



Wish we weren't here

Simon Hill explains how to calculate damages in package holiday and travel cases

When people think of their holidays, many think of sun, sea, sand and sangria, but some will need to add 'solicitor' to this list.

With around 16m package holidays sold to UK holidaymakers each year, inevitably some consumers don't get what they paid for. Since the introduction of the Package Travel, Package Holidays and Package Tours Regulations in 1992 (SI no 3288) (the Regulations) a growing number of holidaymakers are seeking redress for failing to get the holiday they expected.

After advising on the prospects of establishing liability, advising your client on what he can expect to receive is just as important. But calculating damages in package holiday cases is difficult. Until recently, holiday claims remained one of the few types of cases where damages for distress, vexation, frustration and loss of enjoyment were recoverable (usually referred to as 'loss of enjoyment' or 'distress and disappointment' losses). However, calculating this element of a claim is fraught with difficulties, requiring extensive use of comparables.

Basis principles of assessment

Holiday claims are essentially simple breach of contract claims where one party (normally the tour operator) has failed to provide the package of component services (accommodation, flights, transfers to and from the airport, use of a representative at the destination) in accordance with the contract. So when the tour operator has breached its obligations under the contract, eg by not supplying the five-star hotel chosen (as in *Beck v Tropical Worldwide Holidays Ltd* [1999] CLY 1384), the consumer should be eligible for compensation.

That compensation can be broken down into two main headings:

- **Diminution in value;** and
- **Consequential loss.**

In turn, consequential loss divides into four heads: distress and disappointment; additional expenses; physical inconvenience, and physical injury. However, when considering loss under these headings, remember:

- The tour operator is liable for the proper performance of the contract, irrespective of whether the obligations were to be performed by subcontractors (eg where a local bus company provides the transfers to and from the airport) (see Reg 15);
- The claimant can claim not only his losses, but also those of the other members of his family who accompanied him (*Kemp v Instasun* [1987] 2 FTLR 234); and
- If, after the initial problems appear, the tour operator failed to provide prompt assistance or make efforts to find a solution, this is a further breach for which damages can be recovered.

Diminution in value

The claimant will normally recover the difference, in monetary terms, between what he was promised and what he actually received. So where the claimant specifically requested a hotel with a heated swimming pool because his wife was about to have a hip operation and wished to exercise in warm water, but actually received a hotel with a cold pool, he was entitled to the difference in value between the two (*Forsdyke v Panorama Holidays Group Ltd* [2002] 3 CL 544). If a holiday with a warm swimming pool is worth £675, and without one it is worth £225, the claimant will recover £450 as diminution

in value. In practical terms, it is usually fairly easy to find the value of the holiday with each component part meeting the required standard, as it is almost always the price the claimant paid for the holiday (but see 'Loss of a good holiday deal', below).

Conversely, it is generally more difficult to reach a firm view on the value of a holiday where things have gone wrong. Sometimes an arithmetical approach can be adopted; by comparing the value of purchasing a holiday with and without the component parts; eg the price of the holiday with four-star accommodation (what he bargained for), compared with a three-star hotel (what he got). Evidence of comparable holidays from brochures and hotel price lists is invaluable here.

Difficulties arise where some facilities were absent, while some were substandard; such situations require a more subjective (and so more precarious) assessment of what the holiday provided was really worth. Use of brochures/price lists will be of only limited value, especially where the problems were numerous and varied.

Where evidence is lacking, the best approach is to try to assess the value of each component part of the holiday (eg accommodation makes up around 40 to 50 per cent of the cost of a typical holiday to Spain, according to the Federation of Tour Operators). Then, depending on whether the component was absent or just substandard, assess what percentage of that component the claimant actually received. So if the accommodation was not provided at all (as in *Duthie v Thomson Holidays* [1988] CLY 1058), the diminution in value will be 100 per cent of 40-50 per cent of the cost of the holiday. Effectively,

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the claimant should receive about 50 per cent of his money back. While this may seem low (and somewhat out of kilter with some of the reported cases), he will also be entitled to all his consequential losses, in particular, his distress and disappointment and physical inconvenience losses.

Loss of a good holiday deal

Where a consumer purchases a holiday at a knocked-down price, and the tour operator subsequently cancels the holiday before he goes, or the holiday is not up to standard, the consumer will be able to recover the benefit of his bargain. In *Hartman v P&O Cruises Ltd* [1998] CLY 3732, the claimant bought a 12-day cruise at a low fare of £858. The defendant cancelled the cruise the day before departure. The court held the claimant was entitled to the cost of going on a comparable cruise. As the market price for a comparable cruise was £2270, he was entitled to recover this amount.

