Neutral citation no. [2016] EWHC 3876 (Admlty)
Claim No. AD-2015-000071
2015 Folio 165

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMIRALTY COURT

Before the Admiralty Registrar Jervis Kay QC

B E T W E E N:

ARTHUR LAWRENCE

Claimant

- and -

NCL (BAHAMAS) LTD
t/a Norwegian Cruise Line

Defendant

Hearings dates: 9-11th February 2016

Appearances:

For the Claimant – Mr. Asela Wijeyaratne instructed by Simpson Millar LLP

For the Defendant – Paul F. McGrath instructed by Chauncy & Co

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JUDGMENT

The Claim

1. On 17th February 2015, the Claimant issued a claim form seeking damages from the Defendant. The Defendant filed a defence on 5th May 2015. This case involved issues arising under the Athens Convention which is incorporated into English Law by the Merchant Shipping Act 1995. These issues related to the operation of tender boats carrying passengers to and from cruise ships, the responsibilities of the carrying cruise ship when the tenders used were not part of

the ship's own equipment and the manner in which the tenders themselves were equipped and operated.

2. Injuries occurring onboard ships are Admiralty claims which must be commenced in the Admiralty Court by reason of the provisions contained in sections 20(1) and 20(2)(f) and CPR Parts 61.1(2)(a) and 61.2(1)(a)(v). However cases which do not involve matters of maritime interest or expertise, such as cases involving injuries which might otherwise have occurred ashore including injuries arising from slipping, falling or food poisoning, may and usually are transferred to the County Court or to the Central Office of the Queen's Bench Division of the High Court depending upon the level of damages claimed and the complexity of the case. Similarly personal injury claims in which liability has been admitted, so that the only remaining issue is the assessment of the appropriate sum of damages, are generally transferred to the County Court or the Central Office of the Queen's Bench Division of the High Court.

3. In the present case, although the overall level of damages was moderate (and became more modest as the opinion of experts was obtained and assessed) the Defendant has continued to deny liability for what is essentially a maritime incident and therefore the claim was retained in the Admiralty Court and was allocated for trial before myself as Admiralty Registrar.

The Background

4. The Claimant was a passenger on board the cruise liner "NORWEGIAN JADE" (the "Ship"). He was accompanied by his wife on the relevant cruise. From the literature contained in the agreed bundle it appears that the Ship was 93,558 tons gross, with a length of 294 metres and a beam of 32 metres. Her guest carrying capacity appears to have been 2,388 and she was manned by a crew of 1,067. She is described as flagged in the Bahamas. She is one of the fleet of 12 ships apparently operated by an organisation trading as NCL or Norwegian Cruise Line ("NCL"). From the NCL brochure contained in the agreed bundle it appears that all but one of the fleet are registered in the Bahamas (the exception being the "PRIDE OF AMERICA" which sails under the flag of the United States of America).

5. The precise ownership of the Ship was not considered or in issue at the trial. However the brochure provided gives the impression that the fleet is intended to provide the type of shipboard experience which might be associated with a well known and respected maritime nation. The Defendant is named as a Bahamian company and, although it was clear that part of the operation was run from offices in Southampton and Hammersmith, is, for present purposes, to be treated as the owner or the managing operator of the ship. As such it was either the actual owner or, if it was acting as operating manager then it was the agent of the shipowner for the purposes of contracting to carry persons onboard the ship. I should make it clear that no issues as to the identity or operating capacity of the Defendant itself arose at the trial other than those related to the Athens Convention described below.

6. The Claimant booked his holiday through Flights and Packages Limited ("Flights and Packages") which included return flights to Venice, hotel accommodation for 3 nights in Venice and a Greek Isles cruise on the Ship, starting and finishing in Venice and taking in three Greek Islands and one port on the Peloponnesian peninsular (Katakolon which is the nearest port in the vicinity of the ancient archaeological site at Olympia). The booking was confirmed by an email sent on the on 15th April 2013,

7. In the Claim Form and its attached Particulars of Claim it is alleged that:
    a. The Defendant was the carrier and or performing carrier within the provisions of Art. 1 of the Athens Convention 1974 (enacted by s.183 of the Merchant Shipping Act 1995).
    b. The Convention applied to the carriage of the Claimant onboard the Ship because:
        i. It was incorporated by the standard booking terms and conditions of the contract, and;
        ii. The cruise was international carriage within the meaning of Art. 1(9) of the Athens Convention;

iii. The contract of carriage was entered into in the United Kingdom which is state party to the Athens Convention within the meaning of Art. 2(1) of the Athens Convention.

c. The Defendant offered shore excursions one of which was at Santorini on the 2nd July 2014 by way of tender.

d. The Claimant and his wife boarded the tender. The upper deck was full, The lower deck was dark and unlit and the deck was painted black. There were no members of staff to assist the passengers.

e. As the Claimant walked forward he tripped over an isolated step which caused him to be injured.

f. The incident and the injuries were caused by the fault of the Defendant. The main failings alleged were, stated briefly:

i. In failing to warn of the step, highlight it, adequately light it;

ii. In failing to have a safe or adequate system for boarding the passengers;

iii. Used a tender with an unsafe step on the deck.

g. The alleged injury sustained was a tear to the supraspinatus within the rotator cuff of the left shoulder restricting movement of the shoulder as set out in a report of Dr. Vikas Verdi, a consultant orthopaedic surgeon.

8. In its Defence NCL contends that:

a. The injury did not occur on the Ship;

b. NCL was not the carrier or performing carrier within the meaning of Art. 1 of the Athens Convention;

c. The contract of carriage onboard the Ship was made between the Claimant and Flight and Packages Ltd;

d. The Defendant did not own or operate and has no control over the tender. The carriage onboard the tender was not a period of carriage within the meaning of para. 8(a) of Art. 1 of the Athens Convention;

e. No admissions are made and the Claimant should be put to proof:

i. of its contract with Flights and Packages Ltd and as to how and when it was concluded;

ii. as to whether an excursion was offered;

iii. as to the description of the tender, how he was injured and matters relating to the "step";

iv. as to the injuries suffered and whether they arose from the incident.

