HUFFING AND PUFFING: WHEN CAN REPRESENTATIONS IN A TRAVEL COMPANY'S BROCHURE PROVIDE A BASIS FOR A CLAIM FOR PERSONAL INJURIES

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1. Introduction.

A hypothetical case: a family books a vacation through a United States tour operator that includes accommodations at a villa in Jamaica, owned by a Jamaican resort. The tour operator's brochure contains a disclaimer of ownership, possession, maintenance, control, operation and management over the accommodation, as well as a release of liability for all but its own negligence. The brochure also features enticing photographs of a family relaxing in the airy, seaside villa, with a caption promising that the accommodation is "dependable ... five star ... your every need will be attended to by our tour escorts ... and your security and comfort is dependably assured." While on tour, there is a fire in the villa, the smoke detectors and sprinklers fail, and the guests sustain serious injuries. When they return to the United States, they file suit not against the Jamaican resort, but instead against the tour operator, alleging direct negligence and contract claims arising out of the plaintiffs' detrimental reliance upon the brochure language.

Claims against tour operators such as this hypothetical arise for several reasons: the difficulties in pursuing litigation against foreign tortfeasors, such as the resort in the above hypothetical; the near-universal use by tour operators of disclaimers of liability for the negligence of third party vendors, and the respect courts accord them; coupled with the fact that courts generally disfavour claims against tour operators for their vicarious liability for the torts of their third-party service providers. This article proposes to examine one of the few remaining possible claims for a tour operator's direct liability available to plaintiffs injured abroad while on tour, when indicia of control of the scenario giving rise to plaintiff's injury on the part of the tour operator are otherwise absent: that duties and/or warranties arise from representations of "comfort," "safety," or a "worry-free vacation" in a defendant's promotional brochure.

In the United States, it is almost axiomatic, across jurisdictional lines, that a plaintiff injured while on vacation abroad faces an uphill battle in suing the tour operator or travel agency. Generally, the most likely candidate for direct liability for negligence is the service provider whose services the plaintiff was using at the time of injury – an innkeeper, or provider of transportation, for example; and typically, the travel agent or tour operator is cushioned from

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blame because the on-the-ground service provider was an independent contractor, a for-hire component of the whole itinerary, and the travel agent/tour operator had no control over their operations, and had no ownership or partnership interest in their business.[2] Exculpatory clauses in the tour contracts entered into by the plaintiff/traveller absolve tour operators/travel agents of all negligence but their own, and such disclaimers of liability have been upheld by the courts in the travel law context with something approaching total unanimity.[3]

Typically too, where a plaintiff is injured abroad as a result of negligence, the actual tortfeasor is a service provider on the ground that is a foreign entity (again, think of an innkeeper or transport company), beyond the reach of US courts, and an injured plaintiff seeking redress has to litigate in the host country, which is never an attractive option. As a consequence, in the absence of evidence of actual control or ownership on the part of the tour operator/travel agent of the service provider's business, a plaintiff injured on vacation, reluctant to commence her lawsuit in Jamaica or Rio or London or Kenya, has but a handful of legal theories upon which she can base a case of tour operator/travel agent liability for personal injury in United States courts. One such theory is failure to warn, which only succeeds where the tour operator had some prior knowledge of the hazard, and said hazard was not more obvious to plaintiff than to the tour operator/travel agent. Another is negligent selection of a vendor. Success for such claims is dependent on proving the travel professional historically knew of some deficiency of its on-the-ground service provider. Yet another is agency liability or its controversial inversion, "apparent authority;" and another is partnership liability/joint venture, all of which are usually frustrated by the normal absence of such relationships between travel professionals and the service providers whose services compose the itineraries they sell to clients.[4]

Finally, plaintiffs injured while on tour bring direct claims against tour operators based on representations made in brochures and promotional materials, either sounding in negligent or intentional misrepresentation, or in the contract-based theory of breach of express or implied warranties. The gravamen of such a claim is that plaintiffs booked their tour based upon guarantees of one or more of the following representations in the tour operator/travel agent's promotional materials: (1) some variation of a "safe" and/or "secure" and/or "worry-free" and/or "comfortable" trip; (2) the facilities/excursions/activities have been expertly selected and/or prescreened by the tour operator; and (3) the presence of an expert, knowledgeable representative of the defendant's company (tour director/escort) to attend to the needs of and/or "care for" the guests. Such claims allege that the plaintiff relied upon such representa-