Distress and disappointment

Jarvis v Swan Tours Ltd [1973] QB 233 and *Jackson v Horizon Holidays* [1975] 3 All ER 92 recognised in English law that holiday cases fall into an exception to the general rule that distress and disappointment losses are not recoverable for breach of contract.

The very object of the holiday contract is to provide pleasure, relaxation and peace of mind to the consumer. When the tour operator fails to provide what the contract called for, whether that was a reasonable standard of accommodation (*Lynes & Graham v Airtours* [1997] CLY 1773), hygienic food and drink (*Duffy v First Choice Holidays* [2000] 4 QR 8), facilities such as a children's swimming pool (*Hind v Evergreen Travel Services* [1998] CLY 1430) or indoor sports activities (*Jervis v Kuoni Travel Ltd* [1998] CLY 3733), the consumer may recover damages for the distress and disappointment of not being provided with them.

While the size of the award varies according to the individual facts, the more expensive the holiday, the larger the award is likely to be (see *Coughlan v Thomson Holidays* [2001] CLY 4276). Likewise, the less the breach seems to have affected the claimant, the less the award is likely to be (*Pegramm v Style Holidays Ltd* [1999] CLY 1383). Here, a defendant may wish to make use of the claimant's holiday photos

to show he does not seem to have had too unpleasant a time.

In line with most other claims for non-pecuniary loss, reference should be made to comparable cases. While there are no JSB guidelines or *Kemp & Kemp* equivalents available, use can be made of the case finder [opposite]. Unfortunately, with only a patchwork of reported cases, no case is likely to be 'on all fours' with an authority, thereby necessitating a 'broad-brush' approach.

Additional expenses

Where, as a result of some failure by the tour operator, the consumer incurs additional expenses, these should be recoverable, subject to the rule of remoteness and so long as the expenses were reasonably incurred. In *Crump v Inspiration East Ltd* [1997] CLY 1771 the claimant recovered the cost of hiring a taxi when the transfer bus to and from the airport did not show up. Likewise, in *Martin v Travel Promotions Ltd* [1999] CLY 3821 the claimant's connecting flight was delayed, causing him to miss his flight back to the UK. He recovered the cost of the telephone calls he had to make to the UK to sort out another flight.

Physical inconvenience

Although sometimes subsumed within distress and disappointment, care should be taken to ensure physical inconvenience losses (sometimes called 'physical discomfort') are taken into account. Only in rare cases will there have been no physical inconvenience resulting from a breach of contract (one apparent exception is *Westerman v Travel Promotions Ltd* [2000] CLY 4042 where instead of travelling by a 'unique' 1939 train for part of the trip, the claimant was transported first class on Swiss-rail and by air). Examples of physical inconvenience/discomfort occurring as a result of breaches by the tour operator include: the discomfort of waiting at airports due to flights being delayed (*Davis v Thomson Holidays Ltd* [1999] CLY 3826); delays and additional transfers on arrival (*Halpern v Somak Travel Ltd* [1998] CLY 1428); physical discomfort from substandard accommodation, eg *McSharry v Lloyds TSB Bank Plc* [2000] CLY 4037 where the claimant and party had to spend the first two days of their holiday cleaning their villa. Similarly in *Beck v Tropical Worldwide Holidays Ltd* [1999] CLY 1384, rather than a five-star room, the claimant

had to stay in a small, stuffy, hot, sparsely furnished apartment away from the hotel and up some narrow steep steps. In *Collinson v Travel Promotions Ltd* [1998] CLY 1427, the claimant's cabin was not adjacent to (as was required) his elderly mother's; he was at the opposite end of the liner.

Personal injury

Where, as a result of the breach, the claimant has sustained personal injury, such losses can be claimed and quantified in the normal way. Accordingly, where the claimant suffers food poisoning from the hotel food, general damages are recoverable for the resulting illness: *Middlege v Thomson Holidays Ltd* [2000] 5 QR 8. In *Djengiz v Thomson Holidays Ltd* [2000] CLY 4038 the claimant recovered for an injury to his hip suffered while jumping for the ball in a hotel-organised game of volleyball. The court surface was made of concrete with only a small amount of sand on top!

Mitigation of loss

As with all contractual claims, the consumer is required to take all reasonable steps to mitigate the loss caused by the tour operator's breach. Coupled with this is an apparently concurrent and co-extensive duty imposed on the consumer by Reg 15 (9) of the Regulations to communicate at the earliest opportunity to the tour operator and the service provider that he perceives there to have been a failing on their part at the place where the services are being supplied. The most obvious way to satisfy these requirements is for the claimant to report the problem to the tour operator's representative and service provider as soon as it arises.

