of a professional in that ***J.P.I.L. C12*** field is likely to be preferable to that of a lawyer providing evidence on the application of Codes of Practice.

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J.P.I. Law 2014, 1, C8-C11

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1. Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).
2. *McGivney v Golderslea Ltd (2001) 17 Const. L.J. 454* considered.
3. Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.15.
4. *Wilson v Best Travel Ltd [1993] 1 All E.R. 353*.
5. *Evans v Kosmar Villa Holidays Ltd [2008] 1 W.L.R. 297*.