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travellers: the legal implications in New Zealand*

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THE PROVISION OF TRAVEL ADVICE TO TOURISTS AND TRAVELLERS:  
THE LEGAL IMPLICATIONS IN NEW ZEALAND

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ABSTRACT

Obtaining travel advice prior to departure is a recommended prerequisite in minimising any detrimental effects that may cause harm to unsuspecting travellers. Tourists may seek travel advice from a variety of different sources. Thus, the quality of travel advice that is obtained would vary according to the knowledge and experience of the source that provides that information.

This paper examines the legal position of the providers of travel advice in relation to the information that they may give to travellers in New Zealand. The legal implications and repercussions of providing travel advice can vary according to the source of the provision and expectations of the public. With generally no legislation *specifically* enacted for the provision of travel advice, it is the common law, as handed down by the courts, and the civil statutes that, to a large extent, provide a possible solution to a situation of this kind. Strangely, in some instances, not providing any travel advice at all may be a viable option for certain travel providers in order to avoid severe civil penalties that may arise when doing so. Although this paper focuses mainly on the laws applicable in New Zealand, the law of contract is similar in most common law countries and thus has an international application. However, local legislation may amend or modify the common law to suit its local environment.

Key Words: travel advice, tourism, common law, statutes

INTRODUCTION

International travel exposes the tourist to mental and physical challenges in their new environment as part of the travel experience, especially if they are visiting a new destination for the first time. These challenges range from experiencing different climates and altitudes to exposing oneself to pollution, exotic foods, various customs and peoples, animals and microbiological entities that may exist at the time (Freedman and Woodall, 1999; Cetron, *et al.*, 1998; Handszuh and Waters, 1997; Isaacson and Frean, 1997; Lederberg, 1997; Morse, 1995; Wilson, 1995).

In today's age of technology, air travel is by far the most popular mode of transportation (Handszuh and Waters, 1997). This is so because air travel is able to transport tourists far distances at far greater speeds than any other modes of transportation. However, during the journey, the flight can and does expose the passengers to a unique environment of its own with

reduced pressures and therefore reduced oxygen contents in the air. This, together with the dry recycled air in the cabin, effectively makes it quite uncomfortable and difficult for some passengers to breathe and may thus result in some passengers becoming more anxious and stressed (McIntosh, *et al.* 1998). Furthermore, in the confined spaces of the aircraft, there is little choice of where to go or what to do. Hence, the inactivity of the passengers, combined with the reduced pressures of the atmosphere, reduces the blood circulation and this may consequently result in the promotion and formation of clots. This may lead to further health problems at a later stage and, on some occasions, even cause death (Black, 1993; Cruickshank, Gorlin and Jennett, 1988; Sarvesvaran, 1986; Milne, 1992).

Various causes of deaths of tourists are associated with international travel (Prociv, 1995; Guptill, Hargarten and Baker, 1991; Paixao *et al.*, 1991; Hargarten, Barker and Guptill, 1991; Sniezek and Smith, 1991). This illustrates the very real effects of the risks associated with travel and tourism. The highest number of fatalities in all four studies, from which this data was derived, arose from cardiovascular problems. The percentages documented in these cases ranged from 35% to 68.9% (Reid and Keystone, 1997). The second highest number of deaths arose from various forms of injury inflicted only at or *en route* to the destination. These included motor vehicle accidents, drowning incidences, air crashes, homicides, suicides, poisoning, burns and electrocution and also when using any form of water transportation.

With such possible negative outcomes arising from travel and tourism, an obvious solution would be to inform and educate tourists about the possible detrimental hazards that may be encountered during their travels and at the various destinations. Thus, to be knowledgeable and well informed about any hazards that could arise, would ultimately prepare tourists and allow them to exercise avoidance procedures or take preventative measures in order to remain healthy and safe. Therefore, it is recommended that providing health advice to travellers before the journey is undertaken, is imperative and is consequently an excellent preventative measure (Bratton, 1999; Behrens, 1997; McKee, 1996; Wilks and Oldenburg, 1995).

