UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 138

Record Number: 2019/342

Noonan J

Haughton J

Collins J

BETWEEN

SIOBHAN KELLETT

Plaintiff/Appellant

AND

RCL CRUISES LIMITED,

PANTHER ASSOCIATES LIMITED T/A CRUISE HOLIDAYS

AND

PANTHER ASSOCIATES LIMITED T/A TOUR AMERICA

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on the 21st day of May, 2020

1. I agree with Noonan J that this appeal should be dismissed.

2. As I read his judgment, the *ratio* of the High Court's decision to dismiss the Plaintiff's claim is set out in paragraph 61 of the judgment of Barr J and follows from the discussion in paragraphs 54-60. At paragraph 61, Barr J states that he was *"satisfied that even if one were to apply standards which may be thought applicable in this jurisdiction, one could still not find that the White Knuckle Jet Boat Ride was provided without reasonable skill and care as required by the Scaife judgment*." As I read his judgment, Barr J did not decide the action on the basis of the Plaintiff's failure to adduce evidence that Captain Morgan Charters (the entity that provided the "*White Knuckle Jet Boat Ride"*) did not provide the "*service*" in accordance with local regulations or standards. That the Plaintiff failed to adduce such evidence or any evidence of what those regulations or standards might be is, of course, clear as a matter of fact and the absence of such evidence was characterised by Barr J as a "*deficit in the evidence"* (at paragraph 54). However, in paragraph 61 Barr J clearly states that it was not necessary for him *"to determine whether the plaintiff could establish liability in the absence of any evidence as to the applicable standards in St Maarten."*

3. The High Court Judge thus effectively decided the Plaintiff's claim on the basis most favourable to her, namely that the conduct of the service provider – and, consequently, the liability of the Defendants – was to be assessed by reference to common-law negligence principles (there being no evidence either of any relevant Irish regulations or standards). Even on that basis, the Judge concluded that the Plaintiff had failed to establish any liability on the part of the Defendants and I agree

with Noonan J that that conclusion was one properly open to him and that, notwithstanding Mr Quirke's able submissions, no error in the High Court Judge's analysis has been demonstrated that might warrant his judgment being set aside.

4. Before the High Court and this Court on appeal there was significant discussion of Council Directive 90/314/EEC on package travel, package holidays and package tours (hereafter the *"Package Holiday Directive*" or "*the Directive*") and the provisions of the Package Holidays and Travel Trade Act 1995 ("*the 1995 Act")* that give effect to the Directive in Irish law, as well as of a large number of authorities bearing on their proper interpretation and application.[1]

5. While not strictly necessary to the disposition of this appeal, I think it is appropriate to make some observations about the Directive and the caselaw opened to the Court.

6. The Directive was adopted on the basis of Article 100a of the EEC Treaty. Article 100a (now Article 114 TFEU) is concerned with the establishment and functioning of the single market and Article 100a, paragraph 3 requires that harmonisation measures in respect of consumer protection "*take as a base a high level of protection",* a point

[1] The accident here occurred in April 2016, at which point the Package Holiday Directive was still in force. It was repealed and replaced by Directive (EU) 2015/2302 on package travel and linked arrangements with effect from 1 July 2018. While the provisions in the new Directive that are equivalent to Article 5 of the Directive (discussed below) refer to '*lack of conformity'*, that expression is defined in Article 3 as meaning "*a failure to perform or improper performance of the travel services included in a package"* so the interpretative issues arising in relation to Article 5 are liable to arise in relation to Directive (EU) 2015/2302 also. The 1995 Act was amended by the European Union (Package Travel and Linked Arrangements) Regulations 2019 (SI 80 of 2019), including the substitution of a new section 20, in order to give effect to Directive (EU) 2015/2302.

emphasised by Advocate General Tizzano in his opinion in Case C-168/00, *Leitner* (§26). On that basis, as well as the text and aims of the Directive, he considered that, in the event of doubt, the provisions of the Directive "*must be interpreted in the manner most favourable to the person whom they are intended to protect, namely the consumer of the tourism services*" (*ibid*). The Court in *Leitner* also stressed that "*the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers*" (§22).

7. The Directive addresses various issues, including the provision of information to consumers and the solvency of tour organisers/retailers. For present purposes, however, the key provision is Article 5. So far as material, Article 5(1) provides:

> *"Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services..."* [2]

8. "*Contract*" is defined in Article 2(5) as "*the agreement linking the consumer to the organizer and/or the retailer"* i.e. the contract between the consumer (the holidaymaker) on the one hand and the organiser/retailer on the other. "*Organizer*" is

[2] The Directive uses "*organizer*" and "*organizes*" and I have retained this usage when directly quoting from the text of the Directive; otherwise, consistent with the usage in the 1995 Act, I use "*organiser*" and "*organises*".

defined as "*the person who, other than occasionally, organizes packages and sells them or offers them for sale, whether directly or through a retailer*." "*Retailer*" is defined as *"the person who sells or offers for sale the package put together by the organizer*." Finally, "*package*" is defined as a "*pre-arranged combination*" of not fewer than two of "*(a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package"* when "s*old or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation."*

9. Article 5(2) then provides that "*[w]ith regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services"* because (to summarise) the failure was due to the consumer's own fault, fault on the part of an unconnected third party or force majeure or unforeseeable/unavoidable accident.

