



Seminar: Cruise Claims

By Katherine Deal

Katherine Deal, Barrister

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SPEAKER PROFILE

KATHERINE DEAL

Year of call: 1997



Main Practice Areas

Personal Injury, Travel Litigation

Personal Injury & Travel

Katherine Deal specialises in all aspects of personal injury litigation. She deals with claims ranging from whiplash injuries to catastrophic brain injuries of maximum severity. She has a particular expertise dealing with claims arising out of overseas accidents. She has extensive experience in package travel claims, acting for and against all of the major tour operators in claims ranging from mass outbreaks of gastric illness to deaths overseas. She acted for the claimant in the ground breaking decision of *Jones v Sunworld* [2003] EWHC 591 (QB) (with James Dingemans QC) in which a man drowned in a lagoon in the Maldives and (also with James Dingemans QC) for the defendant in *Healy v Cosmosair* [2005] EWHC 1657 (QB), in which the victim was rendered paraplegic after a fall into a swimming pool in Portugal.

Katherine also does a lot of work arising from accidents outside the scope of package holidays. She acted for the claimant (with James Dingemans QC) in the first ever decision from the European Court of Justice to consider the scope of Rome II, *Homawoo v GMF Assurances* (CJEU Case C412/10), and is widely considered a leading expert on interpretation of Rome II (on which she has lectured and published extensively). She has considerable experience in jurisdictional disputes and acted for the claimant in two landmark judgments concerning the direct right to sue a foreign insurer in England, *Jones v AGF* [2010] IL Pr 4 and *Thwaites v Aviva Assurances* [2010] Lloyd's Rep IR 661. She also focuses on disputes of conflicts of laws. Recent notable successes include *Burt v Kravag*, a case in which the claimant suffered catastrophic injuries in a road accident in Germany in which the Court accepted that the claim was not statute barred under German law as the defendant contended, and *Middleton v Allianz & Middleton* [2012] EWHC 2287 (QB), in which the defendant insurer sought unsuccessfully to establish that the applicable law in a road accident of maximum severity involving a young child in France was English law.

Aviation

In addition Katherine acts in a large number of aviation claims, many of which have a jurisdictional element. These range from fatal air crashes to accidents on board suffered by crew members to claims surrounding the opening of Terminal 5 at Heathrow.

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Alternative Dispute Resolution & Inquests

Katherine is an adept litigator but also has immense experience in alternative dispute resolution, and has acted for claimants and defendants in mediations and joint settlement meetings on numerous occasions. She acted for the claimant (with James Dingemans QC) in Grant v AXA, in which the largest ever English settlement was reached arising out of a road accident in France. She has represented clients in numerous inquests including those with juries.

Shipping

Katherine was appointed conciliator for the Passenger Shipping Association in April 2010 and continues to advise cruise lines and disgruntled passengers within the scope of the conciliation scheme.

Other relevant information

She is a volunteer barrister for Disciplinary Hearings held by the Council of the Inns of Court. She is ranked in the current edition of Chambers UK and Legal 500 in Travel Litigation and Personal Injury.

Publications

Katherine contributes Chapter XVIII on Litigating Travel Claims to the Butterworths Personal Injury Litigation Service (and an update is due out later in 2012). She contributed to Oliver & Dingemans on Employers Liability Cases. She is a panel member of the Personal Injury Brief Update Law Journal and edits Chambers' monthly travel article to the same. She edits and contributes to the Chambers' Travel bulletin and contributes to the Personal Injury bulletin. She also lectures frequently, including at the Butterworth's conference on Personal Injury Abroad in December 2011 and is a regular lecturer at PEOPIL conferences.

Memberships

PIBA; LCLCBA; Pan-European Organisation of Personal Injury Lawyers (PEOPIL)

Qualifications

MA (Modern Languages) (First Class), St Hugh's, Oxford

Languages

French; German; Spanish

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CRUISE CLAIMS

1. Basis of claim:
 - a. Booking conditions (and incorporation).
 - b. Package Travel Etc Regulations 1992.
 - c. Athens Convention.
 - d. EU Regulation 392/2009.

2. Personal injury claims: exclusivity of Convention regime in claim against carrier/
performing carrier, Article 14.
 - a. International carriage.
 - b. The Carriage of Passengers and their Luggage by Sea (Domestic Carriage)
Order 1987.
 - c. Norfolk v Mytravel 8 August 2003, Plymouth CC, HHJ Overend
 - d. Lee & Lee v. Airtours [2002] ITLJ 198

3. Jurisdiction
 - a. Article 17 - at option of claimant:
 - i. Court of place of permanent residence or principal place of business
of D.