## PRE-TRAVEL ARRANGEMENTS

As part of the pre-travel preparation, many tourists would seek some form of travel advice whether they do this directly and consciously or not. There is generally a wide range of travel advice available for tourists (Weiss, 1999; Kemmerer *et al.*, 1998; Tipple, Alary and Dewart, 1997). For example, travel advice may be medically related. Additionally, there is also advice about the holiday or destination choice. Thus, even before there is a decision to book a trip, the potential tourist would seek advice about the destination.

Quite often at this early stage, travel advice is sought informally from other people or perhaps from travel brochures or through the visual media and advertisements. Following this stage, once the decision as to the destination has been reached, the next step would be to make the appropriate arrangements in order to undertake that travel. This would often involve a visit to a travel agent or, nowadays, by making use of the Internet to book the air ticket on-line. Furthermore, other non-medical advice often sought by tourists, is for the safety and security of their possessions whilst in transit and at their destinations.

As mentioned above, other pre-travel planning arrangements may involve those that cater for the health of the tourist. This is where accurate health advice is most valuable and essential. There are vaccines that may be administered to boost the immunity of travellers and tourists so as to prevent or minimise infections being contracted at the destination country. However,

nowadays, with trends towards unrestricted travel, there are less legislative requirements for compulsory vaccinations. The International Health Regulations (IHR, 1995), provided for by the World Health Organisation, which advises governments about health issues globally, only require that the yellow fever vaccine be administered in certain instances.

When seeking health advice, the source used would generally be through that of a medical professional. Though the most likely person used for these purposes would be that of the general practitioner (Packham, 1996; Leggat, Heydon and Menon, 1999), other sources used could include travel clinics and perhaps the World Health Organisation. It is interesting to note that in a survey conducted on the provision of travel advice, general practitioners perceive themselves as the best source of travel advice (Leggat, Heydon and Menon, 1999). This is so even though travel medicine is regarded as a highly specialised area of medicine and one that the medical community has little expertise in (DuPont and Steffen, 1997). This often results in travel advice being given to the public which is either inadequate or incorrect or both.

## TRAVEL ADVICE

Travel advice can be obtained from a variety of sources (Kodkani, Jenkins, and Hatz, 1999; Reid and Keystone, 1997; Peach and Bath 1998; Howden, 1995). These sources could include travel agents, tour operators, family doctors, travel clinics, pharmacists, foreign embassies, insurance companies, friends, families and other travellers. Other resources used to obtain travel advice would include books, leaflets, newspapers, radio, television and the Internet. The types and quality of travel advice would vary according to the provider and their specialisation. Nevertheless, there is also an apparent lack of the provision of health advice given to tourists (Ivatts, Plant and Condon, 1999; Peach and Bath, 1998; Lawton and Page, 1997; Packham, 1996; Howden, 1995; McIntosh, Reed and Power, 1994; Keystone *et al.*, 1994).

## PROVISION OF HEALTH ADVICE

Although various governments have concerns regarding the health and welfare of its citizens who travel abroad, there is generally scant legislation that provides for any specific travel advice to be made available to travellers. This is mainly due to the generally complex nature of travel advice and the need to keep up to date with events in order to be effective. However, the European Community Council adopted a directive that requires the provision of information on health measures to travellers who undertake package tours, package holidays and package travel (CMEEC, 1990). Therefore, for example, in France, travel agents regard the provision of travel advice to travellers as part of their duties and as part of the legal conditions required when crossing the French borders. The same situation now applies to Britain, where prior to 1992, the general laws of contract and tort governed legal liability. Thus, with this transition, the tour operator now faces considerable challenges where the burden of proof has shifted to the operator to prove that:

- (a) the tourist or a third party unconnected to the operator is to blame and;
- (b) the circumstances were both unavoidable and largely unforeseeable (McKee, 1996).

