



Case No: E62YX151

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, |CF10 1ET

Date: 12/06/2020

Before :

HIS HONOUR JUDGE JARMAN QC

Between :

LYNNE MORGAN

Claimant

- and -

TUI UK LTD

Defendant

Mr Andrew McKie (instructed by **Wilkin Chapman LLP**) for the **clamant**
Mr Navjot Atwal (instructed by **MB law**) for the **defendant**

Hearing dates: 9 and 10 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 2.00pm on the 12 June 2020.

HH JUDGE JARMAN QC :

1. On the 6 July 2015 the claimant Mrs Morgan and her husband arrived at the Riu Le Morne Hotel in Mauritius for a two-week all-inclusive holiday. On the second evening on the way to dinner they walked along an outside sun terrace adjacent to the swimming pool at about 7pm when it was still light. At about 9pm, by which time it was dark, Mrs Morgan returned to her room via the same route. Just after she walked back onto the sun terrace, which was unlit, she collided with a heavy wooden sunbed and fell, suffering injuries to her knees, face and head. She brings this claim against their tour operator, the defendant for damages.
2. That brief description of the accident is not in dispute, but there are some factual issues of varying importance which I need to resolve. The first is which restaurant Mr and Mrs Morgan went to that night. They both said in their oral evidence that they went to a general restaurant, which was included in the holiday price. The hotel manager at the time, Giorgio Chiarel, who also gave oral evidence, said that he was informed by his staff on the night of the accident that Mrs and Mrs Morgan had dined in the Bangalore restaurant, which is at a different location on the hotel complex, and that was repeated in contemporaneous reports. When this was put to Mrs Morgan in cross examination, she said that they did not dine there at all, as that was a restaurant which was not included in the holiday price and at which it was necessary to reserve a place two days beforehand. She was not challenged on that part of her evidence, which came across as vivid and genuine, and I accept it.
3. The next issue is whether she left a lit pathway to cross a grassed area to get to the sun terrace. She says that she kept to the pathway until it joined the sun terrace, where she turned right and then carried straight on to her room. That latter part cannot be correct, as she would have needed to take a left turn just after turning right to get to her room. In an email of complaint which she wrote from the hotel after returning from hospital, she says that at the time of the accident she was disorientated, and the impression given was that was immediately before she collided with the sunbed. When this was put in cross examination, she said that was worded clumsily and that she meant to say she was disorientated after the accident. Her husband, who arrived at the scene after she had fallen confirmed that she was certainly disorientated after the fall. That fact in my judgment is likely to affect her recall of the precise details surrounding the fall.
4. Nevertheless, she remained firm in her oral evidence that she did not leave the pathway to walk on the grass and was not disorientated before her fall. The short cut across the grass was a very short one indeed, a few paces, and again her evidence as to her route and her orientation before the fall came across as vivid and genuine and I accept that evidence.
5. The next issue is precisely where the fall took place. Her husband, who did not witness the accident, drew a rough plan of the area which shows the point of the accident a few paces into the sun terrace. He took photographs a couple of days later of the area where he marked with a circle where the accident happened. In cross examination he said that this is where he had found his wife lying on the sun terrace after being called by staff. There are posts on the sun terrace supporting retractable canopies, but there is no suggestion that these were closed at the time of the accident. The circle is near to the second line of posts on the sun terrace from Mrs Morgan's

direction of travel, or perhaps a little beyond it. In her witness statement she gave the impression that her husband's marking on this photograph showed where she had fallen. In cross-examination she said she thought it was nearer the first line of posts, but later on said it might have been between these line of posts, but that she knew she hadn't gone far onto the sun terrace and not far enough to know what danger she was in from the lack of lighting.

6. In my judgment, given the affect of the accident upon Mrs Morgan and the time which has elapsed since, it is not surprising that she cannot be more precise. Moreover, she fell forward and hit her face hard on the concrete, and so the point where she made contact with the sunbed was likely to be a little further back. In my judgment it is likely that that contact was between the first and second line of posts, probably nearer the second line.
7. The final issue as to the accident, and the most crucial one, is how dark the sun terrace was at the time and point of contact between Mrs Morgan and the sunbed. To her credit, she agreed in cross-examination that this part of the sun terrace was no darker than any other unlit part of the complex. But she maintained that it was dark enough that she couldn't see the sunbed
8. Mr Morgan said in cross-examination that when he arrived at the scene, he could make out people but it was too dark to spot his wife. Then the manager obtained torches and he could see his wife on the ground. The manager Mr Chiarel, to his credit, when he was cross-examined said that it was probably difficult to see this sun bed on the terrace because it was dark in colour. He accepted that he might have obtained torches or used the light from mobile phones to see Mrs Morgan.
9. There are two pieces of relevant contemporaneous documentation, although the provenance of each is unclear. The first is a form headed holiday details, which appears to have been completed by a member of hotel staff as there is a reference on it that "we" apologised the customer for what happened. The following are relevant extracts with original typographical errors:

"The fall was over a very heavy subbed which had been left in the walkaway. The bed was at least 25kg and was not the normal light plastic type...It was due to the lighting next to the pool as per customer their was no lighting on the walkway next to the pool...Have been we're the accident happen have check the lighting as all the hotel they have a dine light were it is more romantic."
10. There is also a printout of the defendant health and safety agent's proforma report with an incident report date of 8 July 2015, with the following relevant extracts:

"Cause of accident/illness according to Customer: the dim light by the pool at night...The HA spoke personally to the General Manager to place more light next to the pool as it is too dim."
11. There are also the photographs taken of the accident spot in the dark by Mr Morgan, and a video taken by him, also in the dark, after Mrs Morgan returned from hospital a couple of days later. However I must be cautious not to attach much weight to how

dark the accident spot appears in these as it is common ground that they are not a reliable indication of how the level of light would have been perceived by the naked eye.

12. Finally, on this point, the defendant's lighting expert Lionel Laffin, who is based on the next island to Mauritius, took measurements of the accident spot in the dark in 2019. He did so having been informed that there had been no changes to the lighting in the area since the accident. That is incorrect, as it is now accepted that lighting had been installed in the meantime in a landscaped strip with palm trees and bushes between the sun terrace and the swimming pool. He took light measurements just before and after the first line of posts on the sun terrace, and at a spot roughly where the second line of posts are. The measurements were 0.25 lux, 0.24 lux and 1.48 lux respectively. However, he accepted in cross-examination that near to the latter spot at the time of his examination there was a light in the landscaped area to the left, which would have increased that measurement, but he was unable to say precisely by how much. It is now common ground that that light was not present at the time of the accident.
13. In my judgment the preponderance of the evidence on how dark the accident spot was at the time shows that whilst it was not pitch dark, it was dark enough to make it very difficult to see the dark wooden sunbed, especially when someone was walking from the lit pathway onto the unlit sun terrace. If it were necessary to put a figure on it, in my judgment it is likely to have been a little less than 0.24 lux, as that is the figure for the next nearest point going back to the lit pathway.
14. Mr Atwal for the defendant put it to Mrs Morgan that the sunbed was not invisible, most likely had a light covered cushion on it, and the accident happened because she was disorientated and/or not paying sufficient attention to where she was walking. She denied that and said there was no cushion on the sunbed. In light of Mr Chiarel's acceptance that the sunbed would be difficult to see, and he attended the scene shortly after the accident, in my judgment either the sun bed had no cushion on it at the time, or the colour or lighting was not such as to make an appreciable difference to the difficulty in seeing the sunbed.
15. It is not clear how the sunbed got where it was by 9pm. Mr and Mrs Morgan say that on their way down, and they were following other guests along the sun terrace, all the sunbeds were neatly stacked. But Mr Mckie on her behalf made it clear in closing submissions that it was not alleged the defendant was at fault for causing or permitting the sunbed to be where it was at 9pm.
16. Mr and Mrs Morgan say that they had a conversation with Mr Chiarel after returning from hospital, in which he gave the impression that he had been aware that the area was poorly lit before the accident, and there were plans to provide more lighting. In cross-examination he said he could not recall such a conversation and maintained that the lighting of the trees and bushes was later added for ambience and not safety. No documentation was available in relation to this matter. In my judgment Mr and Mrs Morgan are more likely to remember such a conversation than Mr Chiarel, and it is likely that the conversation did take place and the gist of it was as recalled by them. That ties into some extent with the holiday details form and with the prompt given in the defendant's health and safety agent's printout. The additional lighting may well

have been designed and arranged with ambience in mind, but in my judgment, it is likely to have been prompted by the accident and the reports.

17. It does not follow from that latter finding the accident was caused by the lack of lighting on or adjacent to the sun terrace and the time of the accident. On the basis of all my findings of fact above, however, I am satisfied that it was so caused.
18. Had the accident happened in England or Wales, then that is likely to have been the end of the matter on primary liability. It is accepted that under Regulation 15(1) of the Package Travel, Package Holidays and Package Tour Regulations 1992 (the 1992 Regulations), the defendant is liable for the acts of its suppliers where there has been improper performance of the holiday contract which falls below the prevailing local standard in the country in question.
19. Thus, it is for the claimant to show such improper performance. That requirement has been the subject of several authorities, which were reviewed by Tomlinson LJ giving the lead judgment in the Court of Appeal in *Lougheed v On the Beach Ltd* [2014] EWCA Civ 1538. After referring to *Wilson v Best Travel Ltd* [1993] 1 All ER 353, the judge said this.