In practical terms, the duty breaks down into three rules.

- The consumer cannot recover for losses he has successfully avoided.
- The consumer cannot recover for losses incurred but which could have been avoided if he had taken all reasonable steps to mitigate his loss. It seems from the reported cases, however, that the court is slow to refuse to allow the recovery of losses on this ground. For example, in *Currie v Magic Travel Group* [2001] CLY 4278 it was held the claimant had been entitled to fly home rather than accept an alternative hotel 10km away. Similarly, in *McLeod v Malta Bargains Ltd*, unrep, the claimant and her family found their hotel

and its facilities were not up to standard. The defendant offered them accommodation at an alternative hotel, but this offer was refused as the alternative hotel did not have a swimming pool. In awarding compensation for the whole holiday, the judge implicitly accepted the claimant had not unreasonably failed to mitigate her loss by refusing to move to the alternative hotel. However, as *Wheelhouse v CIT* [1994] CLY 1478 shows, the court does sometimes disallow losses on this ground. In that case, the claimant was found to have acted unreasonably by flying home early rather than accepting alternative accommodation which could have enabled him to enjoy the remainder of the holiday.

● The consumer can recover the expenses incurred in taking those reasonable steps to avoid loss. Thus, the claimant in *Crump v Inspiration East Ltd* (above) recovered the cost of hiring a taxi when the airport trans-

fer bus did not turn up. Such expense was recoverable as it was incurred to reasonably mitigate his loss. It was clearly better for the claimant to take a taxi than remain at the airport, or worse, on returning to the airport, missing the flight. Other obvious examples include the cost of using an alternative swimming pool, because the hotel pool is unavailable; and the cost of hiring proper equipment, when the equipment provided is insufficient.

Remoteness

In the average claim, questions as to remoteness will not normally arise as most of the usual types of losses will have been within the reasonable contemplation of the parties at the time of contracting as not being an unlikely result of a particular breach. For instance, an upset stomach is not likely to be too remote a loss from having unhygienic kitchens.

Problems arise where the claimant has

some special or unusual needs or reasons for going on holiday, eg where the holiday is booked specifically for a particular event. If the event is not well known, and its occurrence not specifically communicated to the tour operator or his agent, the loss may be too remote. The distress and disappointment of missing the Rio de Janeiro carnival is likely to be recoverable as a loss which is a natural consequence of the tour operator cancelling a holiday to Rio de Janeiro over carnival time, but the same losses might not be recoverable for missing a religious occasion where the tour operator was not made aware of the consumer's religion (see *Jacobs v Thomson Travel* [1986] CLY 975). On the same basis, had the special needs of the claimant's wife in *Forsdyke v Panorama Holidays Group Ltd* (above) (warm pool water for her recently operated-on hip) not been disclosed, it is likely most of her claim for damages would have been too remote.

Case finder

By comparing the facts of your client's case with those in the keywords column, you should be able to find all the recent analogous cases.

Key: The number in brackets represents the number of people on the holiday (+ indicates the exact number of people is unclear).

The holiday price is the total price of the holiday, not the price per person

Case	Keywords	Holiday price	Diminution in value (DIV)	Distress and disappointment award (D&D)
<i>Morris</i> [1997] CLY 1772	(5) Campsite and luxury home dirty; home lacking in accessories, site overcrowded and noisy	£1,180	£250 (21.2%)	Nil
<i>Graham</i> [1997] CLY 1771	(1+) Hotel unavailable; alternative destination declined, hotel not as good	£2,159	£2,159 (100%)	£500 each
<i>Lynes & Graham</i> [1997] CLY 1773	(2) Hotel not stated star rating; substandard accommodation; dirty; smelly; dangerous; broken facilities	£592	Unknown; £1500 total DIV and D&D damages	Unknown
<i>Halpern</i> [1998] CLY 1428	(2) Hotel overbooked; delays; 12 nights in small, dark room; staff mocking them	£1460	£500 (34.2%)	£1000
<i>Crump</i> [1998] CLY 1427	(2) Hotel undergoing major reconstruction work 24 hours a day; facilities unavailable or relocated; no airport transfers; negligible in-flight entertainment	£2,194	£1,097 (50%)	£1,250
<i>Collinson</i> [1998] CLY 1429	(3) Russian cruise; couple's cabin not adjacent to elderly mother's cabin; no vegetarian food	£4,820	Nil (0%)	£1,300
<i>Josephs</i> [1998] CLY 3734	(4) Villa not in resort; pool small; facilities broken or substandard; construction on site; failure to assist	£2,933.60	£1500 (51.1%)	£500
<i>Hook</i> [1998] CLY 1426	(2) Alternative hotel substandard	£1,012	£200 (19.8%)	£250
<i>Hind</i> [1998] CLY 1430	(7) Dirty hotel; no children's pool; food repulsive (one ill as result); poor security; moved hotel after 3.5 days; no further problems	£2,748	£500 (18.2%)	£1000
<i>Jervis</i> [1998] CLY 3733	(2) Honeymoon; alternative hotel in different location; lack of sports facilities	£3,802	£250 (6.6%)	£500