The Factual Background and Evidence

9. The areas of factual dispute are narrow and most of the factual issues were common ground so that they can be set down in a single narrative. I will however seek to make clear where there is an aspect which is in dispute between the parties.

a. The Claimant contacted Flights and Packages Limited and indicated that he wanted to take up one of their advertised cruises which included 3 days in an hotel in Venice followed by 7 days cruise on board the ship. It transpired that the Claimant paid a fee to Flights and Packages in respect of the hotel and the cruise but the flights were invoiced separately by the airline in question, namely Easy Jet. The Claimant paid for the flights separately. The Claimant had understood that the flight was to be with British Airways and indicated that this subsequently became one of the points of contention between himself and Flights and Packages.

b. Flights and Packages notified the Defendant of the reservation for the cruise element of the holiday. On the 15th April 2013 Flights and Packages sent the Claimant an e-mail confirming the booking of a hotel in Venice on the 26th June 2013 and the cruise onboard the Ship commencing on the 29th June 2013. The letter portion of the document commenced "*Dear Guest. We act as agent and have placed this booking on your behalf with various tour operators, your party and ourselves are now subject to their booking terms and conditions.*"

c. The Defendant provided two booking confirmations. One was described as a "Guest copy" and the other as a "Travel Agent Copy". In the list of documents these are described as dated the 1st February 2013. The documents themselves do not appear to indicate the date upon which they were created but the "Guest copy" contains the following information: (i) the "*Travel agent/contact*" is described as

being "*Flights and Packages Ltd*"; (ii) the booking date is 1st February 2013; (iii) "*reservation number 2257199"*; (iv) "*Booking Conditions. This reservation has been accepted subject to Norwegian Cruise Line booking conditions*"; (v) "*Service Charges. On all NCL ships, payment of a fixed service charge is required. A fixed service charge . . . . will be added to the on-board account of all guests over 3 years . . .*"; (vi) "*Onboard activities: . . shore excursions, dining, entertainment . . .* ".

d. The NCL April 2013-April 2014 brochure contained the Booking Conditions which include the following (emphasis added):

   i. Clause 1 – "*Making your booking – A binding contract between us will come into existence if we verbally confirm you booking and provide a reservation number to you . . . If your booking is made through a travel agent a binding contract will come into existence if your travel agent receives conformation of your booking and a reservation number by any means . . .*";

   ii. Clause 3 – "*A binding contract between us comes into existence when we confirm your booking to you or your travel agent as set out in clause 1. We both agree that English law (and no other) will apply to your contract and to any dispute, claim or other matter of any description which arises between us. We both also agree that any claim (and whether or not involving any personal injury) must be dealt with under the ABTA arbitration scheme . . . . or by the Courts of England and Wales . . . .*";

   iii. Clause 10(1) – "*Subject to clause . . .10(6) below we . . . will accept responsibility if, for example, you suffer death or personal injury or your contractual holiday arrangements are not provided as promised or prove deficient as a result of the failure of ourselves, our employees, agents or suppliers to use of reasonable skill and care in making , performing or providing, as applicable, your contracted holiday arrangements . . .*"

   iv. Clause 10(6) – "*The provisions of the Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 . . .*

('2002 Athens Convention') apply to the cruise element of your holiday as well as the process of getting on or off the ship concerned . We are the carrier for the purposes of the Athens Convention. For any claim involving death or personal injury or delay . . . . arising out of the cruise element of your holiday and/or the process of getting on or off the ship concerned the only liability we have to you is in accordance with the 2002 Athens Convention. This means that you are not entitled to make any claim which is not expressly permitted by the 2002 Athens Convention . . . . ."

e. The Claimant commenced the holiday on 26th June 2013, arriving in Venice on the same date. Consistent with the itinerary provided the Claimant embarked on the ship on the 29th June 2013. The ship was to call at several Greek ports, including Corfu, Santorini, Mykonos and Katakolon. The ship called first at Corfu (Kerkyra) where it docked. The passengers were thus able to disembark directly to shore to explore that town. On 2nd July 2013 the ship called at Santorini, Greece. This island does not provide docking facilities so that the ship anchors off the island and the passengers are disembarked and re-embarked by a tender boat or boats. At many such places the ship's own boats will be used as tenders however at Santorini that did not occur and a tender or tenders operated by a local company were used. According to the witness statement of Mr. Bernard Connelly, NCL's safety officer, this was because the ship was not permitted to operate its own boats but there was no direct evidence as to how the tender or tenders were engaged or paid for.

f. The Claimant and his wife decided to go ashore at Santorini. As could be seen on the CCTV recording put in evidence by the Defendant, he and his wife transferred from the ship to a tender at approximately 1515. He did this by exiting the ship through a door or port in the ship's side and going down a set of steps or companionway to a hydraulically operated platform in the ship's side. From that platform he crossed onto the aft part of the vessel "IPAPANTI" (the "tender").

g. The CCTV recording, referred to above, showed the Claimant and his wife leaving the vessel, through the port in the ship's side, descending to the platform and then boarding a tender. The tender can be seen clearly and I do not think that there can be any doubt that it was "IPAPANTI" (hereafter "the tender").

h. That tender is not owned by the Defendant but apparently by the Boatman Union of Santorini (the Union). I say apparently because although there was no direct evidence on the subject of the tender and its operation a 'computer download' has been provided which appears to be a web site for the Union. That has provided the following particulars for that vessel. She was built in 2008 by Epsilon Marine for a diving centre in Crete, is 21.1 metres in length, has a beam of 5.05 metres, is fitted with two engine developing 650 hp which apparently give her a maximum speed of 24 knots. The specifications provided state that she was built by Santos Marine which contradicts the narrative referring to her having been built by Epsilon. However I was informed that this discrepancy is explained by the fact that Santos Marine was the company which had refurbished the tender in about 2010. She has a variety of electronic equipment including an announcement system and cameras monitoring the engine room, main and upper deck.