10. These provisions are faithfully reflected in section 20 of the 1995 Act.

11. The Defendants initially denied that the holiday sold to the Plaintiff and her husband was a "*package*" within the meaning of the Directive and the 1995 Act. They also

denied that they were the "*organisers*" of that holiday. At trial, however, these matters were – inevitably - conceded. Given the Defendants' acceptance that they were the "*organisers*" of the holiday, I shall, for simplicity, refer primarily to the obligations of *organisers*, though it should at all times be recalled that like obligations apply also to *retailers.*

12. From the consumer's perspective, the ability to sue the holiday organiser and/or the agent through which the holiday is purchased in respect of all aspects of the holiday, including services provided by third party service providers, is obviously a significant benefit.[3] Otherwise, the consumer would, as a matter of probability, have to bring any claim against such a service provider in a foreign jurisdiction – in itself a potentially onerous burden – in circumstances where the precise legal relationship between consumer and service provider will frequently be far from clear.[4]

13. Such consolidation of holiday-related claims is clearly a core objective of the Directive. Less clear, however, is the issue of the legal standards that are to govern claims against a holiday organiser/retailer where the claim arises from the default of a third party *"supplier of services*" operating in a foreign jurisdiction.

[3] A benefit amplified by the fact that under Chapter II, Section 4 of Regulation (EU) 1215/2012 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* the consumer will generally be able to sue in the jurisdiction of their domicile.

[4] Indeed, as Macken J noted in *Scaife v Falcon Leisure Group (Overseas) Ltd* [2008] 2 IR 359, para 25, the consumer will frequently will not even know the identity of the service provider concerned.

14. The decision of the CJEU in *Leitner* may, perhaps, provide some limited assistance. There, the claimant contracted serious food poisoning while on holiday with her family in Turkey, which severely impacted on the family's holiday. The family sued the (German) holiday organiser in Austria (where the holiday had been booked), seeking (*inter alia*) compensation for loss of enjoyment of their holiday. However, Austrian law did not confer any entitlement to recover compensation for non-material damage (though such compensation was recoverable under German law). On a reference from the Landesgericht in Linz, the CJEU observed that it was the purpose of the Directive "*to eliminate the disparities between the national laws and practices of the various Member States in the area of package holidays which are liable to give rise to distortions of competition between operators established in different Member States"* (§20). Significant distortion of competition would result if an obligation to provide compensation for non-material damage existed in some Member States but not in others (§21). Furthermore, compensation for non-material damage arising from the loss of enjoyment of the holiday was of particular importance to consumers (§22). In this context, the Court concluded that Article 5(2) should be interpreted as implicitly recognising the right to compensation for damage other than personal injury, including non-material damage of the kind sought by the claimants.

15. *Leitner* indicates that the Directive may impose substantive as well as procedural obligations on Member States.

16. Whatever the requirements of the Directive as regards the headings of recoverable compensation, the issue that arises here is what is the standard by reference to which an alleged "*failure to perform or the improper performance of the contract*" to be determined. That issue may usefully be illustrated by reference to the facts here. Ms Kellett is resident in the State and booked her holiday here with the Second and/or Third Defendants, who are based in the State. She was injured during a shore excursion from the *Freedom of the Seas*, a cruise ship operated by the First Defendant, a UK company, while the ship was visiting St Maarten, a constituent country of the Netherlands that occupies part of the island of St Martin in the Northern Caribbean. That excursion involved an adventure boat ride – the so-called *White Knuckle Jet Boat Thrill Ride* – organised by the First Defendant but actually provided by a local service provider, Captain Morgan Charters.

17. Ms Kellett says that the boat used by Captain Morgan Charters was not safe or fit for purpose because of the absence of restraints/harnesses and/or the absence of padding around the gunwales and/or of sidebar(s) that she could have held onto during the boat's high-force manoeuvring. It is also said that the skipper should have made different decisions regarding the placing of Ms Kellett within the boat. Accordingly – so it is said – the Defendants were negligent and in breach of their duty to Ms Kellett. Leaving aside the (important) question of whether any claim Ms Kellett may have against the Defendants is contractual or tortious in character, significant issues arise: by what legal standards is her claim to be adjudicated? Is it by reference to the law of

Ireland? Is it the law of St Maarten? Or is it some other standard, such as an autonomous EU law standard?

