Package holidays: legal aspects

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This article discusses the special challenges which the package holiday – and its characteristics of intangibility, perishability, etc – pose for the legal system. After discussing these characteristics, and cases that have been brought relating to them, it concludes that developments in the law nationally and internationally on consumer protection, stricter liability, non-excludable warranties, class actions and damages for disappointment will eventually spell the end of the traditional package brochure and force the adoption of more advanced information technology.

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Tourism and travel is now recognized as the world’s largest industry. It generates more than US$3.4 trillion annually, provides one in ten of the world’s jobs and accounts for 7% of the world’s new capital expenditure.1 The ultimate, mass-market product of this industry is the package holiday. A package holiday is a complex service product which is an experiential, intangible, perishable, consumable, composite, international export.

The law takes a simple view of what constitutes a package holiday. The European Community in Article 2 of the EC Directive on Package Tours defined it thus:

Package holiday means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price . . .:
(a) transport
(b) accommodation
(d) other tourist services not ancillary to transport or accommodation

Nelson-Jones and Stewart, the leading authors on the subject, define them as follows:

Package Holidays . . . are holidays the elements of which are packaged together to form a whole which is sold at an inclusive price. The creator of the package is the tour operator who makes arrangements for transport companies, hotels etc to provide the travel, accommodation, meals and other items which together constitute a particular holiday. In some cases the tour operator, or companies under common ownership and control, will own the airline and hotels which feature in the package. But many substantial operators do not own any airplanes or hotels . . . and even operators who [do] . . . will often use some which they do not own.

These definitions consider package holidays from the perspective of the producer. It is also useful to consider the same product from the point of view of the consumer because ultimately this is where the main problems arise in the regulation of package holidays. Just what is a tourist seeking in the purchase of a package holiday?

Middleton, a leading tourism marketing analyst, defines a package holiday in this way:

... a series of individual products are included in it, from which customers, or tour operators acting as ... [assemblers] ... make their selection to produce the total experience...

and he warns:

In practice, the ability to ‘engineer’ intangible service products on paper and to promise satisfactions in brochures and in advertising, often exceeds a destination’s or a producer’s ability to deliver the satisfaction at the time of consumption. Because tourist products are ideas at the time of purchase, it is relatively easy to oversell such products ... [emphasis added]

So the key to understanding the regulation of package holidays is to recognize that a tourist is seeking an experience and will be satisfied or dissatisfied depending on whether or not the experience is delivered. As we shall see, the experience is more complex and more extensive and more difficult to regulate than the physical components themselves.

Characteristics relevant for regulations

A package holiday is a special kind of service product with special features. These influence industry struc-
Figure 1 Enjoyment

Experiential
In a package holiday, what is being offered in the brochure and what is being sought by the customer is an experience. That experience begins with the build up of expectations before departure, is delivered or not delivered as the components of the holiday are consumed in combination and then is rekindled from time to time thereafter whenever the holiday is remembered.

The attitude of a tourist to a package holiday is illustrated in Figures 1 and 2.

It is important to appreciate that the experience extends beyond the period between departure and return. The excitement of anticipation before departure and the satisfaction derived for many years after return when photographs are viewed or someone asks ‘Have you been there?’ are also very important parts of the holiday experience.

The principles are similar and unfortunately the experience is just as extensive if the holiday does not live up to expectations. This is illustrated in Figure 2.

The common law has gone some way to recognizing this characteristic of package holidays since the landmark case of *Jarvis v Swan Tours Ltd* [1972] WLR 954. This case is undoubtedly the *Donoghue v Stevenson* of tourism law. Mr Jarvis was disappointed when his £63 package holiday in the Swiss Alps did not deliver the experience he had been led to expect. His experience was spoiled when he found that the hosts could not speak English, there were few other people at the hotel, and such things as the yodelling, the cakes and the skiing were not as he was led to expect them to be from the brochure. The Court of Appeal awarded Mr Jarvis £125 damages for disappointment. Lord Denning MR recognized that the right measure of damages was not the deficiency in the commercial value of the holiday as it would be in a sale of goods transaction. Indeed Mr Jarvis had not lost anything in a commercial sense and nor had he suffered physical injury. Nevertheless the court introduced a special exception to general contract principles and held that in travel and tourism cases the disappointed customer should be compensated for the mental distress or disappointment and damages were assessed at £125 by ‘looking at the matter quite broadly’.