There is no such equivalent legislation in the United States and in many other countries. Therefore, governance here is based upon civil and common law concepts. Thus, the concept of negligence may be used in a liability situation where the client of a travel agent may be compensated for a reduced recreational experience due to the failure of the travel agent to provide pre-travel health guidance (Schiff and Binder, 1997). However, the failure to provide pre-travel

health advice is not a criminal offence. Nevertheless, liability for damages in the case of severe injury or loss of property can be quite financially ruinous to the travel provider depending on the judges' or juries' findings.

In Australia, legislation, in terms of section 74(1) of the Trade Practices Act of 1974, imposes standards of care on any service provider to provide services competently and with an acceptable level of skill and care. Negligence can lead to financial loss, personal injury and possibly death. However, only the latter two are compensated for. In the situation where misleading statements, representations and conduct are made, there is additionally a clear statutory basis for all claims, including those for financial loss, as stated in sections 52 and 53 of the Trade Practices Act of 1974 and the Fair Trading Acts (Cordato, 1999).

## THE SITUATION IN NEW ZEALAND

In New Zealand, the conduct of travel agents is self-regulated by the industry itself and thus operated by the Travel Agents Association of New Zealand (TAANZ) (Helibronn, 1992a). Travel providers are in business to generate profits and may therefore be faced with conflict of interests if they discourage their clients from purchasing travel products should warnings exist with regards to the dangers of a particular destination.

Essentially, there are only three possible options that can occur. The travel provider may:

- (a) give false or misleading information to clients;
- (b) desist from providing any travel advice at all to clients;
- (c) provide clients with information about known hazards at the destination which may discourage them from purchasing the travel product.

In the first scenario, where false or misleading information has been given to a client, and the client does not have an incident-free travel or stay, legal liability may result for failing to provide the required health advice (Schiff and Binder, 1997). An example would be a situation where an outbreak, such as malaria or plague, is reported by the Centre for Disease Control or the World Health Organisation and this information is not provided to the traveller or has been ignored by the travel provider for the purposes of gaining sales (CDC 1994; Grabowski and Chatterjee, 1997).

It is important to note that the basis of any contractual relationship is to be found in the free will and consent of the parties. Before a contract can be entered into, statements are usually made by both parties in the negotiation process. Thus, both parties would be interested in trying to secure the best deal possible with minimum risks. In doing so, their sides of the deal may be presented in the best way possible and hence benefits would be praised and stressed and defects usually ignored (Gerbic and Lawrence, 1998).

In New Zealand there is no statutory definition of misrepresentation. However, the courts have defined this as a false statement of fact, which is made before or at the time the contract is made, by or on behalf of one contracting party to the other, and thus one which does not become a term of the contract, but induces the receiver to enter into the contract, and upon which he or she relies (Gerbic and Lawrence, 1998). The remedies for misrepresentation are found in the Contractual Remedies Act of 1979.

Misrepresentation can either be fraudulent or innocent. In the former, there is deceit in the information that is conveyed by the travel provider to the traveller. This conveyance of

information can be done either orally, written or through the conduct of the travel provider, such as when assuring the client that there has been no malaria outbreak at their travel destination. In the latter case, the misrepresentation is due to the ignorance or non-awareness of a situation having arisen at a destination. This can also occur when the statement has been made carelessly or contains information upon which the representee (traveller) is entitled to rely as true or is unable to check. This is commonly known as a negligent misrepresentation. This may occur when the travel provider has not contacted the Centre for Disease Control or the World Health Organisation for warnings on destinations (DuPont and Steffen, 1997). As mentioned previously, medical doctors, with years of medical training, often have problems in providing the correct health advice. Therefore, it is highly possible that travel agents, with no medical training at all, could give incorrect health advice. When this happens and it is detected, there may develop a strong possibility of the client suing for damages. Thus, the Contractual Remedies Act provides for the remedies of damages in terms of section 6, cancellation in terms of section 7 or other relief in terms of section 9 as determined by the courts (Gerbic and Lawrence, 1998).