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- ii. Court of place of departure according to contract of carriage.
 - iii. Court of place of destination according to contract of carriage.
 - iv. Court of place of domicile or permanent residence of C (if D has place of business and subject to jurisdiction there).
 - v. Court of place where contract made (if D has place of business and subject to jurisdiction there).
- b. Admiralty Court in England and Wales - s.20(2)(f) SCA 1981.

4. Liability

- a. Carrier shall be liable for damage suffered as a result of the death or personal injury to a passenger if the incident which caused the damage so suffered occurred in the course of carriage and was due to the fault or neglect of the carrier or his servants or agents: Article 3.1
 - i. Burden on C, Article 3.2 (compare Montreal Convention...).
 - ii. Presumed unless contrary proved if arose from or in connection with 'shipwreck, collision, stranding, explosion or fire or defect in the ship', Article 3.3.
 - 'Defect' likely to be structural - not mere negligent services.
 - Need to show something out of ordinary.

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- Compare description in 2002 Protocol: 'any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances.'

iii. 'Incident': compare 'accident' in Montreal Convention.

iv. In course of carriage: see Article 1.8

- On board; in course of embarkation; in course of disembarkation; in course of tender (if included in fare);
- NOT in terminal, quay or port installation.

v. 'Fault or neglect':

- Negligence
- Irrelevance of local standards...

b. EU Regulation 392/2009 (31 December 2012)

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- i. Carrier liable for 'shipping incident' unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or was wholly caused by an act or omission done with the intent to cause the incident by a third party.
 - ii. 'Shipping incident' = shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship.
 - iii. If not 'shipping incident' - fault or neglect.
 - iv. Death or personal injury - limit increased to 250,000 SDR (not UK carriers)
 - v. If the loss exceeds the limit, the carrier is further liable (up to a limit of 400,000 SDR in damages per passenger on each occasion) unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.
 - vi. Advance payments
 - vii. Compulsory insurance and direct right of action against insurer, Article 4bis.
- c. Dawkins v Carnival [2011] EWCA Civ 1237
- i. For C to show accident caused by D's negligence.
 - ii. When premises were under the management of D and a hazard was present on the floor, there might be a prima facie case of negligence

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against the defendant. The strength of the case would depend on all the circumstances. Akin to Ward v Tesco [1976] 1 WLR 810.

- iii. Issue is whether, on the evidence as a whole, that case was displaced – i.e. by evidence that D took all reasonable care.

5. Damages

a. Personal injury:

- i. Death or personal injury - compare 'bodily injury' in Montreal Convention.
- ii. Convention limits, Article 7.
- iii. No limit if intentional or reckless, Article 13.1. (Costa Concordia...)
- iv. Carriage of Passengers and their Luggage by Sea (UK Carriers Order) 1998
 - 300,000 units of account
 - Carriers whose principal place of business is UK
 - Not limited to UK-registered ships

b. Loss of enjoyment/diminution in value

- i. Not covered by Convention
- ii. Not excluded by Convention (compare flights, Cowden v British Airways [2009] 2 Lloyd's Rep. 653)

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iii. But query where attributable to personal injury...

iv. Milner v Carnival Plc (t/a Cunard) [2010] EWCA Civ 389

6. Limitation:

- a. 2 years from date of disembarkation (personal injury)
- b. 2 years from intended disembarkation (C dies during carriage).
- c. 2 years from death (C dies after carriage) with longstop of 3 years from date of disembarkation
- d. Subject to national rules for suspension or interruption (but not for extension...) with longstop of 3 years from disembarkation.
- e. Can be extended by agreement in writing.

7. Developments

- a. Reg 1177/2010 (Rights of passengers when travelling by sea and inland waterways)
- b. 18 December 2012
- c. Directly applicable
- d. No standalone cause of action at private law (as yet)
- e. Compare for flights (Reg 1107/2006; Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007; Stott v Thomas Cook [2012] EWCA Civ 66

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18 October 2012

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- ❖ International arbitration
- ❖ Personal injury
- ❖ Professional indemnity
- ❖ Property (including landlord and tenant and construction)
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- ❖ Technology and construction disputes
- ❖ Travel litigation

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Our practice groups regularly publish articles and provide talks and seminars on all areas of relevance to business and commercial lawyers. Please contact Mika Thom, our Marketing Manager in this regard at mikathom@3harecourt.com or 020 7415 7911.

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