It is interesting that the court rejected Mr Jarvis’s contention that the proper measure should have been calculated by reference to the loss of wages for the two weeks he was away. There is some support for this approach in economic theory as shown in Figure 3.

Industrial laws and practices notwithstanding, an employee will make the trade-off between work and leisure at the point where to that employee one more day of leisure will give greater satisfaction than one more day of work. Thus leisure time is at least as valuable as the wage foregone. Mr Jarvis invested more than £63 in the holiday – much more. He also invested his leisure which, measured at the rate of his wage, was worth £93. It is not known whether this concept was advanced in argument in the case but as leisure is taken more seriously these days there would appear to be good grounds to argue this issue further in an appropriate case with the support of expert evidence.

In *Jackson v Horizon Holidays* [1975] WLR 1468 the court extended the scope of these damages to compensate Mr Jackson for the disappointment of his wife and children when the family holiday he had
booked turned out badly. Lord Denning expressly awarded to the father the damages that each family member would have recovered for disappointment if privity did not prevent them from suing on the contract.10

While this reasoning was promptly rejected by the House of Lords in *Woodar Investments v Wimpey* [1980] 1 All ER 571 a similar result could be achieved in Queensland by virtue of s55 Property Law Act 197411 or now perhaps even at common law following *Trident Insurance v Mc Niece Bros* (1988) 165 CLR 107.12

*Jarvis v Swan Tours* has been confirmed in Australia in a decision of the Full Court of the High Court of Australia in *Baltic Shipping Co v Dillon 'the Mikhail Lermontov'* (1993), 176 CLR 344. Mrs Dillon was a passenger on a 14-day pleasure cruise aboard the Mikhail Lermontov which struck a shoal off New Zealand and sank on the tenth day. Baltic Shipping refunded A$788 of the A$2205 fare and arranged alternative transportation back to Sydney and subsequently procured her execution of a full release in exchange for an ex gratia payment of A$4786. Mrs Dillon brought proceedings in her own name and on behalf of 122 other passengers claiming damages for personal injuries, loss of personal belongings, disappointment and return of the balance of the fare. At the trial13 she succeeded on all claims and was awarded a further $51 396 made up as follows:

- Restitution of balance of fare: 1 417
- Loss of items of personal property: 4 265
- Compensation for disappointment at the loss of enjoyment: 5 000
- Damages for personal injuries (including emotional trauma): 35 000
- Interest: 10 500
- Less paid: 4 786
- Total: A$51 396

On appeal by the shipping company to the New South Wales Court of Appeal,14 the majority15 held *inter alia* that:

- The contract of carriage was made when the ticket was issued and the limitation clauses contained in the ticket did not form part of the contract as the defendant did not do all that was necessary to draw them to her attention.
- The release was void for unconscionability under the *Contracts Review Act 1980* (NSW) having regard for the insufficiency of sum paid, inequality of bargaining power and diminished capacity of the plaintiff. [See now s51AB *Trade Practices Act 1974* (Cth)]
- The contract of carriage was an entire contract and there had been a total failure of consideration thereby entitling the plaintiff to restitution of the full fare.
- The plaintiff was entitled to compensation for disappointment and distress at the loss of the entertainment and facilities for enjoyment which the defendant had promised. *Jarvis v Swan Tours* applied.

On appeal by the shipping company to the High Court of Australia special leave to appeal on the first two questions was rescinded and the appeal proceeded on the third and fourth grounds. The Full Court of the High Court ultimately held unanimously that:

- re 3: The plaintiff was not entitled to restitution of the fare as (i) the contract of carriage was not an entire contract; (ii) there had not been a total failure of consideration as the plaintiff had derived the benefit of the first nine days of cruising; and (iii) restitution could not be recovered in addition to compensation for disappointment.
- re 4: The plaintiff was entitled to compensation for disappointment. Each judge cited with approval the following passage from Bingham LJ in *Watts v Morrow* (1991) 1 WLR at 1445:

> Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.