i. The photographs (contained in the core bundle) and the CCTV of the tender show that the embarkation point to the tender at the material time was aft on her starboard side just forward of the transom onto her main deck or weather deck. Immediately forward of that is a portion of the main deck of the tender which has seating. At the forward end of that are steps leading to the upper deck which are shown to be a companionway to the port of the vessel's centre line and just aft of a doorway or entrance leading through a bulkhead into the cabin which is situated forward of the aft part of the main deck. According to the Claimant and his wife they had intended to ascend the companionway to the open air seating on the upper deck but apparently information was given by someone that the upper deck seating was filled and they should move forward on the main deck. The Claimant alleges that he

moved forward to the cabin area closely following those ahead of him, he was ahead of his wife, she was not pushing him but he felt under pressure to make his way to a seat. Neither the Claimant nor Mrs. Lawrence could identify who gave the instructions to move forward or precisely where the instructions came from. Mrs Lawrence thought that the instructions came from someone situated behind them.

j. The Claimant tripped and fell over a step on the lower deck and suffered injury to his chin, legs and left shoulder. The Claimant has said that he tripped over a raised area as he went forward. As appeared from photographs this was the sill at the doorway leading to the cabin. The Claimant says that because he was close behind those ahead of him he did not see the raised area. Both the Claimant and his wife said that the raised area was in darkness there was little discernible light. The Claimant said that the floor or deck was painted black. According to the Claimant he tripped and fell with his shins contacting the raised area. His chin and shoulder also came into contact either with the raised area or with the deck forward of the raised area.

k. In his witness statement the Claimant has said "*The step could not be seen prior to the accident. Because the tender boat was crowded by the time we embarked and because passengers were moving forward in close quarters, the floor ahead was not visible. In any event the poor lighting together with the black floor cover rendered the difference in level on the floor surface impossible to discern*".

l. After suffering the trip the Claimant left the tender boat and returned to the Defendant's ship whereupon he was attended to by the medical staff of the ship. A medical report was made by the staff, it was noted that the Claimant had sustained a 1.5 cm, deep, laceration to the chin and small abrasions to both lower legs. No note was made of the injury to the shoulder. It is the lack of any mention of the shoulder injury in this report which has led to a dispute as to whether the Claimant did injure his shoulder at the material time. However the bundle also contains an NCL "Passenger Statement Report" also dated the 2nd July 2013 and signed by the Claimant which under the heading "*Describe all injuries you contend were sustained in the incident*" contains the

response "*Deep cut to chin, cuts to legs. Bruising to left shoulder*". The NCL "Accident/Injury Investigation Report Form" compiled by the ship's security officer, Bernard Connelly, does not describe the injuries and is therefore of no assistance on this topic but it does record that "*The guest alleged that he fell over a step whilst in a shore tender boat boarding at Santorini"* and describes the condition of the complainant as "*Discomfort*". For the sake of completeness Mr. Connelly describes the wind at the material time as having been Northerly Fresh 17-21 (presumably knots) and the seastate as having been smooth with wavelets of a height 0.1-0.5 metres. However it is to be noted that neither the weather nor the movement of the tender has ever been suggested as a cause for the incident.

m. In oral evidence the Claimant and Mrs. Lawrence maintained that the deck area in way of the step was painted black and that this was a material reason for him tripping. Further it was contended that the area was very dark and there was no lighting. The Claimant suggested that the windows in the area were curtained. Mrs Lawrence has also said that there was no evidence of markings "*that we were coming to this step and no one was in attendance.*"

n. Ms Joanne Mulligan gave evidence on behalf of the Defendant. She is "Guest Relations Supervisor" at one of the English offices of NCL. She was not onboard the Ship at the material time and her only direct evidence was concerned with the correspondence between the Claimant and NCL after the incident. Save that her witness statement indicated that there had been negotiations to settle the claim and that the Defendant was, at that stage, content to accept liability to the Claimant the contents were not, in my view, directly pertinent to the issues relating to liability raised in this case. However Ms. Mulligan was cross-examined about aspects of the contractual documents. With reference to the booking conditions at p.197 of the trial bundle she expressed the view that there had been a binding contract between NCL and the passenger. She also confirmed that NCL did not charge an additional fare for use of the tender. It was considered as a service provided within the fare paid by the Claimant to NCL. That evidence

was in conflict with the witness statement of Ms. Jane Kilgour to the effect that the NCL had no contract with the Union which was the owner of the tender. However Ms. Kilgour was not called to give evidence.

10. **The photographs**

a. Mr. McGrath provided the court with a list of the various photographs of the tender. (i) Group 1 (pp 80e-80m and 256-264 of the core bundle) are said to have come from the website of Santos Marine who it is understood performed the modification work to the vessel after it was purchased by the Union. These are said to come from the Santos Marine website from 2010. (ii) Group 2 (pp. 80n-80u and 265-272 in the bundle) are said to have come from the Union's current website. These photographs are of an unknown date but the website appears to have been made in or about 2015. (iii) Group 3 (pp.249-254 of the bundle) are said to have been taken on the instructions of the Defendant's lawyers in October 2015 as appears in the Defendant's Part 18 replies.

b. The photographs from Group 1 included a number which have helpfully been enlarged. One of these is a view taken form aft which shows the seating area on the aft deck. That demonstrates the companionway leading to the upper deck. The wooden deck can be seen and also, to starboard of the companionway just referred to an 'opening' in a transverse bulkhead between the aft main deck and a cabin area. That opening has a door which is open against a longitudinal bulkhead to port and also a closed half door to the starboard (that this was also capable of being opened is shewn in other photos which were provided). The photograph also shews windows to port and starboard of the after main deck area. It was suggested by the Claimant that these had blinds or curtains which were closed at the material time. However the photograph in question does not indicate that the windows onto the aft deck had such blinds although other photographs indicate that the windows to the cabin area did have curtains. Some photographs shew the latter to be drawn and others

undrawn. There is no reliable evidence from which it can be ascertained whether those curtains were drawn closed or undrawn at the material time.

