argued that the purpose of the list of excluded matters was to avoid any confusion of overlap otherwise created by reason of the fact that all of the Acts referred to contained their own independent cost-capping provisions. While Truss J did not comment on this issue, it is noted that claims for damages for dust diseases that are exempted from the maximum costs provisions do not contain their own independent capping provisions.

This is an important case for plaintiffs, particularly where a lengthy trial is involved, as the difference between recovering party:party costs on a deregulated basis or under the maximum costs provisions could equate to several hundred thousand dollars. ■

Notes: **1** Section 338, *Legal Profession Act* 2004. **2** *King v Greater Murray Health Service* (2007) NSWSC 914; and see *Andrews v New South Wales* (2004) 1 DCLR (NSW) 230. **3** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009). **4** *King v Greater Murray Health Service* (2007) NSWSC 914. **5** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009) per Truss J at [20]. **6** *King v Greater Murray Health Service* (2007) NSWSC 914 per Harrison AJ at [30]. **7** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009) per Truss J at [29].

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WINDMILLS OF MY MIND

An eggstreme reaction to ras malai

By Andrew Stone

I recently saw a brief note regarding a claim in the UK against a caterer following an anaphylactic reaction. I was intrigued that such a case could be litigated to an appellate level. My initial thought was that (subject to factual disputes) the legal obligations were obvious. I couldn't see how any liability could rest on a caterer unless they were notified by the consumer as to the potential allergy. I couldn't see how, once the consumer had advised the caterer of their allergy, the caterer could then avoid liability. I looked up the case.

The facts in *Bhamra v Dubb* [2010] EWCA Civ 13 were intriguing. Mr Bhamra was one of 500 guests at a wedding at a Sikh temple at Forest Gate in North West London. Mr Dubb (also a Sikh) who carried on business under the business name, *Lucky Caterers*, had provided the wedding feast.

Mr Bhamra was highly allergic to eggs. However, this allergy caused him no inconvenience, provided he observed strict religious practice. The Sikh religion forbids the consumption of meat, fish or eggs. Indeed, it is contrary to the rules of the temple for any meat, fish or eggs to be brought into the temple.

Mr Bhamra died several days after consuming a dish of ras malai at the wedding. Mr Dubb denied that the dish contained eggs, but the trial judge found to the contrary. The challenging issues involved the scope and breach of any duty of care:

1. Should the defendant have foreseen that food with eggs in it might fatally injure a guest who was allergic to egg?
2. Would a guest allergic to eggs reasonably anticipate that food served in a Sikh temple by a Sikh caterer at a Sikh wedding would not contain eggs (and thus not warn about his allergy)?
3. Did the caterer take reasonable care to ensure that there was no egg in the food served?

The trial judge had answered yes to all three of these questions.

The Court of Appeal found that there was no general duty on the part of restaurateurs or caterers to warn that a dish contains eggs. Expert evidence indicated that only 0.1 per cent of the adult population had an egg allergy. (The court avoided the question of whether there may be a different obligation in respect of nut allergies, which are more prevalent.)

The Court of Appeal upheld the trial judge's findings in relation to the existence of a duty of care. The court noted that it was only the 'very unusual combination of circumstances' that created any duty of care in the particular case.

On the issue of breach, the case was again finely balanced. The trial judge had rejected Mr Dubb's evidence that he had made all the ras malai himself and served it fresh. There was a factual finding that some of the ras malai had been purchased from an outside source (the guests thought some of the ras malai had been frozen!). Having denied that he had purchased ras malai, Mr Dubb could not argue that he had made specific enquiries to ensure there was no eggs in the purchased ras malai.

The court found it significant that Mr Dubb was aware that some Pakistani recipes for ras malai (from predominantly Islamic regions, where there is no religious restriction on the consumption of eggs) could contain eggs. In those circumstances, it was held that it was incumbent upon Mr Dubb to check with his supplier that there was no Pakistani-influenced egg in the dish being served at the Sikh wedding. This was a breach of the unusual duty owed. The trial judge's verdict in favour of Mr Bhamra's widow was upheld.

I suspect that there are not that many cases involving egg poisoning at Sikh weddings. If any do come along, there is now excellent authority on point. What I do remain curious about is whether Mr Dubb of *Lucky Caterers* is now in breach of trade practices legislation in retaining his trading name! ■

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