As in the Court of Appeal there was a consensus that $5000 was at the high end of appropriate compensation for disappointment in a case such as this.16

It is interesting to consider this decision on damages for disappointment in the light of the models of Enjoyment and Disappointment presented in Figures 1 and 2. For ease of discussion they can now be combined, as in Figure 4.

If she had stayed at home Mrs Dillon would have kept her $2205 and felt entirely indifferent to the cruise and her attitude would be represented by the horizontal axis. In fact though, she took the cruise and outlaid the sum of $2205 expecting to derive total satisfaction or enjoyment equal to the area above the horizontal axis, ie A + C. Up until the time the ship struck the shoal, Mrs Dillon had
derived a portion of the enjoyment which she was expecting from the cruise equal to area A. She then suffered disappointment which extended to the area below the horizontal axis, ie B. If she had received a full refund of the fare her net damages for disappointment would have been B - A, ie the sum required to restore her to the state of indifference she would have been in had she not taken the cruise. That would appear to be the basis on which the Trial Judge and the Court of Appeal assessed her damages for disappointment.17

However, the High Court expressly denied her a refund of the balance of the fare in rejecting her claim for restitution and overturning the decision of the Court of Appeal on this point. Accordingly Mrs Dillon was entitled to be compensated for the full loss of enjoyment, ie B - A + C.18 But the High Court also expressly refused to increase the award of damages for disappointment. By holding her damages for disappointment at $5000 and extending the scope of the assessment in this way the High Court in effect reduced the quantum of damages for disappointment by the amount of $1417 compared with the award at trial and in the Court of Appeal.

The position is a little more complicated by the fact that the shipping company had already refunded $788 of the fare, presumably to cover the balance of the cruise time lost on a pro rata basis. Nelson-Jones and Stewart argue that such ‘diminution of contract value’ must always be considered in assessing general damages in package holiday cases.19 Presumably in the High Court’s assessment, damages for disappointment were notionally reduced by at least this amount. So if the shipping company had retained the full fare, damages for disappointment, B - A + C, would have been at least $5000 + $788 = $5788. That is still a substantial sum compared with the total original price of $2205.

It is even more substantial when one considers that Mrs Dillon ‘enjoyed’ nine days of the 14-day cruise. The Trial Judge and the Court of Appeal recognized that the enjoyment in the first nine days of the cruise was ‘entirely outweighed by the catastrophe which occurred. . .’20 This supports the contention that the holiday experience extends well beyond the period between departure and return and the totality of the experience must be considered in assessing loss of enjoyment and disappointment.

However, the High Court gave conflicting signals on how to assess damages for disappointment. On the one hand it held that the cruise contract was not an entire contract and that there had not been a total failure of consideration as the plaintiff had derived the benefit of the first nine days of cruising.21 On its narrowest interpretation this would support assessing the quality of experience on each day and awarding damages on a pro rata basis without regard for the longer term experiential effects. On this basis, if the cruise was a disaster from the first day (as many holidays which go wrong are), damages for disappointment could have been:

\[
\frac{5}{14} = \$5788. \text{ So } \frac{14}{14} = \$16206, \text{ ie } 7.34 \text{ times the original cost of the cruise.}
\]

The High Court may well be uncomfortable with such an extrapolation from its decision because, on the other hand, their honours were at pains to avoid over-compensation and there was a clear consensus that the assessment was already very high.22

It has taken 20 years for the Jarvis v Swan Tours principle to reach the High Court for adjudication and the unanimity and level of analysis in the Mikhail Lermontov case undoubtedly makes this one of the world’s leading decisions on the matter. However, as can be seen from the foregoing, the principles of assessment are still unsettled and as yet there has been no real attempt to apply a sound conceptual basis to the process. The tourism and travel industry has much at stake and the matter ought to be clarified in an appropriate case with the benefit of expert evidence.