c. The photographs in Group 3 at p.249 and 250 of the bundle demonstrate that the "raised area" is in fact a sill at the bottom of the door at the entrance into the cabin area from the aft deck. As the after deck is a weather deck it is not surprising that there is a sill at the door into the cabin area as it would be necessary to ensure that any water which might get on to the aft deck did not enter the cabin area. There is no evidence as to the precise height of the sill but using the photographs at pages 249 and 250 of the bundle it can be seen that the wooden aft deck ran up to the sill. These photographs indicate that the height of sill was not inconsiderable and may have been about half the height of the benches or seating. Again that height has not been measured but it is not unreasonable to suppose that the height of the seating was in the bracket of 16-18 inches. That would indicate that the height of the sill was about 8-9 inches. Furthermore using the photograph at p.80(n) of the bundle it is possible to compare the height of the sill with the rise between the steps of the companionway leading to the upper sundeck. In my view these appear to be similar although the height of the sill might have been a little greater. A not unusual rise for steps may be considered to be 6-7 inches. Bearing these factors in mind I think it probable that the height of the sill was between 6 and 9 inches high.

d. There is a significant issue between the parties as to whether the sill was marked at the material time and, if so, how it was marked. A problem is that the precise date of the photographs is not known. Group 1 show that there were two thin strips of red and white tape. These mark the top of the sill but do not extend very far down it. It is most probable that the Group 1 photographs were taken in about 2010. It is known that the photographs in Group 3 were taken in October 2015. The date of the photographs in Group 2 is less certain but p.80(n) refers to the 70th Anniversary of the Union 1945-2015 and it therefore probable that those photographs also date from about 2015.

However those photographs only shew outside views of the tender and are therefore not of assistance on this point. All that can be said is that it is probable that at some time between 2010 and 2015 the marking on the sill was changed from the two red and white strips seen in the photograph at p.259 to a set of black and yellow strips which are clearly shown on the photographs at pp. 249 and 250. The latter marking appears to be made up of 4 strips which takes up most of the height of the sill. As such it was clearly more visible than the earlier red and white stripes.

The Expert Evidence

11. Each party relied on medical evidence in the field of orthopaedics. The Claimant relied upon Mr. Vikas Vedi and the Defendant upon Mr. Michael Hook. In his report Mr. Vedi took the view that the Claimant has sustained a tear to the rotator cuff of the left shoulder and, as a result the Claimant was suffering from ongoing pain, discomfort and a limited function of the shoulder. His initial view was that this stemmed solely from the incident. However following discussion with Mr. Hook he accepted that there was a pre-existing degenerative condition the symptoms of which were accelerated by a period of about 1 year. Their evidence was provided on the first day of the trial. Mr. Vedi had modified his original view after sight of the evidence following a scan of the Claimant's shoulder which demonstrated pre-existing degenerative changes in the area of the Claimant's spine. He was an impressive witness who was readily prepared to modify his views in the light of further available evidence. He was not dogmatic and was clearly aware of his duty to assist the court.

12. Mr. Hook was likewise an impressive witness who was also prepared to modify his views in the light of further available evidence, was not dogmatic and was aware of his duty to assist the court. He had put forward three possible explanations for the Claimant's symptoms. The first was that the accident accelerated the onset of the symptoms from a pre-existing degenerative changes by a period of about one year. The second was that the Claimant's symptons in the shoulder had been caused by a pre-existing

pathology to the cervical spine. The third was that the Claimant's symptoms to the shoulder had been wholly caused by degenerative changes to the left shoulder. In evidence Mr. Hook stated that the second and third options could not be considered to be related to the incident. He also considered that the third option was less likely than the second and that he felt that the symptoms more probably indicated a problem with the neck and shoulder. His view as to the probability of the first approach being an appropriate consideration depended upon the extent to which the Claimant had complained of symptoms at a time which was proximate to the incident. The apparent lack of complaint about pain in his shoulder by the Claimant immediately after the incident had influenced his initial view that the first option was probably not an appropriate consideration. However he accepted that there had been no complaint of pain prior to the accident and that if there was credible evidence of the Claimant having complained of symptoms in his shoulder within a period of about 48 hours of the incident then the fall was a factor to be considered. In those circumstances he opined that an injury to the shoulder at the time of the fall could and probably had exacerbated a pre-existing condition. He considered that this acceleration of the symptoms becoming apparent would have been by about 12-18 months but said that there could be no certainty of the exact period by which it was accelerated.

13. It appeared that the medical experts were in broad agreement that the Claimant was suffering from a degenerative condition in the cervical spine and/or the area of his shoulder and that would have given rise to symptoms within a period of about 12-18 months of the date of the incident regardless of whether the Claimant had suffered the fall or not. There was an initial difference between them as to whether the fall had been a causative feature accelerating the condition but I think that there was broad agreement that a conclusion on this aspect depended upon whether there was credible evidence that the Claimant had complained of relevant symptoms, such as pain in the shoulder area, at or within a reasonable time of the incident occurring. From the foregoing it is apparent that there is an outstanding issue as to whether there is cogent evidence of complaint by the Claimant at the time of the incident or within a relatively short period thereafter.

Consideration

14. The disputed issues between the parties were in essence as follows:

    a. Application of the Athens Convention:
        i. Whether the Defendant was the carrier or the performing carrier (or both) in respect of the cruise.
        ii. Whether the incident on the tender boat occurred in the course of carriage.
    b. Whether the incident was caused by the fault or neglect of the Defendant or its servants or agents acting within the scope of their employment (Article 3(1) and Article 4(1)).
    c. Whether the Claimant is guilty of any contributory negligence and in what proportion (Article 6).
    d. Extent of injury or loss suffered by the Claimant (Article 3(2)).

Application of the Athens Convention.