A person may wish to sue for damages for a variety of reasons, but may not wish to cancel the contract. The courts treat the misrepresentation as though it was a breach of contract and thus a person is awarded the sum required to put him or her into that position that he or she would have been in had there been no misrepresentation. Thus, section 6 damages would usually be determined according to the difference between the value of the contract, had the statement been true, and its current or actual value (Gerbic and Lawrence, 1998).

A section 7 cancellation entitles a party to a contract to bring it to an end only where either the parties have agreed that the truth of the statement is essential to the cancelling party or the effect of the misrepresentation is to reduce the benefit, increase the burden or substantially change the benefit or burden to the cancelling party or where there has been no affirmation (Gerbic and Lawrence, 1998).

Other relief in terms of section 9 could include (Gerbic and Lawrence, 1998):

- (a) specific performance where the court directs the defendant to honour unperformed contractual promises;
- (b) rectification where the court orders the correction of the written terms of a contract so that it accurately reflects the original agreement of the contractual parties;
- (c) rescission where the court restores the *status quo*. This is used to cancel a contract where there have been grounds of duress or undue influence;
- (d) *quantum meruit* (as much as the person deserves) arises when a person provides benefits in the belief that a contract exists when in law it does not or when the defendant prevents the plaintiff from completing a contract. This remedy is often linked to benefits obtained by the defendant but not paid for. A fair and reasonable price must be fixed by the court.

In addition to the Contractual Remedies Act noted above, the law relating to misrepresentation in New Zealand can also be determined according to the following Acts (Gerbic and Lawrence, 1998):

- (a) The Fair Trading Act of 1986 which prohibits misleading conduct and misrepresentations and provides for a wide range of civil remedies and even, in some cases, criminal sanctions;
- (b) The Consumer Guarantees Act of 1993, which allows a consumer, who enters into a contract on the basis of a misrepresentation, to obtain further rights under the guarantees in the Act. This Act creates guarantees and remedies when goods and services are supplied by a supplier or manufacturer to a consumer. With regards to “services”, the definition section in section 2 applies to a wide variety of performance of work, of a trade and professional nature. This may be a personal service or may occur in association with goods.

Thus, as far as the travel agent is concerned, unless the information provided is adequate and correct, the travel agent may be liable for damages (Helibronn, 1992b) in terms of any one or more of these Acts. Hence, by re-examining the situation, it is likely that the non-provision of health advice would attract a reduced penalty or no penalty at all rather than in the situation when the health advice is incorrect or inaccurate. Furthermore, the non-provision of travel advice may be attributed to forgetfulness or lack of knowledge on the part of the travel agent. However, bad or incorrect advice will not be overlooked in a court of law and will cause clients to lose confidence and trust in the travel agents. Therefore, when weighing up the different implications that could result, it is certainly the non-provision of travel advice that would be the lesser of the two evils.

General practitioners and other medical professionals, who see their patients on a professional basis, are exposed to potential liability just as the travel providers are. The use of exclusion clauses or disclaimers to limit their liability is not supported, as this would affect the standing of the medical profession as well as the doctor's practice (Nicholson, 1988). In providing travel advice, which may be inaccurate or false, the penalties would not differ from that of the travel providers. However, where more intervention than just advice is given, such as in those cases of providing immunizations and medication, the penalties are more severe than those that may be enforced under the tort of negligence. For example, the World Health Organisation in their International Health Regulations (IHR, 1995) with regard to smallpox, which was eradicated worldwide by 1980, state that doctors who continue providing smallpox vaccines to travellers unnecessarily after 1982, would be charged with medical malpractice.

With regard to the issue of printed materials, such as travel brochures, books and other resources, the responsibility for the material generally is that of the author. However, some travel brochures advertising their products sometimes have exclusion and limitation of liability clauses. Though these disclaimers may operate in the United States, these are not universally effective. For example, in Australia, despite the use of liability release forms for the legal protection of the provider, the Trade Practices Act 1974 legally overrides any of these attempts to avoid liability (Wilks, Atherton and Cavanagh, 1994).

