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Court of Appeal upholds liability of cruise operator to passengers for norovirus illness

Swift & others v Fred Olsen Cruise Lines
[2016] EWCA Civ 785

Article by David Bowden

The Court of Appeal has unanimously dismissed a cruise operator's appeal. It has upheld the ruling of the judge below. He found that gastric illness was caused by an outbreak of norovirus on board the cruise operator's vessel Boudicca. Although the cruise operator had a control plan to deal with norovirus the judge said it had not been complied with and that there had been multiple failures in implementing the plan. The cruise operator will have to pay compensation to the passengers that became ill. In a written reserved judgment handed down today, Lord Justice Gross dismissed all 4 grounds of the cruise operator's appeal.

Swift & others v Fred Olsen Cruise Lines
[2016] EWA Civ 785 29 July 2016
Court of Appeal, Civil Division [Lord Dyson (Master of the Rolls), Lord Justice Gross and Lord Justice Christopher Clarke]

What are the facts?
16 passengers who had been on 4 different cruises arranged by Fred Olsen Cruise Lines ('the cruise operator') in 2011 claimed damages for personal injury. They had all travelled on the vessel called '*Boudicca*'. The passengers claimed that owing to a lack of proper implementation of a control plan by the cruise operator that they had contracted the norovirus onboard.

What is the relevance of the Athens Convention?
The '*Convention relating to the carriage of passengers of their luggage by sea'* is known by its shorthand name of the Athens Convention. It is an international agreement to which a large number of countries have signed up including the UK. The passengers became ill from norovirus on-board cruise ships. It may not be clear when or where they became ill. The Athens Convention will apply to allow these claims for British passengers to be brought in an English court. It was brought into force in the UK by the Merchant Shipping Act 1995.

Article 3.1 of the Athens Convention deals with the liability of a carrier – here the cruise operator. It provides as follows:

> *'3.1 The carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.*
>
> *3.2 The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.*
>
> *3.3 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.'*

What happened when the case came before HHJ Robert Owen QC in the High Court?
In a lengthy written reserved judgment handed down on 22 January 2015 Judge Owen upheld the passengers' claim against the cruise operator for personal injury cause by norovirus infection.

What evidence did the passengers produce in support of their claims?
The individual passengers gave witness statements in support and were cross-examined on them at trial before Judge Owen.

What evidence did the cruise operator produce to defend these claims?
At trial it produced 4 witnesses as to what happened on board the *Boudicca*. It also put in evidence from inspections carried out on 2 separate occasions by a Port Health Authority. It relied on its internal '*Norovirus outbreak and control plan*' ('the Control Plan') which was a plan consistent with cruise industry standards dealing with cleaning of cruise vessels. On appeal it sought to rely on 25 lever arch files of documents which contained checklist records which the cruise operator said showed its cleaning regime had been implemented in accordance with its Control Plan.

What was the expert evidence in this case?
The passengers relied on evidence from a number of experts including:

- **Dr Stuart-Moonlight** – an environmental health and hygiene expert,

- **Professor Pennington** – a microbiology expert.

The cruise operator relied on this experts:

- **Dr Curnow** – also an environmental health and hygiene expert.

What grounds did the cruise operator advance for appealing Judge Owen's ruling?
The cruise operator was granted permission for an appeal to the Court of Appeal. It advanced these 4 grounds submitting that:

- Judge Owen's conclusion was contrary to the weight of the evidence as a whole,
- He set the standard for breach of duty too high,
- He failed to give sufficient weight to the biological nature of norovirus, and
- He erred in finding that the cruise operator's failure to implement its own '*Norovirus outbreak and control plan*' adequately had caused the passengers to suffer illness.

What did the Court of Appeal say about the submission that the Judge Owen came to the wrong conclusion?
This was roundly dismissed.

Lord Justice Gross said Judge Owen had '*assessed the evidence with conspicuous care'*. As to the 25 lever arch files, he said the notion that these files '*should simply be left available for the Judge to "dip into" (untutored) is fanciful*'. Gross LJ said if the cruise operator wanted to rely on these records it should have prepared a summary schedule 'focusing *on the representative highlights of the checklists'* and that if this job was to be done it was for the cruise operator to do it which it had not. Gross LJ said it was noteworthy that the evidence of the cruise operator '*went more to the Plan than to its implementation'* and he wryly observed that '*no evidence was called from those who in fact carried out the cleaning'*.