Intangible and perishable

You cannot see, feel, touch or sample a package holiday product before purchase or consumption. Thus there is no scope for implying into the contract traditional Sale of Goods Act conditions regarding conformity with description, fitness for purpose, merchantable quality or conformity with sample.23 These may assist only where the defective component is a physical good, for example a restaurant meal or hire car.

Package holidays are mere ideas at the time of purchase. Therefore the industry and its customers must rely heavily on brochures and audio-visual selling tools. This makes package holidays a fertile source of cases under consumer protection laws. Traditional common law remedies for negligence,24 breach of contract25 or misrepresentation are ineffective for various reasons described below,26 leaving the Trade Practices Act 1974 Cth and equivalent provisions under the state Fair Trading Acts as the main regulatory system.27

There is intense competition and always a great urgency in the tourism industry – rather like legal practice. Production cannot be stored on the shelf as stock and what is not consumed on the day is lost forever. Consider a hotel bed or airline seat. The same is true when they are combined in a package holiday. And so a requirement from regulatory authorities that tour operators simply recall brochures for a few months while reprinting the updates every time there is a change to some detail is not commercially feasible. Consider the assembly process for a package holiday as depicted in Figure 5.

Thus there is usually a lead time of one year before a package tour programme receives its first
customers. The tour programme and the brochure are usually designed to last a further year. Given these time frames, the independence of the components and the nature of the services involved it is inevitable that there will be many alterations to details on the way through. Unfortunately if the original brochure is not withdrawn and updated repeatedly it is also inevitable that this will constitute deceptive and misleading conduct under s52 and following of the Trade Practices Act. Compliance is not commercially feasible using traditional brochures and the Trade Practices Commission needs to review this approach. This is one of the main reasons for the trend from brochures to audio-visual and information technology marketing tools.

Consumable

The package holiday product is entirely consumed as it is used, the consumption period is very short and there is nothing left to return if dissatisfied. Therefore commercial remedies such as after sales service are difficult to organize. How do you repair a welcome? Legal remedies such as rescission are ineffective. Consider a Big Mac or hotel stay. Consumption takes place at the factory and so a special distribution system is required where retailers and wholesalers do not hold stock but rather arrange for customers to visit the factory.

The most far-reaching regulation of this arrangement has come in the 1986 amendments to s74 of the Trade Practices Act. When the Trade Practices Act was passed in 1974 and introduced non-excludable warranties and conditions, tourism still remained relatively aloof because the provisions which implied conditions applied only to goods. Although s74 purported to imply a warranty in contracts for the sale of services (that they be rendered with all due care and skill and that they be fit for the purpose for which they are required), the definition of ‘services’ in s74 was so restricted that it applied to few tourist operators. Change was inevitable as services grew to comprise more than 60% of world trade.

In 1986 the restricted definition of ‘services’ under s74 was removed so that the general definition under s4 applied to include ‘the provision of, or use and enjoyment of facilities for, amusement, entertainment, recreation or instruction’. Thus s74 now implies warranties into the contracts of most tourism operators. Any attempt to exclude or modify these warranties is void under s68 and indeed gives rise to additional civil and criminal liability under s53(g). Even if the agency device is accepted as restricting the scope of the tour operator’s responsibility to the selection and arrangement of the components, s74 is likely to have far-reaching effects.

However, the change has even more onerous
implications for tourism operators. The opportunity which is available for suppliers of goods and many services under s68A to limit (as opposed to exclude) liability to, in effect, resupply or refund of the cost of resupply will not usually be available to tourist operators. That is because tourist services are ‘ordinarily acquired for personal, domestic or household use or consumption’ and are thus expressly prevented from using the limitation provisions. Travel for business purposes would appear to fall within the same category as other tourist services except perhaps if it is clearly identifiable as such, for example special business class products offered by airlines, hotels and car hire companies.

The potential was demonstrated at the trial in the Mikhail Lermontov case where it was invoked to avoid an exclusion clause in the contract for carriage of luggage. Although the Court of Appeal[30] doubted the validity of dividing the contract for the passenger from the contract for baggage the events of that case occurred just before the amendments which would now extend the liability under s74 to the passengers as well.