## THE PROPER LAW RELATING TO TRAVEL CONTRACTS

From the very time of purchasing a travel ticket and obtaining the requisite travel advice, it is important to be aware of which country's laws would become applicable in the event of a dispute arising. This is significant because the requisite laws of the country would determine not only the enforceability of the contract and what terms are to be implied therein, but also others factors such as the incapacity of some persons to enter into a contract or to sue on them (Helibronn, 1992b). The law of contract is similar in most common law countries, but local legislation may amend or modify this. Thus, in New Zealand, legislation confers upon courts wide powers of discretion in order to award relief as it deems fit in accordance with the merits of a particular case. Additionally, travel contracts may very often contain an international character and the parties may therefore specifically indicate which country's laws are to be applicable to them. Furthermore, courts usually assume that all parties intended that all of the contractual obligations be governed by the same law. However, if the parties have made no special mention of which country's laws are to be applicable and a dispute arises, the law of the place to which the contract has its closest and most real connection usually applies. This is very often where the contract itself was made. Additionally, with regard to international agency contracts, same would usually be governed by the laws of those countries in terms whereof the authority of the agent is

authorised, unless express provision to the contrary is given. However, in so far as contracts of international carriage are concerned, same would generally be governed by international conventions, which would include provisions pertaining to the applicable law in the situation (Helibronn, 1992b).

In so far as obtaining information via the Internet is concerned, in order for a court to hear a matter with a trans-border dimension, the appropriate jurisdiction of the court must first be ascertained. A common and key example to be considered by the court is whether at least one party involved in the dispute, has had some connection with that jurisdiction. In this way, a form of connection would be that a contract was signed within the requisite jurisdiction. However, even if this brings the matter within the court's jurisdiction, the problem of the enforceability of the judgment order against the defendant arises if the defendant is resident overseas. Thus, the plaintiff may have to sue in the defendant's jurisdiction, which could prove to be very costly and just not worth the effort. Additionally, evidence required for the trial may be outside of the jurisdiction of the court and therefore it may be impossible for the court to compel that the evidence be made available to it. This would be potentially ruinous to the case. These problems are increasingly likely to occur with the Internet because much of the commercial trading itself would have been conducted outside of the existing legislative framework (Lawrence *et al.*, 2000).

Thus, "overseas Internet advertisers, content service providers and content creators may be completely outside any jurisdiction which could offer redress. In any event, there is the difficulty of obtaining proof of details of the transaction. Web sites can be created and removed in an instant, and the use of hyperlinks confuses the situation still further." (Lawrence *et al.*, 2000, pp 254-5).

Thus, when furnishing the traveller with travel advice via the Internet, "no...simple rule can be applied in the case of email transmission. Who is to blame for delay or non-delivery of email...and how can liability be proved? The problem may be due to server failure, network failure, the sender using a wrong email address or the recipient simply not reading his or her email." (Lawrence *et al.*, 2000, p 258).

Thus, it is advocated that to facilitate some sort of "orderly conduct" of commercial transactions over the Internet, some form of "electronic conduct" is required. In Australia, the Electronic Transactions Act indicates that electronic transactions are to be treated in the same way in law as traditional paper transactions. This law is based upon those requirements prepared by UNICTRAL (United Nations Commission on International Trade Law). Thus, subject to certain restrictions, where a contract was formerly required to be reduced to writing or signed, an agreement can now be reached by either "electronic communication or electronic signature", which "provides default rules on when and where an electronic message is sent and received." (Lawrence *et al.*, 2000, p 258).

Thus, from the above, the complexities of contract formation via the Internet are evident. The rendering of travel advice to travellers and tourists via the Internet is becoming more popular. The real problem is, however, asserting the primacy of contracts in those jurisdictions where the defendant resides. This is especially so where travellers or tourists rely on travel advice received over the Internet from either medical doctors or travel agents, who do not reside in their country, and which information proves to be incorrect, deficient or harmful in some or other way.