18. Article 5 provides very limited guidance as to how these questions are to be answered. Article 5(1) refers, without further elaboration, to the liability of organiser/retailer *"for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer... or by other suppliers of services."* Article 5(2) refers to the "*failure to perform or the improper performance of the contact*" and requires Member States to ensure the liability of the organiser for such non-performance/improper performance unless it is "*attributable neither to any fault of [the organiser] nor to that of another supplier of service*." It appears therefore that "*fault*" on the part of the organiser and/or the "*supplier of service*" is required. But the Directive gives no further guidance on how such "*fault*" is to be assessed.

19. The contract referred to Article 5 is, as already noted, the agreement "*linking*" the holidaymaker and the organiser (here the contract between the Plaintiff and the Defendants). Though perhaps an obvious point, it is nonetheless worth observing that the reference in Article 5 to "*the performance of the contract*" is not limited to the protection of holidaymakers from injury. Although the cases frequently arise from injuries suffered by holidaymakers as a result of accidents and thus focus on issues of safety and risk, the "*proper performance of the contract*" encompasses all aspects of the package holiday, including the standard of the accommodation, the quality of any

catering included in the holiday package, the level of amenity, the reliability of transportation links and so on. It follows that there may be many complaints of a failure of performance or improper performance of the holiday contract that do not relate to issues of safety at all.

20. It follows from Article 5 that the organiser will be liable for the proper performance by a third party supplier of services of obligations that *"arise from*" a contract to which that supplier is not a party. In terms of the facts here, the effect of Article 5 would appear to be that the Defendants are liable for any failure to perform and/or improper performance by Captain Morgan Charters of any of "*the obligations arising*" from the contract between Plaintiff and Defendants, at least where such failure of performance or improper performance was attributable to the "*fault*" of Captain Morgan Charters (or possibly the "*fault*" of the First Defendant in selecting Captain Morgan Charters as its chosen "*supplier of services*"). As a matter of principle, that does not appear to be in dispute. But the evidence before the Court throws no light on what those "*obligations*" might be: certain contractual documentation were put before the High Court but they do not identify the Defendants' obligations to the Plaintiff or the standard by which the performance of those obligations is to be judged.

21. An argument might be made that the concept that is central to Article 5 liability – the "*failure to perform or the improper performance of the contract*" – must be given an autonomous EU law meaning. However, that does not appear to derive any support

from the caselaw and no argument to that effect has been advanced in these proceedings.

22. There is, in any event, clear Irish authority – in the form of the Supreme Court's decision in *Scaife v Falcon Leisure Group (Overseas) Limited* [2007] IESC 57, [2008] 2 IR 359 – that the standard by which the performance of a package holiday contract is to be assessed is that of "*reasonable skill and care*": see per Macken J (with whose judgment the other members of the court agreed) at para 35. Where that standard is not expressed in the contract, it "*will be readily implied into it*": *ibid.* Article 5 does not, *Scaife* makes clear, impose strict liability or make the organiser or service provider an insurer of the safety and welfare of the holidaymaker. The "*reasonable skill and care*" standard was also the standard prior to the enactment of the 1995 Act: per Macken J at para 27, citing the Supreme Court's earlier decision in *McKenna v Best Travel Ltd* [1998] 3 IR 57.

23. In this respect, there is no difference between the approach taken in *Scaife* and the approach that has been taken in England and Wales, as is evident from *Hone v Going Places Leisure Travel Ltd* [2001] EWCA Civ 947 which was discussed in some detail in *Scaife*. In a passage set out by Macken J (at para 31), Longmore LJ stated that, while a holiday contract might impose an "*absolute obligation*" (such as a contractual promise that the holidaymaker's hotel has a swimming pool), in the absence of such an obligation *"the implication will be that reasonable skill and care will be used in the rendering of the relevant service."*

24. However, identifying the standard as that of "*reasonable skill and care*" does not by any means resolve all of the issues presented by Article 5/section 20 or provide an answer to the questions posed in paragraph 17 above. If - as *Scaife* indicates - the critical issue in these proceedings is whether the services provided by Captain Morgan Charters were provided with "*reasonable care and skill*", the question remains: by what standards is reasonableness to be judged in this context? Is it to be adjudged by reference to Irish standards, the standards applicable in St Maarten or by some other standard?

25. There is a line of caselaw from the courts of England and Wales, which has also been followed in Northern Ireland, that articulates a general principle that claims arising from accidents on package holidays abroad ordinarily fall to be determined by reference to the regulations and standards applicable where the accident occurred, with the onus strictly resting on the claimant to establish non-compliance with those regulations and standards.

26. A number of those decisions were cited to the High Court and again to this Court on appeal. From those decisions (as well as the decision in *Scaife* which was also cited to him) Barr J extracted the following principles:

> *"34. From the foregoing case law, it is possible to state a number of broad principles. Firstly, the 1995 Act imposes a type of vicarious liability on the*

organiser as defined in the Act, in respect of negligence and breach of duty on the part of third parties who are engaged to provide accommodation or other services as part of the holiday package.