“Wilson v Best Travel was a case concerning the contractual liability of a tour operator under s.13 of the Supply of Goods and Services Act 1982. The Greek hotel at which the plaintiff stayed had glass patio doors fitted with ordinary glass, not safety glass, of 5mm thickness, which complied with Greek but not with British safety standards, which would have required the use of safety glass. In an oft-cited passage Phillips J said, at page 358:- ”

“What is the duty of a tour operator in a situation such as this? Must he refrain from sending holidaymakers to any hotel whose characteristics, in so far as safety is concerned, fail to satisfy the standards which apply in this country? I do not believe that his obligations in respect of the safety of his clients can extend this far. Save where uniform international regulations apply, there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another. All civilised countries attempt to cater for these hazards by imposing mandatory regulations. The duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided that they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question. On the facts of this case I do not consider that the degree of danger posed by the absence of safety glass in the doors of the Vanninarchis Beach Hotel called for any action on the part of the defendants pursuant

to their duty to exercise reasonable care to ensure the safety of their clients.”

9. That case was concerned with safety regulations, as opposed to the standards adopted in routine maintenance and cleaning in order to ensure the safety of hotel guests. In principle however one would expect a common approach to both. Standards of maintenance and cleanliness vary as between countries and continents and indeed what is reasonably to be expected in a five star hotel in a Western European capital differs from what is reasonably to be expected in a safari lodge, however well appointed. There may perhaps be certain irreducible standards in relation to life threatening risks, but to expect uniformity of approach on a matter such as the frequency of inspection and cleaning of floor surfaces is unrealistic.”

20. Section 13 of the 1982 Act referred to by Tomlinson LJ, by which a term is implied in the contract between the parties to provide a package holiday that the defendant will carry out that service with reasonable skill and care, is also relied upon in the present case.
21. There was little evidence before me of safety regulations in Mauritius as to external lighting applicable to hotels. The hotel in question was acquired by its present owners in 2014 and substantially refurbished, but no contractual documentation relating to that refurbishment was put before me. Mr Laffin said that he had checked the Mauritius Standards Bureau (MSB) web site and there was no indication of any applicable regulations. He added in his oral evidence that he had phoned the board twice and it was confirmed there were none, but he did not give the position of the person to whom he spoke. The state of the evidence before me on this point is not entirely satisfactory.
22. The claimant’s expert, Tom Magner, relied primarily upon an international standard on emergency lighting adopted by the International Organization for Standardisation (ISO) in 2007. Mauritius is a member of that organisation, and as the forward to the standard makes clear, it was adopted by a special procedure which requires approval by at least 75% of the member bodies casting a vote. The forward also made clear that ISO collaborates closely with the International Electrotechnical Commission (IEC) on all matters of electrotechnical standardisation. However, there was no evidence before me of how, if at all, Mauritius cast its vote.
23. Mr Magner accepted in cross-examination that this standard relates to minimum luminosity at surface level for hazard perception in worst conditions such where there is smoke. He accepted that the standard did not apply strictly to what lighting would be required at the accident spot, but it refers to where the public or workers have access. He said the standard is frequently used in construction to give a minimum for such hazard perception. The minimum is 0.5 lux, and this is one of the few universal principles. Where, as in Mauritius, there is no specific local standard, he said that this is what is used. He said that he was not surprised that there is no such local standard in Mauritius, as it is “behind” the UK. He could not name a specific hotel where it has been specifically adopted, but said he had been involved in a number of cases in Mauritius where it was used. In his report he says that his local enquiries and analysis

are based upon a combination of case-specific enquiries and his collective experience of Mauritian standard in practice in that country since 2002.

24. In his initial report, there appeared to be a measure of agreement on this point from Mr Laffin who said this:

“Certain international standards are taken into account by the Mauritius Standard Bureau (MSB) as Mauritian Standards (MS). This may be the case of the ISO or IEC-standards generally speaking. These MS are accessible at the MSB. By visiting the site of MSB, I did not find any reference to requirements in terms of lighting and illumination. On the contrary, it is general practice among the different consultancy firms of the island to take into consideration the MS, the British Standards (BS) or British standards coming from the application of European Standards (BS EN) by default. The consultancy firms and companies also used guides established by the trade unions of engineering consultancy firms because there are generally practical and summary documents that combine different regulatory texts. Nevertheless, these guides only reflect professional vision of foreign countries. There are therefore not considered in Mauritius as a goal to be reached but as a simple bases of works. Consequently, these benchmarks should be considered as recommendations and not absolute rules.”

