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SOURCES OF LIABILITY
TOURISM OPERATORS FACING LAWSUITS

Abstract

Liability for negligence or breach of contract is the most common cause of lawsuits for tourism operators. Whereas lawsuits were once thought to imply incompetence, nowadays they are often inevitable for tourism operators. Despite the obvious scale of the problem, lawsuits involving tourism businesses have been the subject of a limited number of academic publications, in tourism literature. Bearing this in mind, the current study discusses the main reasons for such incidents in conjunction with relevant literature, and provide recommendations for tourism operators to avoid legal action for negligence or breach of contract.

Keywords: Liability, lawsuit, negligence, breach of contract, tourism operators.

Introduction

Tourism businesses, like any other businesses, sometimes harm or disappoint their customers. In addition, the many risks that confront tourism create potential liability for them (Abbott and Abbott, 1997). Consequently, tourism businesses often face the threat that their owners' and managers' could become part of a lawsuit as a result of their customers suffering during the course of their vacation. A review of past cases indicates that attorneys for injured parties, fatalities and the failure of tourism operators to deliver adequate services as contracted can result in lawsuits.

Whereas lawsuits were once thought to imply incompetence, nowadays they are frequently inevitable for tourism operators. Despite the obvious scale of the problem, lawsuits involving tourism businesses have been the subject of a limited number of academic publications, in tourism literature. Given the apparent deficiencies within the literature concerning lawsuits to tourism businesses by their clients (with notable exceptions the studies of Quinton and Richards (1995) and Urdang and Howey (2001), this study was designed to explore the most common reasons that tourism operators are send to the court and to provide recommendations to avoid liability for negligence or breach of contract. In doing so, this paper is divided into four sections. Following this introduction, section two presents the main areas of litigation covering areas of negligence (that lead to accidents, and subsequent injuries and fatalities); and breach of contract (through the failure of tourism operators to deliver adequate services as agreed). Section three refers to damages awarded for compensations due to such incidents. The final section presents the conclusions and the recommendations of the study.

Reasons for Lawsuits

The threat for legal action has put many tourism operators in jeopardy. In the tourism literature there are two critical reasons for litigation, namely negligence and breach of contract.

Negligence

Past research (e.g. Bentley et al., 2001; Hargarten, Baker and Guptill, 1991; Page and Meyer, 1996) has shown that unintentional injuries are a main reason of tourist morbidity and mortality. For instance, in 1997, 62 British died from drowing, 6 from skiing, and 20 from balcony/window falls while abroad (Foreign and Commonwealth Office, 1998); although in New Zealand during a period of 15 years ending December 1996, recreational and adventure tourism injuries made a significant contribution to overseas visitor morbidity with one in every 12,000 visitors (8.4 injuries per 100,000 arrivals) admitted to the hospital (Bentley et al., 2001). Thus, injuries and fatalities have emerged as the most common areas of litigation, and tourism operators have expressed a growing concern to create a safe environment and ensure all necessary precautions for the well being of their customers.

Courts generally have held that a tourism operator, although is not an insurer of guests' safety, has the legal duty to take "reasonable care" regarding their clients' safety, and in case of a lawsuit, judges always inquire whether the offended person showed reasonable care so as to avoid the loss or damage or to mitigate it. In the words of Abbott and Abbott (1997: 22) to establish a claim of negligence a plaintiff should prove either that the defendant owned the plaintiff a particular standard of care or the defendant deviated from that standard or the deviation caused injury to the plaintiff.

Frequently cases are reported where tourism businesses are not with the required standards of safety. For example, in 1994, inspections of 60 swimming pools in Portugal and Majorca showed that 41 (68.3%) were so dangerous that could lead to drowning or serious injury (Consumer Association, 1995). Two years later, in 1996, inspections of 39 hotels in Gran Canaria and Turkey found that all apart from one failed to comply with English safety standards (Consumer Association, 1996). The same year, inspections of 21 water-sports firms in Spain and Crete showed that only two firms were safe and all the rest had poor operating procedures that made them dangerous or potentially dangerous (Consumer Association, 1997). However, legislation, as well as safety standards, differ from country to country. This was evident, in the case of Wilson v Best Travel Ltd (1993) A11 ER 353, where it was stated that there was no requirement for a hotel abroad to comply with safety regulations made under English law.