## IMPLIED WARRANTIES IN CONTRACTS WITH TRAVEL AGENTS AND TOUR OPERATORS

Express terms in a contract are often supplemented by implied terms, which usually become applicable as a result of the operation of law (statute or common law) or by custom or general usage of a trade. Implied terms therefore become binding on travel agents and tour operators in the same way that express terms would be. In the provision of travel advice by the requisite parties to travellers, the following implied terms are the most significant:

(a) To provide safe travel and to select competent suppliers: Even although there is no implied term placed on travel agents and tour operators to take reasonable care to ensure that the travel and accommodation is a safe choice, they must nevertheless exercise proper care in selecting suppliers. In this way, travel agents and tour operators impliedly undertake to exercise proper care in making arrangements with suppliers although failure to do so would be hard to prove (Helibronn, 1992b).

(b) To act with competence and diligence: The common law clearly implies that travel agents and tour operators are required to act with the requisite competence and diligence. To what extent this obligation will be applicable, would depend upon the merits of each case and therefore it would be unreasonable to require a travel agent or tour operator to guarantee a service which it cannot control (Helibronn, 1992b). Thus, a travel agent is expected to meet the same standards that would be expected of a reasonably competent professional travel agent. Failure to do so could very well render it liable to the traveller or supplier or both of the parties in contract and in tort.

(c) To resolve travel problems: Tour operators and travel agents are usually obligated to do everything reasonably possible to resolve travel problems. This will depend upon factors such as the nature of the travel product purchased, the problem(s) encountered and the remedies available (Helibronn, 1992b).

(d) To avoid the effects of industrial action or natural disasters: It is arguable that an obligation of tour operators and travel agents is to protect travellers from natural disasters, such as typhoons, and the effects of industrial action. Thus, if the tour operator or travel agent knows in advance that it is likely or foreseeable that danger may exist, then the traveller should be given the option to avoid this. This is due to the fact that it is implied in travel contracts (except those involving risk or adventure) that the travel agent or tour operator will not knowingly expose the traveller to loss or injury from any cause (Helibronn, 1992b).

To date, searches undertaken by the authors herein of the various legal databases, have revealed no reported cases or examples in New Zealand describing a situation when a tour operator, travel agent or medical doctor have been held liable for information given to tourists or travellers and where same has resulted in their injury or death.

## CONCLUSION

There is a distinct lack of legislation directly and specifically relevant to the provision of health advice to tourists. Regarding the different travel advice sources, such as the travel provider or the medical practitioner, the legal liability in providing poor, inaccurate or false travel advice, is similar. Therefore, compensation to the tourist for damages is based upon the common law and the civil law remedies and thus not usually by invoking any of the criminal law statutory

procedures. The law of contract is similar in most common law countries and thus has an international application. However, local legislation may amend or modify the common law to suit its local environment.

Although medical travel advice can be obtained from a variety of sources before travelling, the most popular source of advice sought comes from the family doctor or the general practitioner. The other source of advice when wishing to travel to a particular destination usually comes from the travel provider who has more contact with the traveller than the family doctor. Nevertheless, the advice received may be accurate or flawed depending upon the expertise of that travel provider. Regardless of ethics, it is sometimes more beneficial for a travel provider to not provide any travel advice at all than to take risks in providing this and which may subsequently be found to be inaccurate or inadequate.

The provision of health advice is a complex and serious task. Generally, there is very often inadequate travel advice provided to tourists, and that which is provided, is very variable in quality. Consequently, there are usually a good percentage of tourists who are afflicted by some or other illness and consequently this decreases their contentment with their travels. This trend will continue to grow unless there is greater support for the promotion of good health advice to tourists. Imposing criminal sanctions on travel providers as a matter of course would surely oblige them to fulfil their duties to travellers more comprehensively.

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