Composite
The package holiday product is synthetic: it involves a multitude of components and suppliers in different locations making it difficult for tour operators to coordinate and control the composite product so that the desired holiday experience is delivered. This is compounded by the fact that each component is also usually marketed as a ‘stand alone’ product so that suppliers are independent of the tour operator. If something goes wrong it may also be difficult for consumers and any other innocent parties involved to identify who is legally liable. The complexity is illustrated in Figure 6.

It can be seen that there are numerous contracts involved sometimes dealing directly, sometimes indirectly with the others. The important point to note is that the travel agents and tour operators endeavour to organize their affairs so that they are mere agents and the real principals are the airlines, hotels and other component suppliers. This then affords them in a contractual dispute the very effective defence of privity. Travel agents and tour wholesalers are sufficiently in control of the brochure and other package tour documentation to ensure the relationship is structured in this way.

The device has been held to be effective by the House of Lords in Wall v Silver Wing Holidays (1981) unreported[31] and in Craven v Strand Holidays (Canada) Ltd (1982) 40 OR (2d) 186. That leaves the tour operator with a much narrower responsibility in contract and tort for selecting the components with all due care and skill. Most of the ultimate responsibility for the satisfaction of the customers is thereby passed onto the component suppliers, perhaps where much of it belongs.

The device is not so effective against the consumer protection provisions of the Trade Practices Act 1974 and the State Fair Trading Acts whose net is cast more widely than the parties to the contract. In some circumstances it may be arguable that the device itself is deceptive and misleading.[32]

Tour operators and travel agents are able to structure their affairs in this manner because the product is intangible and there is no stock.

International
The package holiday product usually involves interstate or international transactions which are subject to multiple regulatory systems with different and often conflicting requirements. Consider a package holiday through 10 countries.

Australia asserts jurisdiction wherever it has the proper law of the contract regardless of any stipulation to the contrary in the contract.[33] The EC Directive on Package Tours has gone much further and imposed an almost strict liability on the tour operator or travel agent involved at the EC end of the transaction. If, as is usual, the tour operator takes an indemnity from the Australian components, in many cases our industry will bear the ultimate liability imposed by these laws. In this way the EC Directive will be extended by private contractual arrangements to become the de facto world standard.

Interestingly a similar technique is employed under the Trade Practices Act to deal with a foreign manufacturer of goods imported into Australia.[34]

Export
Although tourism imports visitors it is an export industry in economic and foreign exchange terms. Thus inbound tourism operators have a logical claim to be included in any incentive schemes for export industries and to be excluded from any taxing schemes from which exporters are exempted.[35]

The future
Package holidays are tailor made for class actions and we can expect to see a great increase in claims for damages, including disappointment. Given the
state of the law and the trend towards more consumer protection, stricter liability and non-excludable warranties on services, the days of the traditional package tour brochure are numbered.

There will be more and more use of audio-visual and computerized marketing tools which present more accurate and timely information on which to build expectations of enjoyment. The ultimate solution may be 'virtual reality' technology which is so realistic that a tourist may enjoy every sensation of the experience without even taking the holiday. Unfortunately that would replace the tourist industry, tour operators, travel agents and all.

Notes and references

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1 Geoffrey H. Lipman, President of the World Travel & Tourism Council, in a speech delivered to the 10th General Assembly of the World Tourism Organisation, Bali, Indonesia, 7 October 1993.


5 Op cit, Ref 4, p 85.

6 Mr Jarvis complained that the Swiss yodelling was inadequate. It can also be overdone. An unfortunate German couple who paid A$6699 each for a 14-day Caribbean cruise found that 500 of the 600 passengers on board were members of a Swiss yodelling association who entertained themselves by yodelling throughout the entire cruise. The Frankfurt District Court awarded them damages of A$2223 each. 'Torture by Yodelling', Sunday Mail, 17 January 1993.