The increasing number of tourists seeking adventure activities during their holidays, such as white water rafting; sea kayaking; mountaineering, mountain biking, etc, means that risk is a vital element of the adventure tourism experience that presents increasing possibility for serious accidents (Bentley et al., 2001). Johnson (1989: 712) grouped the risk behavior of tourists and recreationists into three levels: those that risk is an ultimate attraction; those that risk is accepted as a necessary condition of such recreations; and those that remain totally unaware of risk until they experience it. From a legal perspective, the debate in cases of risk exposure is over how much of the risk rests

with the operator and how much rests with the willing participant (Callander and Page, 2003). For instance, the case of *Rootes v Shelton* (1967) 116 CLR 383 demonstrates (Callander and Page, 2003):

> An action was brought by a water-skier who suffered injuries when the driver of the boat towing him steered too close to a stationary boat and the skier collided with the stationary boat. The defence pleaded *volentia non-fit injuria* on the bash that what happened was part of the risks of water-skiing. The defence failed because the collision occurred due to the negligence of the driver and not because of any inherent risk in the sport (p.19).

Although for tourists seeking adventure experiences risk includes an inevitable trade off, what about the majority of tourists that are not aware of the nature of risks involving the accommodation, transportation, swimming and participation on some types of "soft" activities? Tourism operators have a legal duty to provide guests safe premises, keep the customary articles of furniture without danger when used in the ordinary and reasonable way, and give precise information about any potential dangers. In addition, they are vicariously liable for all employees working under their directions. Failure in doing so can potentially give rise to actions of negligence. But let's see what is negligence? According to Sherry (1995: 18-19) there are two types of negligence:

1. failure to adhere to a standard of reasonable care that common law imposes on tourism operators for the physical protection of their guests; and
2. failure to comply with a statutory or regulatory standard of care expressly enacted to govern the type of harm and the protection of certain classes of persons from that harm.

However, for a better understanding of negligence, let's see the following facts. In a case of Gary Hotel Courts v Perry, negligence of the hotel to notice defects by reasonable and ordinary inspection was accepted by the court as responsible for personal injuries from a collapsing chair (Quinton and Richards, 1995: 76). On the other hand, in another case a hotel was not held liable by the Supreme Court of Nebraska after a broken bench resulted to the injury of a woman, because the accident happened due to a "latent defect" that could not be discovered in the course of a reasonable inspection (Quinton and Richards, 1995: 77).

Breach of contract

In the case of sale of a tourism product, two parties enter into a contractual basis, where one party, the purchaser deposits an amount of money, and the other party, the provider, promises to perform as agreed. Failure of tourism operators to deliver adequate service as contracted is a major reason of lawsuit, since the party who did not receive what was promised can seek redress against the other in the courts. As Urdang and Howey (2001) state:

> Within the travel and tourism industry there are countless horror stories concerning people who have purchased travel and tour packages expecting an enjoyable, relaxing trip, only to find that the reality of the trip is quite different. Some of the dissatisfying experiences may be the result of fraudulent practices and some due to lack of expertise on the part of the travel "expert". Some may be due to unforeseen glitches in the travel experience as it unfolds. The tourist has an unsatisfying experience that is the result of a failure of the service provider, the travel agent, or the tour operator to deliver the services as promised. In certain circumstances legal action could be taken against the service provider (p. 533).

Nowadays claims for breach of contract are rising in the tourism sector. But let's see what is breach. Breach is the failure of a business to treat customer within the standard of service and facilities promised by contract. In doing so, tourism operators can become liable. Also, tourism operators can become liable for civil actions in respect of misleading statements in their brochures, and tourists are able to prosecute them for false or inaccurate information, even though it relates to foreign destinations beyond their jurisdiction (Unter-Jones, 2000). For example, a claim was made for personal injuries suffered at a hotel in Turkey through package holidays supplied by Cosmos (Mawdsley v Cosmosair PLC 2002, CLC 1593). In detail, a fall occurred when Mrs. M lost her footing and fell while she and her husband were descending a set of stairs carrying their daughter in a pushchair. The decision of the Court of Appeal was that Cosmos was liable for Mrs. M's injuries because its brochure contained misleading information by stating that the hotel restaurant was accessible via a lift, but it could not, and further that the hotel was suitable for children, but was not because there were so many steps to tackle in order to get to the restaurant. The judge found that there was a clear causal connection which directly put Mrs. M and her husband in such a position that the accident followed.

