

BAD AP

Injuries abroad involving incidents at theme parks, tourist attractions, hotels and other foreign destinations are legion. Domhnall O’Catháin and Conway O’Hara give some sound advice on what you should know if a client injured in the US comes calling

Janet (not her real name) was having a great trip to New York City with her friends. She, like approximately 300,000 other Irish tourists that year, grabbed a last-minute package deal. What followed was a whirlwind tour to New York that included Broadway, late-night restaurants, pre-Christmas shopping, Central Park and Times Square – a sample of the delights that New York City offers.

On the morning that Janet was due to return to Belfast, she and her friends set out to walk across 42nd Street from Bryant Park to Times Square. After crossing 6th Avenue, she walked past the subway entrance and, in a scene familiar to millions of people, the footpath was covered with erected scaffolding. Janet, mindful of the scaffolding, walked along with her friends until she suddenly tripped on a flagstone that was jutting out of the footpath. Janet had not seen the jutting flagstone because of the shadows created by the scaffolding. She was rushed to the hospital where she was diagnosed as having a subarachnoid haemorrhage after smashing her face against the footpath. Terrified of being alone in New York City, Janet insisted on returning to Ireland that night, where she was then hospitalised. Unfortunately, that was not the end of her bad luck with New York City.

Just shoot me

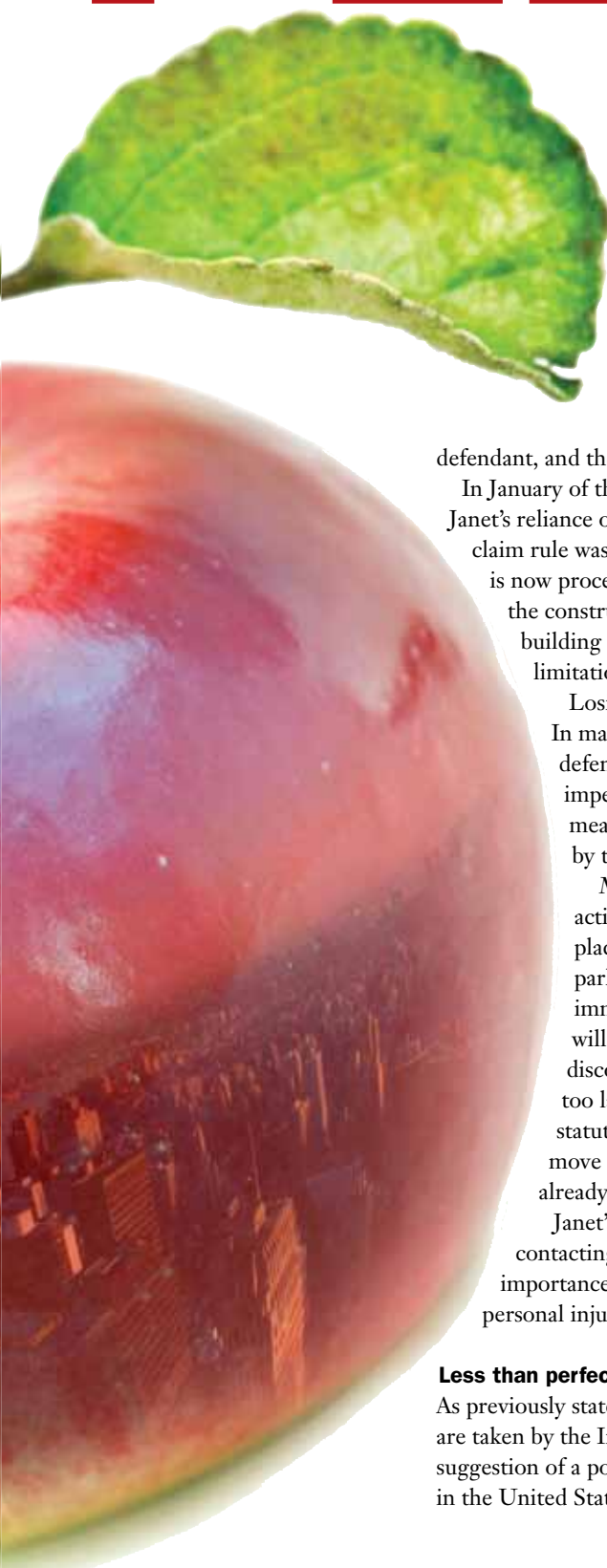
Ninety days after the accident, Janet visited a solicitor in Belfast for advice on the accident. The solicitor made a few phone calls to a friend in Pennsylvania, who created a contact with Janet’s current lawyers in New York. What Janet and her solicitor in Belfast didn’t know was that, if New York City had not received a notice of claim concerning the accident within 90 days of the accident, the claim would be barred against New York City as a defendant. However, this time limit does not apply in relation to private defendants, as we shall see.