15. The following provisions of the Athens Convention are relevant:

    a. Art.1.1(a) of the Convention provides that the carrier is the person "*by or on behalf of whom the contract has been concluded, whether the carrier is actually performed by him or by a performing carrier*"
    b. Art 1.1(b) provides that "*performing carrier actually means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole of a part of the carriage*".
    c. Art. 1.8(a) provides that carriage covers " . . . *the period during which the passenger and/or his cabin luggage are on board the ship of in the course of embarkation or disembarkation, and the period which the passenger and his cabin luggage are transported by water from the land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for the purpose of auxiliary transport has been put at the disposal of the passenger by the carrier.*"
    d. Art. 3.1 – "*The carrier shall be liable for the damage suffered as a result of . . . personal injury to a passenger . . . . if the incident which caused the damage so suffered occurred in the course of the carriage*

was due to the fault or neglect of the carrier or his servants or agent acting within the scope of their employment."

e. Art. 4.1 – "*If the performance of the carriage or part thereof has been entrusted to a performing carrier, the carrier shall nevertheless remain liable for the entire carriage according to the provisions of this Convention.*

f. Art. 4.2 – "*The carrier shall, in relation to the carriage performed by the performing carrier, be liable for the acts or omissions of the performing carrier and of his servants and agents acting within the scope of their employment*".

g. Art. 6 – "*If the carrier proves that the . . . personal injury to a passenger . . . as caused or contributed to by the fault of neglect of the passenger, the court seized of the case may exonerated the carrier wholly or partly from his liability in accordance with the provisions of the law of that court.*"

Was the Defendant the carrier or the performing carrier (or both) in respect of the cruise.

16. The Defendant submitted that the documents available did not establish a contractual relationship between the Claimant and the Defendant but that it was open to the Court to conclude that the carrier was actually Flights and Packages Ltd. I cannot accept the Defendant's submission on this point.

    a. There is no evidence that Flights and Packages ever intended to contract in any capacity other than as agent. Nor is there any evidence to suggest that NCL intended to enter into the contract other than as carriers. On the contrary NCL provided two confirmations. The one provided for Flights and Packages stated in terms that it was the "Travel Agent Copy". The other, the Guest Copy, stated in terms that the "*reservation had been accepted subject to the NCL booking conditions*".

    b. The booking conditions stated that a binding contract was entered into when NCL confirmed the booking to the Claimant or to his travel agent. By clause 10 NCL stated that its obligations arose under the

Athens Convention which included whilst the Claimant was onboard as well as when he was in the process of getting on or off the ship.

c. Furthermore Ms Mulligan accepted that there had been a contract entered into between the Claimant and the Defendant and the course of the subsequent negotiations between the Claimant and the Defendant raise an inference that the Defendant had accepted that it had been in a contractual relationship with the Claimant. There was certainly no suggestion at that stage that it had not or that it was not the carrier for the purposes of the Athens Convention.

d. In my view it follows that NCL had agreed to act and was the carrier for the purposes of the Athens Convention.

Whether the incident on the tender boat occurred in the course of carriage.

17. The question is whether the period when the Claimant was onboard the tender is "carriage" included under Art.1.8 of the Convention. It is clear that carriage includes periods whilst the passenger is in the course of disembarkation and the period whilst the passenger is being transported from the ship to the land or vice versa. The Defendant submitted that where this is being done by means of water transport then it is only included as a period of carriage if the passenger and his cabin luggage are the subject of such transportation. In my view such a literal construction of the Article would be contrary to a purposive construction of the Convention as it would mean that only disembarkation at the beginning and end of the voyage would be included. Further, and in any event, Art.1.6 defines "*cabin luggage*" as not only including luggage which the passenger has in his cabin but also luggage which otherwise in his "*possession, custody or control*". The article does not provide that the passenger must be in the process of being transported with all his cabin luggage and if a literal approach is to be applied it would be enough that when the passenger was in the course of transportation he had some or any of his possessions with him. It is difficult to envisage any situation in which a passenger might wish to go ashore during the course of a cruise without taking any of his possessions with him.

18. It was also submitted that the article did not apply because NCL did not provide the services of the tender for the purposes of allowing passengers to disembark at Santorini. I cannot accept that contention. Both the Claimant and his wife denied that a specific fare was required or paid for their use of the tender and Ms. Mulligan confirmed that the Claimant did not, himself, pay for passage on the tender but that it was included in the overall price of the cruise. This begs the question as to how the Union was being paid. There was no evidence that the Union were providing their services voluntarily and it seems inherently unlikely that this would be the case. In my view there is a very strong inference that either NCL paid the Union directly for its tender services or the Union was paid by a third party such as the port authority. If NCL did not pay the Union directly then it is probable that the tender's services were provided as part of the port services which would have been covered by the port dues payable by the Ship's owners. It follows, on a balance of probabilities, that either the services of the tender at Santorini were organised and paid for directly by the NCL or it was supplied as part of the port facilities provided to the Ship. In either event I conclude that the tender was a vessel which was put at the disposal of the disembarking passengers by the carrier, namely NCL.

19. It follows that the tender passage was provided by the NCL as part of its overall contractual obligation and took place during a period of carriage included in Art.1.8(a) of the Convention, therefore NCL was responsible for the period whilst the Claimant was in the course of disembarking from the Ship and was being transported from the Ship to land on a tender the costs of which was included in the fare or was put at the disposal of the Claimant by the carrier.

20. In any event even if the injury did not occur during a period defined in Art.1.8 it did occur during a period when the carriage was entrusted to a performing carrier, namely the owners of the tender and during that time the carrier remains liable for the for any acts of omissions of the performing carrier by virtue of Art. 4.1. It is to be noted that if both the carrier and the performing carrier are liable for any loss that liability is joint and several (see Art.4.4).

Was the incident caused by the fault or neglect of the Defendant or its servants or agents acting within the scope of their employment (Article 3(1) and Article 4(1)).

21. To establish liability the Claimant needed to show that his injury was caused by either the carrier or by performing carrier for whose acts the carrier is liable. I do not think that the Defendant seriously challenged the assertion that the Claimant tripped over the sill referred to and thereby was injured to some extent. On the balance of the evidence I consider that it corroborates the Claimant's case that he did complain about an injury to his shoulder at the material time and I conclude that the acceleration of his pre-existing degenerative condition was caused by the fall which he suffered. However the Claimant's evidence included his recollections of a number of matters which he contended amounted to negligence by NCL or by the Union as owners of the tender. Those recollections were not accepted by the Defendant whose counsel called into question the Claimant's accuracy and veracity with respect to them. For this reason it is necessary to consider the extent to which the Claimant should be considered as a witness upon whose accuracy and veracity the court could rely.