Likewise, tour operators are liable for the improper performance of the package components, whether through their negligence or that of their agents, suppliers or subcontractors performing services for their travelers abroad. For example, a court awarded HK$575,050 to a mother of a girl from Hong Kong that drowned whilst crossing a lake by boat on holiday in the People's Republic of China. The package tour to China included a visit to the Ethnic village at the Pak Tang Lake, which had to be crossed by ferry from a subcontractor. Due to a late arrival the last ferry had gone, and the tour leader booked a small speedboat to take them across, when the boat collided with a junk whilst racing another speedboat (Wong Mee Wan v (1) Kwan Kin Travel Services Ltd (2) China Travel Services Company and (3) Pak Tang Lake Travel Services Company (1995) PC 6/11/95). This was also evident in another case (Craven v Strand Holidays (Canada) Ltd 40 OR (2d) 186) that the court held that if a tourism operator "agrees to perform some work or services, he cannot escape contractual liability by delegating the performance to another".

Damages awarded for compensation

In cases that go to trial, both the defense and plaintiff legal teams have experts who dispute whether care rendered in a given case within standard (Glusac, 2003). However, one unresolved question is how much a tourism provider, who has been found liable for

negligence or beach of contract, will be required to pay to the offended part. This is the main problem, since most courts worldwide have little guidance as to how to determine the amount of a monetary award, and as a result there is an uncertainty among tourism operators as to their proper level of compensation which the court will order them to pay (Urdang and Howey, 2001: 533). However, it is clear that worldwide, most courts allow travelers to receive a monetary award for those types of non monetary harms. In doing so, the court's aim is to give to the offended part which was suffered by negligence or the loss caused by the breaching party's failure to perform as agreed. As Urdang and Howey (2001) report:

> The logic behind such an award is that the law will attempt to place the purchaser into as good a position (not better), monetarily, as he/she would have been in had the first dealer performed as promised. Since contracts are usually concerned with financial matters, losses caused by one's failure to perform as agreed are ordinarily measured by that standard. As such, the general rule is that one may recover only those monetary losses which have been incurred due to the other party's failure to perform as agreed. Other non-monetary items of damages such as compensation for the "emotional distress" or "mental suffering" that the failure to perform caused the purchaser to suffer, which are recoverable in many noncontract (negligence, personal injury) cases, are not available. If one were to strictly apply that rule to the travel/tourism contract, the only damage award the traveler would be permitted by law to receive would be a full refund of the price paid for the trip plus any out-of-pocket, incidental expenses incurred as a result of the service provider's failure to perform. These might include items such as substitute travel and accommodation expenditures or telephone calls to inform others of the changed plans (p. 534).

Conclusions and recommendations

Travel and tour professionals should imply "warranty" that the "products" offered are fit for the purpose for which they are offered (Sherry, 1997). When a business fails to act with reasonable care the willingness of consumers to go to the court increases, and the business may hold liable for negligence and breach of duty. However, operators and judges should bear in mind that liability crisis is often the result of high, and often unreasonable, expectations of tourists to recover large settlements for the loss and damage suffered while on holidays.

Given the frequency that nowadays tourists go to trial, operating a tourism business can be liken to a Russian roulette. In fact, there are a number of reasons for tourism operators to face actions for common law damages due to their acts or omissions. Even for a significant proportion of tourism professionals who were not sued, good luck might was the reason of escaping the legal system, although it may be a mater of time whether an untoward event will occur due to negligence, breach of contract or even a vagarious client seeking a deep pocket. In such cases the only 'defense' may be "to load the gun as ably as possible".

