

Norovirus not a 'defect in the ship'



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The recent decision of *Nolan v TUI UK Ltd*¹ heard in the Central County Court marks a landmark decision for the cruise industry in defending personal injury claims arising from outbreaks of Norovirus.

Introduction

The recent decision demonstrates that there is now recognition by the courts that cruise operators are not liable for such outbreaks if they implement the industry standard when it comes to plans and taking the necessary measures to manage and control the illness.

Case study

This was a claim by 43 passengers of the cruise ship the *Thompson Spirit* against the performing carrier, TUI UK Limited, for damages in negligence and breach of contract arising from an outbreak of gastroenteritis in the course of a cruise from Ibiza to Newcastle in 2009. The outbreak affected at least 217 people including crew. Some of the claimants claimed damages in respect of personal injury, while others claimed damages for quality complaints. Some of the key arguments by the claimants included the following:

- First, they contended that the outbreak was caused by negligence on the part of the carrier.
- Second, they argued that the carrier had breached an implied term in the contract of carriage, which required the carrier to warn them in advance of 'known, significant, previous, existing or continuing episodes of illness or infection on board'.

- Third, in attempting to establish liability against the carrier, the claimants sought to rely upon a presumption of fault and neglect pursuant to Article 3, para. 3 of the Athens Convention 1974. In doing so, the claimants' counsel submitted that there was contamination to the structural fabric of the ship with Norovirus, based upon the evidence of 18 cases of Norovirus on the immediately previous cruise, and that the contaminated ship amounted to a 'defect in the ship' within the meaning of Article 3, para. 3.
- Fourth, the claimants contended that the failures of the operator to carry out a proper 'deep clean' of the ship between voyages and to warn passengers in advance of the possibility of their contracting the same illness amounted to breaches of the carrier's obligations, which caused injury to the claimants.

Norovirus, sometimes known as the winter vomiting bug in the UK, is the most common cause of viral gastroenteritis in humans. Infection is characterised by nausea, vomiting, diarrhoea, abdominal pain and, in some cases, loss of taste. General lethargy, weakness, muscle aches, headaches and low-grade fevers may occur. The disease is usually self-limiting, and severe illness is rare. Infection is normally person to person, but it can be transmitted by food, water and contaminated surfaces. Although having norovirus can be unpleasant, it is not usually dangerous and most who contract it make a full recovery within two to three days.



Norovirus not a 'defect in the ship' continued

- 1 *Nolan and others v TUI UK Ltd* [2016] 1 Lloyd's Rep. 211
- 2 One of the main causes of bacterial foodborne disease in many developed countries. Its symptoms are similar to Norovirus, but there are additional features of fever and often blood in stools.
- 3 *Sidhu v British Airways plc* [1997] AC 430, [1997] 1 All ER 193

Article 3, para. 3 of the Athens Convention 1974 states: 'Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases, the burden of proving fault or neglect shall lie with the claimant.'

Court findings

After hearing evidence from both the ship and eight of the claimant passengers as well as expert witnesses, the court reached a finding of fact that the illness was Norovirus rather than *Campylobacter*,² as claimed. Whilst *Campylobacter* does not usually cause outbreaks and is not a common source of illness on cruise ships, it is a bacterial pathogen and its presence would be *prima facie* evidence of a breakdown of the ship's systems, leading to findings of liability. The court further found that the virus that led to the Norovirus outbreak was most likely brought onto the ship by passengers. (At least one passenger reported that his symptoms commenced within hours of joining the ship.) The court further found, based on the oral testimonies and the carrier's records, that the carrier and the crew had in this case fully implemented and complied with the onboard systems for controlling the outbreak even beyond the levels required for the scale of reported illness.

Defect in the ship?

This case raises interesting issues of law. As the bookings were made in the UK, the Athens Convention 1974 governed the claims for personal injury to passengers for international carriage by sea. As referred to previously, Article 3(3) reverses the normal burden of proof where there is a grounding, fire, collision, stranding, etc. or where the injury is caused by a 'defect in the ship'.

The claimants argued that contamination of the ship with Norovirus from the previous cruise constituted a 'defect in the ship' pursuant to the terms of the Athens Convention. The carrier argued that the presumption of liability applied to marine perils and matters of a navigational nature and not to allegations concerning the implementation of food, hygiene or the hotel department policies and procedures. His Honour Judge Mitchell agreed with the carrier's argument

and took the view that 'defect in the ship' is limited to defects in the structure of the ship. In reaching this conclusion, the judge drew clear distinctions between 'a typical maritime peril' and something that could have happened onshore.

Other outcomes

Of further interest is the ruling of the court, which followed the decision of the Supreme Court in *Sidhu v British Airways plc*,³ that the Athens Convention 1974 is the exclusive remedy available to claimants travelling by sea in respect of claims for personal injury. The judge also dismissed the claimants' argument that the Convention permitted them to bring a claim for personal injury suffered on the ship where the fault occurred prior to boarding (contamination from the previous cruise). This is significant for the cruise industry in that, as a matter of law, the fault or neglect argued must occur during the carriage.

The court also held on the facts of this case that there was no duty to warn passengers as there could be no criticism of the handling of the illness on the previous cruise.

Conclusion

The judgment is the first of its type to be successfully defended at trial in the UK. It is of great importance to the cruise industry in recognising that Norovirus is not caused by the ship and that, even with high levels of implementation of industry procedures, outbreaks of Norovirus do occur. The case has not been appealed and whilst Norovirus claims have shown a decline since July, there are now more claims with claimant solicitors seeking to distinguish *Nolan*. The claimants continue to argue for unspecified bacterial illnesses and hope the cruise line cannot show proper and due implementation of its systems.

Maria Pittordis and her team at Hill Dickinson, London, represented the carrier.