35. The liability imposed by the 1995 Act is not a strict liability. It is not the case that the organiser is liable under s. 20 unless he can bring himself within one of the exceptions provided for in that section, see Scaife v. Falcon Leisure.

36. The plaintiff must establish negligence or breach of duty on the part of the service provider in order to establish liability against the organiser. The negligence on the part of the service provider in the foreign country can be in relation to static conditions, such as the state of the hotel premises, as in Wilson v. Best Travel Limited, or can be in respect of casual negligence, which is negligence in the performance of a function, as in Scaife v. Falcon Leisure.

37. The difficult question is what standard of care can be expected of the service provider in the foreign country. Much of the English case law has focused on whether it will suffice for the service provider or the organiser to establish that the service provider complied with all relevant local regulations and standards. While there are dicta which suggest that compliance with the applicable local standards will suffice, the preponderance of judicial decisions hold that compliance with local standards is not solely determinative of the issue, because there may be circumstances where the local regulations or

standards are shown to be clearly inadequate or outdated, even in the foreign country itself, or they may fly counter to internationally recognised standards.

38. However, these decisions also make it clear that a holiday maker from Ireland, or England, cannot assume that Irish or English standards will apply in the accommodation, or services provided by a third party in a foreign country. ...

39. In an effort to answer this difficult question, the law in Ireland would appear to be that stated in the judgment of the Supreme Court in Scaife v. Falcon Leisure, where it was pointed out that the organiser is not an insurer to the consumer. Macken J. went on to state that 'the standard by which the acts in question are to be judged is that of reasonable skill and care, which standard, if not expressed in a contract will be readily implied into it.' To that, one can probably safely add that in general, if it is established that the service provider complied with all relevant local regulations and standards, they and the organiser will not be liable in negligence or breach of contract to the consumer, unless it can be shown that such local standards were patently deficient, or were not in conformity with uniformly applicable international regulations."

27. This analysis was not significantly in dispute in this Court save that there was sharp disagreement as to whether it ought to be a matter for Ms Kellett to establish a

departure from the *"relevant local regulations and standards"* (as the Defendants contended) or whether it was a matter for the Defendants to establish compliance with such regulations and standards (as Ms Kellett argued). Although the formulation in paragraph 39 of the High Court's judgment above might appear to suggest that the Judge considered that the onus was on the Defendants to establish compliance, it is clear from his judgment as a whole that (consistent with the approach taken in England and Wales) he took the view that the onus was in fact on Ms Kellett as plaintiff to establish non-compliance: see paragraphs 52-54. Ms Kellett says that the Judge was wrong to do so.

28. Many of these cases are discussed by Noonan J in his judgment on this appeal. I do not propose to undertake a comprehensive review of the caselaw. However, it does have a number of notable aspects. Perhaps the most striking is the absence from it of any real engagement with the Package Holidays Directive. Another (presumably connected) aspect is the fact that the foundational decision – that of the Queen's Bench Division (Phillips J) in *Wilson v Best Travel Ltd* [1993] 1 All ER 353 - did not concern the Directive at all. That being so, it seems curious that *Wilson* has subsequently been treated and applied as if it had definitively determined the approach to be taken to claims made pursuant to the Directive (and the Regulations giving it domestic legal effect).

29. A third notable aspect is that whereas the cases variously refer to local "*standards" and/or "standards and regulations"*, these terms are not always used in quite the

same way. Some of the cases are concerned with what would be regarded as technical (or regulatory) standards (sometimes binding in character, sometimes advisory only), such as the standards governing the type of glass to be used in patio doors in Greek hotels (*Wilson*), the standards governing the operation of hotel lifts in Spain (*Codd v Thomsons Tour Operators Limited* [2000] EWCA Civ 5566) and those governing the type of tiles to be used immediately adjacent to swimming pools in Portugal (*Healy v Cosmosair plc* [2005] EWHC 1657 (QB)). In other cases, "*standards*" is used to refer not to such technical or regulatory standards but to more general "*local standards of care*": see for instance the decisions of the Court of Appeal of England and Wales in *Gouldbourn v Balkan Holidays Ltd* [2010] EWCA Civ 372 and *Lougheed v On the Beach Limited* [2014] EWCA Civ 1538, as well as the Northern Ireland decision referred to by Barr J, *Kerr v Thomas Cook Tour Operations Limited* [2015] NIQB 9. It seems to me that, in this context, there may arguably be a significant difference between mandatory technical standards (such as the building code at issue in *Wilson)* and more general local *"standards of care*" (such as the "*standards*" relating to the presence of cats in and around hotels in Tunisia in *Kerr*). [5]

30. Fourthly, while some of the cases acknowledge that "*compliance with locally promulgated safety regulations may not be the end of the enquiry"*[6] it is not at all

[5] And that appears to have been the view of Macken J in *Scaife*: see at para 34 where she appears to suggest that there was "*no true comparison"* between the technical standards applicable to the "*slippiness*" of tiles (that being a reference to *Healy v Cosmosair*) and "*the position in the present case*" where what was at issue were the standards governing the cleaning regime in a hotel dining room.