To minimize tourism operator's exposure to lawsuits, tourism professionals should adopt, where appropriate, the following measures:

1. Tourism professional should prevent accidents, injuries and fatalities before they occur, and anticipate the potential problems that might occur by considering the parameters of a bad travel experience. Regular inspections of premises and facilities for defects should be the concern of all employees, and record dates and times of inspection, nature of repairs made, and names of employees inspecting, should be a part of a business risk-management procedure and a formal problem-resolution program. A well-documented inspection program can be the best defense if a client sends a tourism business to the court.
2. For a guest to recover damages there must be proof of fault on the part of the operator and ignorance of the danger on the part of the guest (Sherry, 1994). In an attempt to minimize common law damages, tourism professionals should give safety warnings and inform their clients of any known danger or risk to face during their vacations. In doing so, they can shift, to an extent, responsibility for safety on to holidaymakers, and ascertain that their clients have sufficient knowledge, information and understanding of potential risks while they are on the premises or before they participate in any, adventure or not, activity.
3. Brochures should clearly state what offered by a tourism business and their agents, suppliers and subcontractors. They should not include misleading information so as to avoid any kind of liability.
4. Tourism operators should not sign contracts in cases they are not in a state to deliver adequate and agreed services.
5. Tourism operators should suggest their customers, where appropriate, to purchase travel insurance in an attempt to diminish their exposure to costly litigations.

To conclude, the possibility of paying big amount of money to tourists who were harmed or disappointed can become real to tourism operators. Operators should be aware of such cases in order to plan adequately, avail and protect themselves and avoid bad publicity. Tourism businesses should receive lessons from the past and determine the degree of past failures being litigated. Likewise, they should keep in mind that there are tourists seeking a deep pocket and they will exploit any opportunity offered by a tourism business to receive a monetary compensation through a lawsuit.

References

Abbott, J. and Abbott, S.M. (1997) Minimising Tour Operator's Exposure to Lawsuits. *Cornell Hotel and Restaurant Administration Quarterly,* April: 20-24.

Bentley, T., Meyer, D., Page, S. and Chalmers, D. (2001) Recreational Tourism Injuries Among Visitors to New Zealand: An Exploratory Analysis Using Hospital Discharge Data. *Tourism Management,* **22,** 373-381

Callander, M. and Page, S.J. (2003) Managing Risk in Adventure Tourism Operations in New Zealand: A Review of the Legal Case History and Potential for Litigation. *Tourism Management,* **24,**1, 13-23.

Consumer Association (1995) Swimming Pool Safety. *Holiday Which?* March, 91-93.

Consumer Association (1996) How Safe Is Your Hotel? *Holiday Which?* September, 175-177.

Consumer Association (1997) Water Sports Safety. *Holiday Which?* March, 105-107.

Foreign and Commonwealth Office (1998) *Consular Work Annual Review*. London.

Glusac, E.J. (2003) Under the Microscope: Doctors, Lawyers, and Melanocytic Neoplasms. *Journal of Cutaneous Pathology,* **30**, 287-293.

Hargarten, W., Baker, M, & Guptill, K. (1991) Overseas Fatalities of United States Citizen Travelers: An Analysis of Deaths Related to International Travel. *Annals Emergency Medicine*, **20**, 6, 622-626;

Johnston, M. (1989) Accidents in Mountain Recreation: The Experiences of International and Domestic Visitors in New Zealand. *Geojournal,* **19**, 3, 323-328.

Page, S. and Meyer, D. (1996) Tourist Accidents. An Exploratory Analysis. *Annals of Tourism Research*, **23,** 666-690.

Quinton, W. and Richards, A. (1995) Collapsing Chairs: A Source of Liability. *Cornell Hotel and Restaurant Administration Quarterly,* **36**, 1, 75-79.

Sherry, J.E.H. (1994) Comparative knowledge: Knowing but not disclosing risks can result in liability. *Cornell Hotel and Restaurant Administration Quarterly,* **35**, 6, 16-17.

Sherry, J.E.H. (1995) Innkeepers may still lose liability suits despite compliance with statutory regulations. *Cornell Hotel and Restaurant Administration Quarterly,* **36**, 2, 18-19.

Sherry, J.E.H. (1997) Property owners may be liable for defective products offered to guests by a third-party tenant. *Cornell Hotel and Restaurant Administration Quarterly,* **35**, 6, 16-17.

Unter-Jones, J.H. (2000) Identifying the responsibility for risk at tourism destinations: The UK experience. *Tourism Economics,* **6**, 2, 187-198.

Urdang, B.C. and Howey, R.M. (2001) Assessing damages for non-performance of a travel professional – a suggested use of "servqual". *Tourism Management.* **22**, 533-538.