25. In my judgment, given that the ISO standard relates to emergency lighting and therefore to potential life threatening situations, the evidence of Mr Magner that in lighting terms this was one of few universally acceptable principles is not surprising and I accept it. It is unlikely in my judgment that hotels in Mauritius are free to provide no emergency lighting at all.
26. However, it does not follow that this was the minimum standard applicable to the accident spot. Mr Laffin spent some time in investigating the route which Mrs Morgan took, and other routes which were available, because he said, he was asked to give as much information as possible, even though this appears to go beyond his remit as a lighting expert. It is not in dispute that there were two lit routes back to the rooms, one alongside the beach and one to the rear of the rooms. However, it was not in dispute either that once the lit footpath which Mrs Morgan was using joined the sun terrace the most direct route to her room was along the terrace. She and her husband say they had seen other customers use this way to access rooms and Mr Chiarel, although he could not remember seeing this, accepted it may have been the case. The holiday details form refers to the accident spot as on a walkway, and whilst there was no activity in or around the pool after it closed at 8pm, there is no suggestion in this or in the health and safety pro forma that Mrs Morgan should not have been walking where she was. To the contrary both referred to the poor lighting. In my judgement that accident spot was upon a walkway which customers may reasonably be expected to use to access their rooms, even after the pool closed.
27. This is not the sort of case as in *Wilson*, where there is a specific local standard which is lower than, for example, the prevailing British Standard. It is a case of coming to a

conclusion on the limited evidence before me of whether there is a prevailing local standard and if so, what it is. I prefer and accept the evidence of Mr Magner on this point.

28. Reference was also made to the Mauritian Occupational Safety and Health Act 2005, but this expressly applies to workplaces and not clearly to hotels. There is a European standard which applies to the lighting of outdoor workplaces, but Mr Magner made it clear that this was secondary in importance to the ISO standard.
29. Accordingly, in my judgment, the defendant is liable for Mrs Morgan's accident under the 1992 Regulations in respect of the poor lightening where she fell.
30. Mr Atwal submitted that in that event Mrs Morgan should be held to have contributed to the accident by 75% by not taking one of the lit routes and by continuing on into the darkness. It follows from the findings I have already made that in my judgment no criticism can be made of her in choosing initially the route she did. She was not expecting a sunbed to be in the way, having come that way without obstruction some two hours earlier. Moreover, I am satisfied that she had only walked a few paces onto the sun terrace when the accident happened. She would only have had moments to realise that the way ahead was dark and to decide to turn back. Nevertheless, in my judgment by not doing so she failed to take reasonable care for her own safety, although this failure is proportionately small compared to that of the defendant and I assess contributory negligence at 20%.
31. There was a large measure of agreement on general and special damages. Mr Mckie ultimately submitted that the appropriate total for general damages should be £35,000, to include diminution of enjoyment of Mrs Morgan's daughter's wedding the following month. Mr Atwal submitted the appropriate total is £22,000.
32. The differences between them relate, first to moderate tinnitus and hearing loss, the JSB Guideline for which begins at £13,970. I agree with Mr McKie that the appropriate award is £15,000, rather than £12,500 submitted by Mr Atwal. The second relates to fractures of two upper incisors, the guideline figure for which starts at £4080. Again, I prefer Mr McKie's figure of £6000 rather than the £4,500 suggested on behalf of the defendant. The third relates to a specific phobia of falling which Mrs Morgan developed. Although she had a significant pre-accident history of depressions and anxiety, she coped with medication and held responsible employment. The phobia is expected to resolve with CBT. In my judgement the defendant's figure of £2,000 is too low but that of the claimant at £7,000 is too high. The appropriate figure in my judgment is £4,000. The defendant submitted that there should be no separate award for a nasal injury with possible cracked nasal bone whereas the claimant claims £2,000. That again is too high in my judgment as the top guideline bracket for a confirmed undisplaced fracture is £2,370. The appropriate amount is £1,500. The defendant submitted that £500 is appropriate for mild headaches over nine months whereas the claimant claimed £2,500. However, that is too high given there was a significant history of headaches and the appropriate award is £1,500. In my judgment with a discount for overlapping injuries the appropriate total general damages sum is £30,000.
33. As for special damages, many of these are agreed. In respect of those which are not, I agree that claimant's figures for diminution of enjoyment of the holiday, damaged

clothing and travel are reasonable. As for past dental treatment, there is only about £1,000 between the parties, but as there were pre-existing problems in my judgment the appropriate figure is nearer that of the defendant and I award £6,500. It is also appropriate to award a sum for ongoing treatment and the claimant's figure is reasonable.

34. I will hand down this judgment remotely. Counsel were optimistic that consequential matters can be agreed, and I invite them within 14 days of hand down to file a draft minute of order and written submissions in respect of any matter which cannot be agreed. I will then determine these on consideration of those submissions.