[6] Per Tomlinson LJ in *Lougheed v On the Beach Limited* [2014] EWCA Civ 1538, at para 13.

clear what are the circumstances in which the court's inquiry should extend beyond such regulations or the standards to be applied if and when it does. The High Court Judge in his judgment in this case states that "*the preponderance of judicial decisions hold that compliance with local standards is not solely determinative of the issue, because there may be circumstances where the local regulations or standards are shown to be clearly inadequate or outdated, even in the foreign country itself, or they may fly counter to internationally recognised standards."* However, it is notable that none of the cases actually provides an illustration of where local regulations or standards were, so to speak, disapplied because they were shown to be "*clearly inadequate or outdated", "patently deficient"* or were contrary to *"internationally recognised standards."*

31. In *Lougheed* – a claim arising from a slip and fall on a stairs in a Spanish hotel – Tomlinson LJ allowed that locally promulgated safety regulations might be recognised locally as inadequate, giving by way of example a scenario where there was a local practice of placing warning stickers on untoughened glass.[7] Presumably, in such a scenario, a failure to affix such a warning might result in a finding for a claimant injured in the circumstances of *Wilson*, notwithstanding that the use of untoughened glass was in itself compliant with local regulations. But, as Tomlinson LJ observes later in his judgment, [8] such a scenario involves the *application* of "*locally applicable standards*" and he explicitly rejected the contention that, where an

[7] At para 13.

[8] At para 16.

English court "*finds local standards to be unacceptable",* performance should be judged by "*by reference to the standards reasonably to be expected of a similar establishment operating in England or Wales*". Such an approach was, in his opinion, neither sensible nor realistic and was also precluded by authority. Quite what standards are to be applied in such circumstances is not clear from *Lougheed*.

32. As for the High Court Judge's reference to the possibility of local standards being disregarded where "*not in conformity with uniformly applicable international regulations",* again the case-law from England and Wales appears to interpret this qualification very restrictively, with the decision of the Court of Appeal in *Gouldbourn* suggesting that "*uniform international regulations*" means only those standards "*which the relevant country has accepted and adopted".*[9] On that analysis, local standards should be applied even if not in conformity with international regulations or standards unless the latter had been "*accepted and adopted*" by the "*relevant country*".

33. Having reviewed the authorities from England and Wales and Northern Ireland, it seems to me that the flexibility of approach identified by the Judge in paragraph 37 of his judgment is, perhaps, more apparent than real. With the notable exception of the Court of Appeal's decision in *Evans v Kosmar Villa Holidays Ltd* [2007] EWCA Civ 1003, [2008] 1 WLR 297, discussed below, in practice a very rigid approach appears to have been taken to claims under the Directive.

[9] At para 20.

34. *Evans v Kosmar Villa Holidays Ltd* appears to be the only decision cited to the High Court or to this Court in which the court's inquiry in fact extended beyond the question of "*compliance with locally promulgated safety regulations".* The claimant had suffered calamitous injury when, late at night, he dived into the shallow end of a swimming pool of a hotel in Corfu and struck his head against the bottom of the pool. He sued the tour operator in contract as well as pursuant to the 1992 regulations that transposed the Directive. Noting that *Wilson* had not involved those regulations, Richards LJ observed that, under the regulations, the tour operator was "*directly liable … for improper performance of the contract by the hotel even if the hotel is under independent ownership and management*". Thus, the focus could be *"on the exercise of reasonable care in the operation of the hotel itself rather than in the selection of the hotel and the offer of accommodation at it*" but in his view this did not affect the principle that had been laid down in *Wilson, "namely that the hotel is required to comply with local safety regulations rather than with British safety standards."* Importantly, however, Richards LJ observed that, even where there was no evidence of non-compliance with "*local safety regulations*", it was still open to a claimant to pursue a claim based on implied terms of the contract and the allegation that such terms had been improperly performed. What had been said in *Wilson* (so Richards LJ continued) did not purport to be "*an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty".*

35. The claimant in *Evans* had succeeded at trial but did not keep that judgment on appeal. While it was pleaded that there had been non-compliance with local safety regulations, that plea was not pursued. A claim of non-compliance with the standards laid down by an industry body, the Federation of Tour Operators (FTO) failed on the basis that the FTO guidance was advisory in character and had no legal force. The case therefore came down:

> *"to the most general of the implied terms pleaded, that reasonable skill and care would be exercised in the provision of facilities and services at the apartment complex and in particular at the swimming pool and its surrounds. It is common ground that such a term is to be implied. The dispute relates to the scope of the duty of care and whether there was in the particular circumstances a breach of that duty."* [10]

36. After a detailed consideration of that issue, Richards LJ concluded that the defendant's duty of care did not extend to a duty to guard the claimant against the risk of his diving into the pool and injuring himself. That conclusion flowed to a significant extent from Richard LJ's consideration of the House of Lords' decision in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46. *Tomlinson* was not concerned with the Directive or any issue of liability for an accident abroad. Rather it concerned the liability of public authorities for injury suffered by the claimant when he dived while swimming in a lake on lands owned and managed by the defendant

[10] At para 26.

authorities. Swimming in the lake was prohibited, though that prohibition was frequently ignored. The House of Lords held that, in the circumstances, no duty of care was owed to the claimant to protect him against obvious risks or self-inflicted harm. Thus, as I read the judgment of Richards LJ, the principal issue in *Evans* was decided not by reference to Greek standards or regulations but by the application of general principles of English negligence law.

37. While *Evans* has been cited in the subsequent cases, it is not easy to reconcile the approach taken by the Court of Appeal there with the more inflexible approach taken in later decisions such as *Gouldbourn* and *Lougheed*.

38. Fifthly, and finally, the UK cases indicate that expert evidence directed to establishing the applicable local standards and their alleged breach will ordinarily be required,[11] with the onus of proof resting on the claimant. In practical terms, the requirement to adduce expert evidence of local standards may be a significant burden for claimants, a point to which I return below.

39. Irish authority is limited. *McKenna v Best Travel Limited* [1998] 3 IR 57 arose from an accident shortly after the adoption of the Directive but before the date for its

[11] In *Lougheed*, Tomlinson LJ expressed the view that while it was not necessarily the case that evidence of local standards had to be given by experts, that was "*ordinarily preferable*" and a claimant choosing not to adduce such expert evidence "*does so at his peril*", though that was not to say that the evidence could not in an appropriate case be given by an appropriately experienced and qualified individual who was not an expert: para 27.

implementation. There was, therefore, no consideration of the Directive. Notably, however, while the plaintiff's claim ultimately failed, the Supreme Court (per Barron J) adopted a relatively expansive approach to the scope of duty of care owed by travel operators and agents. The plaintiff had bought a holiday to Cyprus and had booked a mini-cruise from Cyprus to Egypt and Israel. The cruise was advertised by the travel agent but had to be booked locally. While a passenger on a bus near Bethlehem, a stone was thrown at the bus which struck the plaintiff, causing injury to her. According to the Supreme Court, the travel agent owed a duty of care in respect of the cruise as if the cruise had been booked through it. It had a duty to familiarise itself with the conditions likely to be met by the plaintiff in Israel and Egypt. According to Barron J, the *"duty of care in tort arises from the proximity created by the contractual relationship*" and "*extends to all matters concerning the safety, well-being and comfort of the tourists which by the nature of the relationship between the tourists and those providing the service would or should be known to the latter but not to the former*." In that regard the "*standard of knowledge*" to be attributed to travel professionals was *"that of the person on the spot providing the service*." (at page 60). Nevertheless, the defendants were not insurers and the court accepted that, on the evidence, a reasonably prudent tour operator exercising reasonable care would not have considered it necessary to give a warning about the possibility of incidents of unrest in the vicinity of Bethlehem.

40. There is then the decision of the Supreme Court in *Scaife* to which I have already referred. The circumstances in which injury occurred in *Scaife* were rather more

prosaic than here, the plaintiff slipping while on her way to the buffet in a hotel restaurant in Salou, Spain. Her fall was caused by a spillage on the floor that had not been cleaned up. The plaintiff had succeeded in the High Court before Herbert J on the basis that the judge considered that the hotel proprietor was under a legal duty to take reasonable care to ensure that the hotel was reasonably safe and was maintained in a reasonably safe condition for visitors. It had not acted with "*reasonable care and skill*" on the evening in question in that there was no evidence that an appropriate system for identifying and cleaning up spillages was in place on that occasion.[12] While there appears to be no available record of the *ex tempore* judgment of Herbert J, the plaintiff does not appear to have called any evidence of any regulations governing cleaning or of Spanish cleaning standards or of any breach of such standards by the hotel. In any event, it is clear that Herbert J's finding of liability was not based on any finding of such a breach. He did, it appears, find that the hotel had a system in place to deal with spillages (though it had not operated that system on the evening that the plaintiff slipped) but whether that system complied with local standards, fell short of those standards or exceeded them is not apparent. Furthermore, it appears from the judgment of Macken J that the judge's approach had been informed by the provisions of the Hotel Proprietors Act 1963 and the Occupiers Liability Act 1995, even though neither of those Acts would appear to have any application to premises or property located outside the State. If those statutory provisions were relevant – as plainly Herbert J thought they were – that can only have

[12] At para 8.

been because the judge was of the view that Irish law standards were relevant to assessing the performance of the hotel in Spain.