Litigation

Case	Keywords	Holiday price	Diminution in value (DIV)	Distress and disappointment award (D&D)
<i>Doneck</i> [1999] CLY 3823	(2) Five-star hotel and room very dirty; absent or substandard facilities; alternative hotel dirty	£1,423	£1423 (100%)	£500
<i>Griffiths</i> [1999] CLY 3820	(7) Considerable sewage works around room; two confined to the room; unpleasant; difficulty accessing beach	£1,759	Unknown: Total award £550	Unknown
<i>Moore</i> [1998] CLY 1425	(2+) Hotel room overlooking road not pool as requested; alternative accommodation offered at charge; returned home after three sleepless nights	£356 each	Full refund	£100
<i>Hartman</i> [1998] CLY 3732	(2) Cruise cancelled one day before departure; loss of a bargain	£1716	£4540 (264.5%)	Nil
<i>Beck</i> [1999] CLY 1384	(2) No five-star hotel; alternative noisy, hot, away from hotel, bedroom tiny, up six flights of stairs, sparse furnishing; went home next night	£1760	£1760 (100%)	£1800
<i>Lawless</i> [1999] CLY 1385	(5) Quiet holiday; too noisy (vehicles/carnival/bars)	Unknown	£960 (% unknown)	£500 (Total)
<i>Pegramm</i> [1999] CLY 1383	(4) Building works near hotel noisy; most of holiday still enjoyable; children hardly affected	£1,446	£482 (33.3%)	£350
<i>Milne-Williamson</i> [1999] CLY 3827	(3) Hotel overbooked; £300 paid to claimant; new hotel had ants, tasteless food, poor entertainment	£732	Nil	£300
<i>Davis</i> [1999] CLY 3826	(2) Flight delayed 12 hours; hotel overbooked; same standard accommodation provided; intimidated; unpleasant atmosphere	£889.90	Nil	£500
<i>Martin</i> [1999] CLY 3821	(2) Connecting flight missed because of delay	Unknown	Nil	£250
<i>Thompson v Airtours (No. 1)</i> [1999] CLY 3819	(2) Five-star hotel; pool noisy/overcrowded, no Nile view	Unknown	Unknown (66.6%)	£1000 (Total)
<i>Westerman</i> [2000] CLY 4042	(2); Sightseeing holiday; memorable train ride not provided	£1590	£100 (15.9%)	£200
<i>Duffy</i> [2000] CLY 1658	(2) Honeymoon; diarrhoea/vomiting/cramps; recovery four weeks	Unknown	Unknown; £1,500 total DIV and D&D	Unknown
<i>Noble</i> [2000] CLY 4039	(4) Two-night break; coach and accommodation substandard; tired	£351.50	£175 (49.8%)	Nil
<i>Middlege</i> [2000] CLY 1657	(1) Food poisoning lasting duration of holiday plus three weeks;	Unknown	Unknown (60%)	£500
<i>McSharry</i> [2000] CLY 4037	(4+) Villa dirty, pool unusable; garage damp and untidy;	Unknown	Full Refund	£750
<i>Currie</i> [2001] CLY 4278	(2) 'Platinum' hotel; requested quiet room; room noisy; returned home immediately	£894	£894 (100%)	£225
<i>Thomson</i> [2001] CLY 4275	(3+) Apartment swap; dangerous access; party inc toddler and OAP. No alternative accommodation offered	Unknown	Unknown (£1,030 received for substitute accommodation)	£1,000
<i>Coughlan</i> [2001] CLY 4276	(2) 'Gold' holiday; flight delayed 23 hours; uncomfortable nights' sleep; first two days ruined	£1,320	Nil	£550
<i>Buhus-Drwin</i> [2001] CLY 4279	(3+) Luxury villa infested with rats; returned home	Unknown	Full Refund	£2,000
<i>Thompson v Airtours (No. 2)</i> [2002] CLY 2323	(2) Winter break; four-star hotel, most facilities closed; quiet room requested, got noisy room, room damp and cold	Unknown	£300	£550
<i>Forsdyke</i> [2002] CLY 2321	(2) Hip problems; swimming pool too cold to use	£675 (approx.)	66.6%	£75