MAIN POINTS

- **Taking personal injury actions in the US**
- **New York’s 90 days notice-of-claim rule**
- **Referring PI cases to US-based lawyers**



PLE



New York City is a municipality and therefore, under New York law, must receive a notice of claim as a condition precedent to a lawsuit against it within 90 days of the accident. Nearly all states have a notice of claim requirement when a municipality is a likely defendant, and the time limit can vary from state to state.

In January of this year, a New York Supreme Court judge ruled that Janet's reliance on her solicitor's ignorance of the 90-day notice-of-claim rule was not enough to excuse her from that rule. Janet's claim is now proceeding against other liable private parties, including the construction companies that erected the scaffolding and the building that was being repaired, within the regular statute of limitations that applies to slip-and-fall cases in New York.

Losing a municipality as a defendant is a significant loss. In many personal injury cases, there might not be other defendants to sue, or those other defendants might be impecunious. However, a municipality will always have the means to pay, even though their exposure might be limited by the laws of state where the injury occurred.

Municipalities are, more often, proper defendants in actions where it might not be expected – particularly in places where tourists are injured, including amusement parks and other tourist attractions. You should not immediately assume from the facts that a municipality will not be a defendant. Often, experienced practitioners discover the liability of a municipality when it is already too late. Also, if time is running on a notice of claim or statute of limitations, you can insist that the American lawyer move by motion for a good-cause extension if the time has not already run.

Janet's case underlined the importance of an injured party contacting both their own solicitor immediately and the importance of retaining an American lawyer with experience in personal injury as soon as practicable.

Less than perfect

As previously stated, it is of the utmost importance that all necessary steps are taken by the Irish solicitor, as a matter of urgency, once there is the suggestion of a potential personal injury case originating from an incident in the United States. This is even more so where there is the potential for



Slips and the city

a municipality to be a defendant. The reasons for this are to protect both the client and the solicitor.

Once instructions are taken in a matter, a solicitor could be found jointly and severally liable for professional malpractice, both in terms of work carried out by him, but also in relation to work carried out by his American colleague on the case. This is the double-edged sword in accepting a potentially lucrative fee for referring the matter to an American lawyer. This also underlines the importance of retaining a competent and experienced American lawyer to handle the case. Solicitors should be mindful of any impact this may have on their professional indemnity insurance and consult with their insurers as appropriate.

Therefore, on receipt of instructions, all necessary details in relation to the client and the alleged incident should be taken immediately. This will facilitate the prompt and thorough briefing of the American lawyer and avoid any unnecessary delay in the filing of documents in the United States. A file should be opened in the normal manner and a careful record kept of all work carried out in relation to the case.

King of Queens

Typically, American lawyers who practice personal injury will specialise in personal injury. The most common resource for searching for personal injury lawyers is the American Association of Justice (www.justice.org). The American Association of Justice's website allows you to narrow your search by geography and by practice area.

While retaining a lawyer in the area where the accident occurred is the most obvious approach, you

are not confined to those lawyers. It is possible for a New York firm to handle a personal injury case in Florida, for example, by bringing the case in federal court. Broadly speaking, under American law, if the plaintiff and defendant are from different states, the case can be brought in federal court. If your client is from Ireland, the case can be brought in federal court or state court. This might be a consideration if your client wants to retain an Irish lawyer based in America, because most Irish lawyers in America are based in either New York or California (see www.iabany.org and www.irishamericanbar.org).