41. On appeal, Falcon argued that the High Court had wrongly applied a principle of absolute or at least strict liability and that some fault on the part of the hotel owner had to be shown. It also criticised the High Court judgment on the basis that it was not possible to discern whether the standard to be applied to the hotel owner was the Irish legal standard or the Spanish legal standard, arguing that it must be the latter *"being the standard governing the place where the accident occurred."* However, that submission was not, it seems clear, accepted by the Supreme Court, which dismissed the appeal. It appears to me that, had the Supreme Court been persuaded that Falcon's liability could only be established by evidence that demonstrated that the hotel had failed to comply with local regulations or standards, Falcon's appeal would have had to succeed given the absence of any such evidence before the High Court.

42. Macken J. characterised as "*hypothetical*" both the suggestion that there might be a difference between Irish and Spanish law as to the appropriate standards governing the safety of hotels and the implicit suggestion that Spanish standards were lower, observing that there was no evidence to support either hypothesis. Had there been evidence before the High Court of what were the applicable Spanish standards, the court would of course have been able to assess those standards against the relevant Irish standards. While the decision in *Scaife* does not appear to exclude the possibility of applying foreign standards in respect of "*technical issue[s]*" such as the *"slippiness*

of tiles" (at para 34, referencing *Healy v Cosmosair*), the Court certainly appears to have stopped short of endorsing any broader principle to the effect that claims under section 20 fall to be determined by the regulations and standards applicable in the place where the accident occurred. Indeed, Macken J went so far as to suggest that, on the hypothesis that Spanish standards were lower than Irish standards, "*the application of a lower standard, if such exists in respect of the safety of hotels in Spain, might not necessarily comply with the provisions of the Directive*", citing in support the observations of Advocate General Tizzano at §26 which have already been referred to above. While that tentative suggestion was clearly *obiter*, it is nonetheless inconsistent with any reading of *Scaife* as endorsing the approach taken in *Wilson* and the authorities following from it.

43. As the issue was not the subject of any significant debate before this Court, it is necessary to be cautious in offering any observations as to how the standard of "*reasonable care and skill*" is to be assessed. In determining whether that standard has been met in relation to a service provided by a third party operating in another jurisdiction, there is undoubtedly force in the argument that such determination should be *informed* by the terms of any local regulations and standards that govern the provision of that service. However, it appears to me to be quite another matter to suggest that such regulations and standards should be *determinative* or even presumptively so.

44. Such an approach would have the paradoxical effect that, the lower the local standards (and, in consequence, the greater the risk of harm to the holidaymaker) the harder it would be for an injured holiday-maker to obtain compensation. Such an outcome seems difficult to reconcile with the consumer protection objectives of the Directive.

45. That is particularly so, in my view, where what is at issue is an optional holiday activity such as the jetboat ride here. Such an activity ought not to be offered to holidaymakers unless the organiser satisfies itself that it is reasonably safe. So much was accepted by Mr O' Callaghan (for the Defendants) in the course of the hearing of the appeal. It is, in my opinion, doubtful whether that duty is discharged simply by confirming that the activity complies with local standards, without regard to the substantive contents of those standards and their adequacy in ensuring the reasonable safety of passengers. Such an approach would effectively permit the organiser to delegate its responsibilities to those who set the local standards (whatever form those standards may take). It is also important to recall in this context that the organiser is free to agree with service providers – such as Captain Morgan Charters here – that the service provided by them should comply with specific standards, which may exceed generally applicable local standards.

46. The Directive might, of course, have provided that, in the case of accident, the liability of holiday organisers and/or retailers should be determined by reference to local regulations and/or standards to the exclusion or near-exclusion of all other considerations. However, it did not do so. Rather, the Directive focuses on the *proper*

performance of the contract between the organiser and the holidaymaker, a contract that will, in general, be governed by the law of the Member State in which the organiser is established or where the holiday-maker is resident.[13]

47. In this context, the standard of "*reasonable care and skill*" appears to me to import a flexible standard requiring a broader approach than that which has in fact been adopted in the United Kingdom, one that has regard to any applicable local regulations and standards – perhaps particularly those of a technical nature – but which also has regard to the wider circumstances, including the nature of the activity and the risk, the adequacy of any local regulations or standards and the broad circumstances in which accident and injury occurred. The standards applicable in the Member State in which the holidaymaker and/or organiser reside may also be relevant: that certainly appears to have been the approach taken in *Scaife*.