The passengers did not have it entirely their own way because Judge Owen '*rejected the more extravagant claims advanced*' by them. However Gross LJ ruled that:

> '*On the totality of the evidence, the reality revealed multiple failures in implementing the Plan – not isolated failures'*.

What did the Court of Appeal say the standard of care that should be imposed on the cruise operator?
Again this ground of appeal was dismissed not only because it was heavily linked to the first one. Gross LJ ruled:

> *'Self-evidently, the taking of reasonable precautions to safeguard the health of passengers is a matter of the first importance for cruise operators. To my mind, it is equally plain that unrealistically or unreasonably high standards cannot and should not be set. That is well understood and nothing in this judgment suggests otherwise. FOCL could not have guaranteed that no passenger/s would contract norovirus; nor could it guarantee that every surface on the vessel would be clean at all times. That is not, however, what this case is about. On the facts, the Judge held that FOCL was at fault because of material – not isolated - failures to implement its own Plan.'*

Did the Court of Appeal attach any relevance to the biological nature of norovirus?
Professor Pennington's evidence was that the spike in norovirus infection had occurred in 2010 the year before the passengers had taken their cruises on the *Boudicca*. Gross LJ noted that the management of an outbreak was dependent '*on a number of factors, not simply keeping contact surfaces clean*'. Gross LJ accepted the passengers' submissions that the cruises had taken place after the spike norovirus infection.

What did the Court of Appeal rule on implementation of the cruise operator's own norovirus Control Plan?
Both Judge Owen and the Court of Appeal were broadly satisfied with the cruise operator's Control Plan which Judge Owen said was '*an appropriate plan, consistent with industry standards*' but the real issue was whether the cruise operator had implemented its own plan properly or not. It was here that the Court of Appeal said the cruise operator fell down. Gross LJ ruled that:

> *'the Judge was entitled to conclude that the breakdown of the Plan caused or materially contributed to the spread of norovirus on board the vessel and to the Claimants' illnesses. '*

Gross LJ endorsed what Judge Owen had said when he ruled:

> '*The claimants have established the fact that illness from Norovirus was acquired on board ship and not otherwise. It was acquired by reason of a failure by the defendants properly to implement their plan or procedures."*

What are the practical implications of this decision?
This is a decision of the Court of Appeal and so it is binding on judges sitting in the High Court and County Court. It shows the dangers of a company or other large organisation being too dependent on its own documented internal practices and procedures. What let the cruise operator down here, was that the trial judge found there had not just been isolated breaches of these procedures but that there had been multiple breaches. The judges were not persuaded by the internal procedures of themselves but needed to be persuaded that these procedures had been scrupulously followed in practice.

What sort of compensation is likely to be due?
Irwin Mitchell which acts for the passengers says it has already secured a settlement of £280,000 for 139 passengers on-board the *Boudicca* in 2009-10. Travel Mole has previously reported that a group of passengers whose holidays on *Boudicca* were ruined by gastric illness caused by norovirus had received a '*5-figure settlement from the cruise line*'.

What action should those advising or operating a cruise operator take in light of this decision?
The cruise operator's own Control Plan fared very well when it was scrutinized by both the trial judge and the Court of Appeal. Any such control plans will need to be sufficiently comprehensive. The main failing in this case seems to be that the control plan was not followed sufficiently well enough in practice.

Cruise operators will need to ensure their record keeping is robust enough to demonstrate compliance with their own standards. Whilst here the cruise operator had produced 25 lever arch files of checklist records, it was difficult to see from those records on their own what they showed. The Court of Appeal said that a summary schedule should have been produced. If cruise operators are facing similar claims and seek to defend them on the basis of similar operational records then they will need to produce schedules of this nature.

In this case no evidence was called at trial as to what had actually happened in relation to cleaning of the vessel. It may be that in other cases, a cruise operator has good records about cleaning and a plausible witness who can speak to cleaning routines who will stand up well in cross-examination.

It is helpful that the hurdle has not been set too high by the Court of Appeal. Had this been a one-off outbreak, then it seems likely that a cruise operator may have escaped liability. The comments in relation to infection 'spikes' are also helpful. They seem to indicate that if the passengers had gone down will their gastric illness when the norovirus first surface or reached its peak, that the cruise operator may have escaped liability. However here the infections was caused a year after the spike and the Court of Appeal clearly felt that by this time the cruise operators should have got their cleaning and disinfection processes under control.

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