When you have chosen the American lawyer to handle the case of an injured Irish tourist, there are a number of ground rules you must set to protect your client and yourself before you advise your client to retain that lawyer.

The odd couple

The retainer agreement is the agreement between the American lawyer and the client. It will calculate the fee for the lawyer if there is a recovery in the case. The general rule is that the lawyer is entitled to recover one-third of the sum recovered by the client.

However, this can vary depending on the complexity of the case, the likelihood of recovery and the rules in the state.

Depending on the state, and using the following figures for convenience, the fee might be calculated as follows: a \$200,000 recovery with \$20,000 in expenses to prepare the case (for example, hiring experts) will give the lawyer one-third of \$180,000, that is, \$60,000, leaving the client with \$120,000. Other states will calculate the one-third lawyer fee from the \$200,000, that is, \$66,666 for the lawyer, leaving the client with \$113,333 (\$133,333 minus \$20,000 in expenses). You must be clear about these calculations.

More significantly, what is not stated in the retainer agreement is what makes the American system unique. In practice, the client is not responsible in the event that the client loses the case. This bears repeating, because it is the question most frequently asked by Irish clients – and what deters many potential Irish litigants. The 'American rule' states that the client will not be responsible if the client loses the case because the lawyer will cover the costs of litigation.

Diff'rent strokes

In America, personal injury lawyers are permitted to pay a percentage of their fee to another lawyer who referred the case, although a few states restrict the

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LOOK IT UP

Actions:

- Notice of claims in New York State “against certain municipalities, public corporations or authorities” must be filed within 90 days: GML 50-e, 50-i; PAL 1212(2), 1276(2), 2980, 2981
- Personal injury actions (except (1) ‘Agent Orange’, and (2) intentional tort actions) must be brought within three years: CPLR 214(5)
- Tort actions (except (1) intentional torts, (2) tort actions against certain governmental entities, (3) ‘Agent Orange’, (4) certain toxic torts, and

(5) wrongful death) must be brought within three years: CLPR 214

Literature:

- Website of the American Association of Justice – www.justice.org
- Website of the Irish American Bar Association of New York – www.iabany.org,
- Website of the Northern California Irish American Bar Association – www.irishamericanbar.org

payment to lawyers with specific qualifications.

The percentage paid for the referral will usually reflect the percentage used to calculate the lawyer’s recovery. Assuming the US lawyer’s fee was one-third of the recovery, the referring lawyer will usually be entitled to one-third of that fee. Applied to the calculations used earlier to compute fees of \$60,000 or \$66,000, the referring lawyer will receive either \$20,000 or \$22,000 for referring the case.

American lawyers are permitted to apply this arrangement to solicitors in Ireland who refer cases to them. Therefore, when you find the American lawyer that your client will retain, you should enter into an agreement with the American lawyer to calculate a fee for your referral. However, this will be a bargaining process that will depend on the likelihood of recovery, the value of a recovery, and the amount of work that will be required of the solicitor or barrister. If the case will amount to a small recovery, it might not be economically prudent for the American lawyer to take the case if one-third of the legal fee is paid out on a referral.

The American lawyer cannot charge any fee for legal services on top of the percentage he or she receives for bringing the case. Therefore, if the client succeeds, the lawyer gets the percentage reflected in the retainer agreement – nothing more. If the client

loses, the lawyer loses, and the client is not obliged to pay the solicitor for legal expenses.

For the Irish solicitor, it would be prudent to send a variant of the standard section 68 letter to the client at this point, outlining that you are entitled to a percentage of any recovery for referring the case and for reimbursement of expenses.

Welcome back, Kotter

The ease of transatlantic tourism has brought a massive increase in the number of tourists injured in America. Injuries involve a myriad of incidents that have occurred at theme parks, tourist attractions, hotels, cruise ships, rental cars, tour guides, recreational vehicles, boating injuries, rifle ranges and many other places.

All of these occurrences have unique rules applying to them that might require the involvement of an American lawyer within a few weeks of the incident. The Irish solicitor must be mindful of the likelihood of these rules and move expeditiously to help the client retain an American lawyer that is equipped in that practice area. **G**

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