Whether the Court can rely upon the Claimant's evidence.

22. On the issue of the Claimant's truthfulness Mr. McGrath, counsel for the Defendant, questioned the Claimant as to his entitlement to call himself a knight as the claim was brought by the Claimant in the name of "Sir" Arthur Lawrence. Mr. Mcgrath asked the Claimant whether he was a knight. The Claimant responded that he was not a knight but a baronet. He subsequently informed the court that he did not know the date of the creation of his baronetcy but that it was associated with a piece of land in the channel islands which had been gifted to him by a person or persons whose identity he refused to disclose. As his demeanour on this subject was defensive and the explanation did not appear to be satisfactory, at the end of the hearing, the court invited the Claimant to produce any list or other documents which would support his claim to be a baronet. An order was made to allow him to do so.

23. Whether or not a person is entitled to refer to himself as a baronet can be ascertained from the Official Roll of the Baronetage ("the Official Roll") maintained by the Lord Chancellor in accordance with the Royal Warrant of the 8th February 1910 and a Transfer of Functions Order of 2001. This is a public document which is now kept in the Ministry of Justice and is maintained by the Standing Council of the Baronetage with the authority of the Lord Chancellor. A Royal Warrant of King Edward VII, dated 8th February 1910, directed that no person whose name is not entered on the Official Roll of Baronets ("the Official Roll") shall be received as a Baronet, or shall be addressed or mentioned by that title in any civil or military Commission, Letters Patent or other official document. The up to date Official Roll may be inspected on the relevant web site which includes the fact of and reason behind the Royal Warrant. In my view the Official Roll may be relied upon for the purposes of the 1910 Royal Warrant, to determine if an individual should be officially accorded the title and precedence of a baronet. I have considered the Official Roll so provided and it does not include an Arthur Lawrence.

24. The Claimant's solicitors provided what they described as "a bundle of documents provided by the Claimant in evidence of his baronetcy". These included a statement by the Claimant. Among the documents provide was one headed "Manor titles" which stated that it was a "Certificate of Title" and purported to bestow the title of "Sir Arthur George Lawrence". However the document does not purport to transfer land to which a manorial title is attached, nor does it bear a signature or name the conferring body or purport to confer a baronetcy or any other rank actually known in heraldry or which carries with it an honorific title. Further in his additional statement the Claimant has stated "*The only Honours which carried the title Sir are Knight and Baronet. Since I am aware that I have not been knighted I have always believed that I am a Baronet. This has never been questioned in nearly thirty years, thus I have never bothered to investigate in depth.*" However the mere fact that the Claimant has been using the title for a number of years without being questioned is not a sound basis for using such a title.

25. I have considered these documents carefully and have concluded that they do not provide any evidence which supports the Claimant's contention that he is entitled to hold himself out as being a baronet and therefore Mr. McGrath was right to question the propriety of the Claimant's use of the title. In these circumstances I have come to the conclusion that the Claimant has, for many years, been using a title to which he is not entitled. Bearing in mind the contents of the Royal Warrant he should not have used the title "sir" in bringing this claim and I direct that the Claim Form is to be amended with service dispensed with.

26. The question is to what extent that should affect my view as to his credibility. If a person adopts such a title for the purposes of gain then its use may be dishonest but it may be that such an affectation merely indicates snobbery or a "follie de grandeur" which, of itself, is essentially harmless. However in cases where even a little investigation should have indicated that the assumption was incorrect it may be taken to indicate a distinct capacity for self delusion. The present case is one where the Claimant has assumed and used the title of baronet when even the most modest research would have indicated that this was not appropriate. In my view that indicates a capacity on the part of the Claimant for wishful thinking and self delusion which should be borne in mind when considering his evidence as to what occurred and how much weight I can place upon his evidence.

The Claimant's evidence and the allegations of fault by the Defendant

27. Bearing the matters above in mind I will now turn to consider the strength of the Claimant's evidence:

    a. The Claimant has said that the gangway to the tender became crowded and that there were no members of the crew to control the flow or numbers of passengers boarding the tender. The earlier statement was contradicted to some extent by his later statement in which he has said that there were two attendants provided to assist the passengers boarding the tender. The CCTV recording demonstrates that, at the time when the Claimant passed from the ship to the tender, there does not appear to have been undue congestion and that there were

personnel present at the embarkation point to the tender. The Claimant's initial evidence therefore appears to be mistaken on these points.

b. The Claimant has stated that as he boarded the tender he had persons ahead of him and behind him. Having observed the flow of passengers from the CCTV I am unable to accept that the Claimant was being unduly crowded when he arrived onboard the vessel although I accept that there were persons ahead of him and his wife was behind him.

c. In his statement and in his oral evidence he emphasized that the interior of the lower deck was dark with little discernible light. I find this difficult to accept. The boarding took place in mid afternoon on a midsummer day in Greece. There was no evidence of poor weather conditions and it is therefore probable that the ambient light would have been good or bright. As can be seen from the photographs of the tender, the windows in the area aft of the sill did not have curtains. Although the area was probably in shadow I cannot accept that lack of light played any significant part in causing the Claimant to trip over the sill.

d. The Claimant has also stated that the deck was painted black. The photographs indicate that this was not the case. The deck was planked wood. Although the Claimant asserts that it was a combination of the black floor and the lack of light which rendered it impossible to discern the deck I cannot accept this assertion. In my view the Claimant has deluded himself in an attempt to provide and explanation for his fault which places the whole fault on the Defendant.