7 See for example Sale of Goods Act 1896 Qld s54.

8 And recreation, sports, entertainment, events and the like.

9 Lord Denning MR at p 958.

10 The law literally went to the dogs on this principle in Newell v Canadian Pacific Airlines 1976 74 BLR (3d) 575 where the Canadian County Court awarded two airline passengers $500 general damages for the disappointment and distress at the unfortunate fate of their two dogs carried as 'excess baggage' at a charge of $56. The dogs were so dearly regarded that they were like surrogate children.

11 Which gives a non-party beneficiary rights to enforce a contract.

12 Which gave a non-party beneficiary the right at common law to sue on an insurance contract.


15 Gleeson C.J. and Kirby J., Mahoney, J. dissenting.

16 Mason C.J. at p 361 (with whom Toohey J. agreed) and McHugh J. at 406 endorsed the view that in the absence of 'some exceptional circumstances increasing the sting of the failure to provide the enjoyment and pleasure promised ... no more than half the sum awarded in this case should be the norm for the ordinary passenger': Kirby J. in the Court of Appeal decision at p 31.

17 It should be noted that on this analysis there would be no 'double counting' of restitution and general damages.

18 That is, to be restored to the position she would have been in had the contract been fully performed.

19 Op cit, Ref 3, p 159.


21 See, eg, Mason C.J. at p 353 who said he did not understand how the benefits could be entirely negated by the catastrophe.

22 ... 'no more than half the sum awarded in this case should be the norm ...' Mason C.J. at p 366 (Toohey J. agreed) and McHugh J. at p 406 all agreeing with Kirby J. at the Court of Appeal; 'on the higher end of the scale of permissible awards': Brennan J. at p 372, 'more than adequate': Deane J. and Dawson J. at p 383, 'very generous', Gaudron J. at p 387.

23 Sale of Goods Act 1896 Queensland s16, s17(1), s17(2), s18 and Trade Practices Act 1974 Cth s70, 71(2), 71(1), and 87z respectively.

24 Liability for common law negligence is excludable under the contract.

25 Liability is excludable under the contract; tour operators may also claim to be mere agents and thereby avoid privity and liability.

26 Rescission for innocent misrepresentation is not available where the product cannot be returned; liability is also excludable under the contract.

27 Most of the cases have involved misleading or deceptive conduct under s52 [s38] Trade Practices Act 1974 Commonwealth (and state Fair Trading Act equivalents, Queensland in square brackets) and the following specific sections:

- s51AA, AB unconscionable conduct;
- s53 false representations [s40];
- s55A misleading conduct in relation to services [s45];
- s58 accepting payment if unable to supply as ordered;
- s74 warranties in relation to supply of services.

28 See, for example, Diolap v Air New Zealand (1978) ATPR 40-082 s53c, Dawson v World Travel (1981) ATPR 40-240 s58, s53c, s55A, Doherty v Associated Travel (1982) ATPR 40-323 s55A.

29 That is why there was no attempt to apply the traditional Sales of Goods Act conditions to services when the Trade Practices Act was introduced.

30 Dillon & ors v Baltic Shipping Co 'Mikhail Lermontov' 1991 22 NSWLR 1.

31 Hodgson J. held that 'In the normal way it is perfectly well known that the tour operator neither owns, occupies or controls the hotels which are included in his brochure, any more than he has control over the airlines which fly his customers, the airports whence and whither they fly and the land transport which conveys them from airport to hotel. If injury is caused by the default of the hotel owners and occupiers, the airline, the airport controllers or the taxi proprietor, the customer will have whatever remedy (against them) the relevant law allows ... I would find it wholly unreasonable to saddle a tour operator with an obligation to ensure the safety of all the components of the package over none of which he had any control at all.'


34 Trade Practices Act Manufacturer's Liability:

- s74C Supply by Description;
- s74B Fitness for Purpose;
- s74D Merchantable Quality;
- s74E Supply by Sample;
- s74H and s74A(4) Right to recover against Manufacturer or Importer.

35 Excluding from the Opposition's Goods and Services tax exemptions proposed for export industries was illogical.