JUDGE DISMISSES VIRAL ILLNESS GROUP ACTION

We are pleased to report on the outcome of a recent trial where Mark Fanning of Miles Fanning Legal and David Boyle of Deans Court, successfully defended a Group Action involving Viral Illness. This claim is very important in terms of liability issues for viral illness claims, particularly considering the COVID-19 pandemic and the risk of any future claims that may arise from outbreaks.

CIRCUMSTANCES OF THE CLAIM

On or around 10 August 2014 a guest vomited in reception on arrival at the 5-star Lindos Imperial Hotel, on the island of Rhodes. The incident was an isolated incident and was dealt with accordingly. In the early hours of 12 August 2014, several guests started to call reception at the hotel to report illness. Within a few hours, it became clear to the hotel management that a full-blown outbreak was taking hold.

The hotel management team activated its outbreak control plan; called in specialist hygiene consultants; the local authority public health team; doctors to help treat guests and extra staff from sister hotels to assist in containing the outbreak. Cleaning and sanitation protocols were implemented. There were hundreds initially taken ill, but within a few days that dropped significantly as the control measures started to take effect.

The local public health team identified Norovirus as the most likely culprit and applauded the hotel for their efforts to control the outbreak.

A number of the customers involved in the outbreak brought claims against the tour operator(s) involved. Miles Fanning Legal, acting on behalf of one of those, defended a group action involving 26 claimants. The claim proceeded to trial in March 2021 and was heard by His Honour Judge Gosnell sitting in the County Court at Leeds.

The 26 claimants included in the action were represented by Sarah Prager (instructed by Farnworth Rose) and presented their case in three ways:

- The illness was caused by an unidentified food-borne bacterial pathogen, not Norovirus and as such, the food served was not fit for purpose.
- If it was caused by Norovirus, then the virus was most likely ingested on food served from the hotel buffet and as such the food was not fit for purpose; and
- If neither of the above, then the illness was caused by Norovirus and the hotel had not done enough to prevent or deal with the outbreak i.e., they had been negligent, and that materially increased the risk of exposure.

The defence was, in summary:

- That the outbreak was caused by Norovirus; and
- That the hotel had a good outbreak control plan in place, implemented it quickly, and worked tirelessly to bring the outbreak under control as quickly as possible, whilst at the same time supporting those that were affected.

After hearing evidence from the Claimants, the hotel management team, and experts in the fields of environmental health, microbiology, and gastroenterology, the judge found that the outbreak was not caused by contaminated food and that the hotel staff had not been negligent in the context of exceptionally difficult circumstances.

The claims were dismissed.

ANALYSIS

This case demonstrates how clearly documented and implemented outbreak response plans can, in cases comparable to this, protect hoteliers (and in turn package organisers) from legal liability. This is fundamental in group actions where financial exposure on a finding of liability could be significant.

As an organiser, you should ensure that your accommodation suppliers do the following:

- Have a clearly documented and effective outbreak control plan in place.
- Ensure that staff are well trained and practiced in its implementation.
- Obtain good advice and support from Health & Hygiene Consultants; and
- Carefully document the implementation of the plan during any outbreak and retain those records e.g., the plan, how it was implemented, advice sought from consultants and a record of the new illness numbers reported.

It is important, where you are using suppliers to provide accommodation, that you have oversight of your suppliers' processes and actions during an outbreak and that you have written contracts in place to support that. What made a real difference to the outcome, in this case, was the co-operation from the Hotel, enabling us to work as a cohesive team with the hotel, their lawyers, the tour operator, and insurers. We were able to investigate the claim at a very early stage and secure extensive documentation and witness evidence, with which to defend the claims.

As a tour operator, you also need to have contractual indemnity and insurance provisions in place with your suppliers, to support any recovery action should anything go wrong. With limited pandemic cover available currently for Professional Indemnity and Public Liability, it is even more vital for tour operators and their accommodation suppliers to get this right and to revisit their contracts to make sure they are fit for purpose or there could be significant financial exposure.

Whilst this case relates to Norovirus, at some point, there is a risk that the industry may start to see Covid related claims as we move towards unlocking overseas travel again. There are many similarities in terms of the prevention and control measures for both viruses. Adhering to the areas mentioned above could also prevent you from being exposed to financial risk if you are faced with a claim following a COVID-19 outbreak, as a claimant will need to prove negligence to succeed in any claim.

If you would like to discuss this case further or would like support with your supplier contracts, please do not hesitate to contact:

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