e. There was an issue as to whether the sill itself was marked. The earlier photographs indicate that there was a red and white warning strip in place. That indicates that the owners of the tender appreciated that the sill was a potential hazard which needed to be marked. All the later photographs either come from the Santorini brochure which was dated 2015 or those taken on behalf of the Defendant in 2015. The fact that it had been improved indicates that the owners of the tender considered that an improvement needed to be made. The evidence does not indicate when the sill was re-marked with the black and yellow stripes

which are deeper than the earlier ones. The Defendant caused the photographs to be taken in 2015 and it would have been relatively easy to ask the owners of the tender when the improvement was made. As the Defendant had introduced the marking as a matter of its defence I take the view that it had a burden to establish when the improvement was made. Mr. Wijeyaratne submitted that I must accept the evidence of the Claimant that the sill was wholly unmarked at the relevant time. In the light of the evidence of the earlier photographs I do not accept that submission but, given the evidential burden on the Defendant, there is an inference that the marking was improved after, and possibly because of, the incident involving the Claimant.

f. On a balance of probabilities I find that, at the time of the incident, the sill was marked with the red and white lines as shown in the earlier photographs and that the improvement was made after the incident. This finding again demonstrates the Claimant's misrecollection of the circumstances surrounding his injury. As he had just been injured and was probably shocked I do not find it surprising that his recollection is imprecise but I do think that his later account of the circumstances is as a result of an attempt to reconstruct what he considers must have occurred.

g. The Claimant stated that there were no crew available in the area of the sill to assist or warn him of the potential hazard. I accept that evidence. It has never been suggested that there was a sign at the doorway to warn of the sill.

h. The evidence of Mrs Lawrence was that the interior of the tender was dark and unlit, that the deck was painted black and that there were no markings on what she describes as "*the high, floor level divider beam used to divide the back and front of the boat*". For the reasons already given I am unable to accept that evidence. I was also concerned that her statement gave evidence of how the Claimant fell, namely with his shoulder onto the floor as well as his chin and legs whereas in her oral evidence she stated that his legs, chin and shoulder made contact with the raised area (or sill). The two are inconsistent and demonstrate that her recollection cannot be fully relied upon.

28. In the light of the evidence the allegations of negligence contained in paragraph 10 of the Particulars of Claim should be considered. These can be most conveniently be dealt with in the order which coincides with the Claimant's approach to the sill over which he tripped.

    a. *The Defendant used a tender boat which had an unsafe step on its deck.* In my view the mere use of a tender which had a sill dividing its weather deck from the cabin cannot be a fault attributable to either NCL or the owners of the tender. NCL could not avoid the use of the tender provided and it is not surprising that the tender had a sill where it was in order to prevent water from running from the weather deck into the cabin. The mere fact that the tender had a sill cannot be a matter of fault. However whether it needed to be adequately marked is a matter for consideration.

    b. *Failed to have any safe system of boarding the passengers onto the tender.* The evidence indicates that there were attendants to assist passengers boarding the tender. In any event it is difficult to see how the act of boarding the passengers onto the tender can have caused or contributed to the Claimant tripping. Insofar as it appears to be alleged that the manner of boarding can have had a causative effect on the later tripping the CCTV footage does not indicate an unseemly rush to board the tender nor that there was undue crowding. In my view such allegations fail.

    c. *Failure to provide direction onboard the tender, permitting the Claimant to traverse the tender when it was unsafe to do so, failure to instruct the Claimant to use an alternative route, failure to provide any assistance or direction to the Claimant upon boarding the tender.* In my view these are all "make weight" allegations which have little or no substance. Boarding the tender and making his way to a seat were essential ingredients of being given a passage to the shore and have not been shown to be causative of the injury. The suggestion that there was an alternative route into the cabin is absurd as there was only one route into the cabin. In my view the area of interest in this case was the step or sill itself.

d. *Failure to ensure that the step was highlighted or that there was adequate lighting onboard.* For reasons already given I take the view that the contention that the interior of the vessel should have been lit at the time of the incident does not indicate a lack of care or of fault by the owners of the tender. It was therefore not a fault on the part of NCL. Although it is probable that the passengers were passing from bright light to an area in shadow the windows at the aft end of the vessel were large and the suggestion that the lighting was inadequate cannot be accepted.

e. *The failure to mark or give warning of the step or sill.* In my view this is the one contention where both the owner of the tender and NCL are open to criticism and where it can be said to have been guilty of fault or neglect of the Claimant:

    i. The carriers are bound to take reasonable care of their passengers. The fact is that the vast majority of cruise passengers are retired people and therefore, by reason of age, less able to look after themselves than younger more able bodied persons. It follows that cruise operators and any performing carriers should take it upon themselves to exercise that care which is commensurate with carrying elderly passengers who might be less wary of potential danger.

    ii. Although the step or sill was a necessary and integral part of the tender which if adequately marked might normally be negotiated it nonetheless appears that it was a potential hazard if it was not so marked.

    iii. The fact that the step or sill was a potential hazard is demonstrated by the fact that it had been marked long before the incident. In my view the fact that the marking was probably improved after the incident is indicative that it was insufficiently marked at the relevant time.

    iv. However even if it was marked at the material time as shown in the 2015 photographs I take the view that, when looking after elderly people, that was not sufficient.

v. The Claimant has stated that there were no crew available in the area of the sill to assist or warn him of the potential hazard. I accept that evidence. I also find that there was no sign at eyelevel to one side of the doorway to warn of the sill.

vi. Looking at the photographs it would have been easy to place a warning sign to one side of the entrance to the cabin at a height which was readily visible. Even if the tender was crowded such a sign would have made it clear to persons entering the cabin that they should watch the area around their feet. In my view such a sign would probably have been seen by the Claimant who would have been better warned as to the hazard he was approaching. The failure to provide such a sign and the deficiencies in the marking of the sill were, I find, causative of the injury and was a fault by the owners of the tender who were performing carriers for whose faults NCL were directly responsible.

vii. Although NCL could not be said to be directly responsible for the lack of physical warnings on the tender itself nonetheless it seems to me that their duty to the passengers should involve them in a continuing duty whilst the passenger are being carried on excursions ashore by the use of local tenders to the extent of inspecting those vessels to ensure that there are no obvious hazards which should be guarded against. This is a function which should be performed by the ship's safety officer and if in this case he had done so he should, in my view, have recognised the potential hazard formed by the step or sill. Had he done so there is no reason why he should not have asked the owners of the tender to place a warning sign in the doorway to the cabin or, if they had proved unable or reluctant to do so to have provided a marker and board from the ship's own stores to provide a warning. As a reasonable alternative there is no reason why he should not have insisted that one of the ship's crew accompany the passengers to warn them of the relevant hazard. It is generally recognised by cruise ship operators that it

> is necessary to have personnel standing by the entrance onto tenders to assist passengers boarding or disembarking and if there are hazards onboard the tender itself there is no logical reason why crew from either the ship or the tender itself should not be placed on standby to ensure that the potential danger is avoided. Looking at the particulars of the ship provided in the documents it is noteworthy that she carries a very large crew. In the circumstances it cannot be argued the ship was insufficiently manned to carry out this simple task. What was needed was sufficient foresight to identify the hazzard and sufficient commonsense as to how to tackle it efficiently.