48. The approach adopted in England and Wales also places a significant burden on claimants by requiring them to adduce evidence of the applicable local standards and of a departure from those standards. That requirement will - at least ordinarily - involve calling an expert or experts. The consequences of a failure to adduce such

[13] In default of a choice being made by the parties, it would appear that holiday contracts will be governed by the law of the holidaymaker's habitual residence: Article 6 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)

evidence are starkly illustrated by the Court of Appeal's decision in *Gouldbourn* and that of the High Court of Northern Ireland in *Kerr*.

49. It is, of course, right in principle that a holidaymaker should bear the onus of establishing a "*failure to perform or the improper performance of the contract"* on the part of the organiser. *Scaife* makes it clear that the liability imposed by Article 5/Section 20 is neither absolute nor strict and there is nothing in those provisions to suggest that the onus rests on the organiser or retailer to establish proper performance or to disprove fault. The mere fact that an accident occurs during a package holiday does not give rise to any form of *res ipsa loquitur*: The onus is on the holidaymaker to identify and establish the standards by which contractual performance is to be determined and to establish a failure to comply with those standards giving rise to injury or loss.

50. Where *prima facie* evidence of such a failure is provided by the holidaymaker – whether by reference to Irish law standards, internationally recognised standards or otherwise – it seems to me that there is a cogent argument that, if the organiser seeks to avoid liability on the basis that the service at issue was provided in compliance with local standards, it should be a matter for the organiser to prove such standards and such compliance as a matter of defence.

51. Holidaymakers typically will have little or no knowledge of local standards. It is not suggested here, for instance, that Ms Kellett was or ought to have been personally

aware of the regulations and standards applicable to the operation of the *White Knuckle Jet Boat Thrill Ride* by Captain Morgan Charters in St Maarten. She no doubt relied (and was entitled to rely) on the First Defendant to inform itself of those standards and to assess their adequacy in terms of protecting the safety of its passengers. That surely is a core obligation of every holiday organiser – not to offer such a service to holidaymakers without first conducting an assessment of its safety. This was, after all, an optional excursion – if it was not reasonably safe, it ought not to have been offered.

52. As already mentioned, Mr O' Callaghan very fairly accepted that this was so. He acknowledged that holiday organisers are under a duty to inform themselves of (and be satisfied with) the regulations and/or standards applicable to activities such as the *White Knuckle Jet Boat Thrill Ride* offered by Captain Morgan Charters. That was, he accepted, part of organisers' duties to holidaymakers such as the Plaintiff. Therefore, while the Defendants chose not to give evidence, it is reasonable to suppose that in these proceedings they were in a position to call evidence of such regulations and standards and of Captain Morgan Charters' compliance with such regulations and standards. The Defendants had access to Captain Morgan Charters that the Plaintiff did not. They presumably have ongoing connections with/presence in St Maarten that their clientele does not. Package tour organisers will generally have resources that holidaymakers do not. In these circumstances, it appears to me that there is force in Mr Quirke's submission that, to the extent that the Defendants considered that the local regulations and standards to be relevant to the question of whether the jet boat

ride here was provided with "*reasonable care and skill*", it was a matter for them to plead and prove those regulations and standards and that placing the burden on the holidaymaker in such circumstances may not be compatible with the Directive. Otherwise, it appears to me that there would be a real risk that the one of the principal objectives of the Directive – to make it easier and less expensive for consumers to obtain redress in relation to services provided by foreign-based service providers – could be practically undermined.

53. Pursuant to SI 391/1998, any expert evidence that a holidaymaker intends to adduce as to the applicable standards and the breach of those standards must, of course, be disclosed in advance of trial. Where the organiser proposes to adduce expert evidence of local standards and of compliance with those standards, such evidence would similarly have to be the subject of pre-trial disclosure in accordance with SI 391/1998. disclosed in advance of the hearing. A holidaymaker who chose not to engage with the substance of such evidence would obviously do so at their peril.

54. I have read with admiration the judgment of Noonan J. At paragraph 39 of that judgment, he sets out a number of principles distilled from the analysis of the authorities undertaken by him. The approach suggested by him is notably more flexible than that appears to have been adopted in practice in England and Wales (as is the approach suggested by Barr J in the High Court). However, having regard to the manner in which the High Court Judge decided Ms Kellett's claim, I do not believe that it is either necessary or appropriate for the Court to reach the issues addressed by

Noonan J. Had those issues fallen for determination, I would have taken the view that it was appropriate to make a preliminary reference to the CJEU under Article 267 TFEU to obtain its opinion on the interpretation and effect of Article 5 of the Directive and, in particular, its opinion as to what are the standards by which the issue of "*proper performance*" is to be assessed in circumstances such as those here, where the claim against the holiday organiser arises from the default of a third party *"supplier of services*" operating in a foreign jurisdiction and, as part of that reference, I would have specifically sought the opinion of the CJEU on the question of whether, to the extent that local regulations and/or standards are relevant to that issue of "*proper performance*", the onus of proving such should be on the holidaymaker or on the organiser/retailer.

55. I would dismiss the appeal.