29. For the reasons above although I find that the majority of allegations of fault by the Defendant were not made out nonetheless there was a feature of the operation of the tender which fell below the necessary degree of care for its passengers. It is common ground that the Claimant did fall and was injured thereby. In my judgment the Defendant did fail to take sufficient care of the Claimant as he approached the doorway and that failure was a significant cause of the Claimant's injuries.

Contributory negligence

30. Although, as I have found, the Defendant was at fault in safeguarding the Claimant which was causative of his injuries it is necessary to consider whether he failed to take reasonable and proper case of himself amounting to contributory negligence and, if so, to what extent. Although the Defendant was at fault I nonetheless take the view that persons of whatever age must, to some extent at least, take steps to ensure their own safety. This is particularly the case where they are engaged in operations or in places with which they may not be familiar. In such cases it behoves them to be more cautious than usual.

31. As I have found the conditions facing the Claimant were not so difficult that he could not have avoided tripping if he had been paying proper attention. He has given evidence that there were others ahead of him and, as there is no suggestion that others were injured, it follows that they managed to avoid

tripping over the sill. Not only does this confirm that the conditions near the sill were not as bad as the Claimant has tried to convey it demonstrates that with an element of care being taken it was possible to avoid the danger posed by the sill. In my view a contributory reason for the fall was because the Claimant was probably proceeding too closely behind those ahead of him. In my view that is a matter emanating from his own failure of care rather than that of the Defendant.

Conclusion on liability

32. In these circumstances I find that a proper degree of contributory negligence is 25% making the division of fault 75/25 in favour of the Claimant.

The application to strike out the claim

33. For tactical reasons, which arose from the "qualified one-way costs" regime recently introduced and applicable to personal injury claims, the Defendant's counsel applied to the Court to make an order striking out the claim pursuant to CPR 3.4 once all the evidence had been heard. It is very unusual for such an application to be made, as in this case, immediately before or even during the trial itself although the rules do not preclude such an application. The object of this application was to seek to obtain the more advantageous costs result for the Defendant which may be allowed where such an order is made. As I have found that the Claimant's injuries did arise, at least in part, from the Defendant's fault it is obvious that an order for summary judgment could not be made. However it seems to me that if this type of argument is to become common it will, as it did in this case, add significantly to the time spent on submissions. If the rules were clarified or altered so as to allow the court a wider discretion to make costs orders against a Claimant in favour of a Defendant in cases where it is obvious, having heard all the evidence, that the case should never have been commenced or continued a recurrence of this situation might be avoided. This is a matter which might be considered by the rules committee.

The quantification of the loss

34. The Claimant's case is for general damages for pain and suffering caused by the injury together with special damages as set out in the updated schedule provided. The Defendant has provided a counter schedule. I shall approach this on the basis of full liability and re-adjust the damages to allow for the contributory negligence in due course.

35. *General damages.* Claimant's counsel referred me to the Judicial College Guidelines.
    a. *The shoulder injury* - What needs to be compensated is an injury which has been accelerated by 12 moths according to the Claimant's expert and by 12 to 18 months according to the Defendant's expert. The range for that period with a 10% uplift is £3,630 to 6,600 which gives a mean of £5,115. Of the comparables provided it appears that *Harrison v Montracon (Refrigerated Vehicles) Ltd* (2001) and *Bird v. Kattah* (2008), which are both concerned with degenerative injuries with accelerated symptoms in the 12-18 months range, are both helpful. These attracted corrected awards of £4,850 and £4,814 respectively. However in the present case there was lessening of the symptoms attributable to the incident so that the Claimant was able to take up his hobbies of table tennis after 4 months and golf after 6 months. Insofar as his later and ongoing shoulder pains are concerned these are I think attributable to the degenerative nature of his pre-existing condition. Taking all these matters into account I find that £4,000 is a proper figure to allow for the shoulder injury alone.
    b. *Lacerations to the chin and the shins.* These are comparatively minor injuries which, in my view fall below the £1,160 set out in the JC Guidelines. In my view an appropriate figure for this would be £1,000.

36. *The itemised special damages*. Having heard both counsel and considered the schedules provided and bearing in mind that many of the items were unvouched but based on estimates I award the following:
    a. *Travel expenses* - £30
    b. *Osteopathy treatment in 2013* £90

c. *Loss of holiday bargain and enjoyment.* The injury occurred half way through the holiday which cost the Claimant a little over £1,500 for each person. The reduction in bargain and enjoyment was essentially the loss to the Claimant. His wife must have suffered some loss but to a lesser extent £1,125

d. *Past care and attendance.* Given that the Claimant was able to resume his hobby of table tennis after about 4 months the amount of care necessary must have been reduced significantly by the time that came about (allow 7.5 hours x £5 x 16weeks) £600

e. *Miscellaneous.* One shirt (£75) and telephone calls (£10) £85

f. Total £1,930.

Conclusion on quantum

37. Therefore the total of the damages payable to the Claimant amounts to £6,930 which is to be reduced by 25% to reflect the contributory negligence and therefore amounts to £5,197. To that sum must be added interest. It would assist if counsel would consider and try to agree the appropriate figure.

Dated the 6th day of May 2016