2. *See*, e.g., *McElheny v Trans National Travel, Inc.*, 165 F. Supp. 2d 190, 197 (D. R. I., 2001)(collecting cases):"Courts have generally declined to impose liability on travel agents and tour operators for injuries sustained by clients aboard vessels, buses and other modes of transportation or at hotels or other destinations. The courts have usually found that there never existed a relationship which would have given rise to a duty on the part of the travel agent to investigate the safety of instrumentalities over which it had no control or knowledge. This is so because the sole function of the travel agent is to sell and arrange travel tours for those who might wish to purchase them." (citations and internal quotation marks omitted).

3. *See*, e.g., *Sova v Apple Vacations*, 984 F. Supp. 1136, 1139-40 (S.D. Oh. 1997)(collecting cases).

4. *See*, *infra*, e.g.: *Wilson v American Trans Air Inc.*, 874 F.2d 386 (7th Cir. 1989) (negligent selection claim fails); *Passero v, DHC Hotels and Resorts, Inc.*, 981 F. Supp. 742 (D. Conn, 1996) (failure to warn claim fails); *Wilson v American Trans Air, Inc.*, 874 F.2d 386 (joint venture liability claim fails); *Sova v Apple Vacations*, 984 F. Supp. 1136 (agency liability claim fails); *Davies v General Tours, Inc.*, 63 Conn. App. 17 (2001) (apparent authority, duty to warn and negligent selection claims fail).

tions to her detriment, and that as a result, she was injured. In the alternative, similar brochure language is claimed to be a warranty of the plaintiff's safety while on tour, and such a warranty either gives rise to a duty of care on the part of the tour operator/travel agent, or else its breach is subject to principles of ordinary contract law.

Specific factual representations in a tour operator's brochure have provided the basis for actionable negligence and breach of warranty claims

The leading case where tour operator liability was found for personal injuries sustained while on a tour based upon the defendant's promotional materials is *Stevenson v Four Winds Travel, Inc*.[5] There, the plaintiff, an elderly retiree, booked the defendant's 47-day tour of South America. The tour was accompanied by the defendant's escort/tour director. While in Brazil, the tour itinerary took the group to the Amazon, and to that end Four Winds arranged with a local travel agency to furnish transportation, and a local guide as well. After travelling by boat on the Rio Negros while en route to a rubber plantation, the boat anchored near a pier, and the group was transported to the pier by smaller boats. There was no gangplank from the small boats to the pier, and the members of the group, all of them elderly, including the plaintiff, had to step down a three foot gap to the pier, and Four Wind's tour director and the local guide helped them down, even lifting some of their guests down to the pier. The pier was only a few inches above the water, and water splashed onto it. The planks on the pier were weather-beaten and worn, and covered with slime in patches. The plaintiff slipped and fell on the wet pier, sustaining serious injuries.

The complaint alleged that the plaintiff was led to select the defendant's tour based upon representations made in its printed travel brochure, and that she acted on reliance of said representations. The relevant representations cited by the plaintiff were that "from the moment you leave until your journey ends you are cared for by a carefully selected Four Winds escort ... they know precisely what you will be seeing and doing every day. After all, they've been there before ... Guaranteed fully escorted from start to finish." The brochure also indicated that local tour guides with specialised knowledge of destinations on the itinerary, would supplement the tour director.

The complaint further alleged that at no time did the defendant, its agents or representatives, do anything to lead plaintiff to believe that they were not in full and complete charge of the tour. (Uniquely among travel cases, the existence of a disclaimer of liability of the tour operator for the negligence of others, including its independent contractors, was never raised in the opinion, and impliedly not raised as an issue by Four Winds). In addition, Four Winds had replied to an interrogatory that its tour director assumes management of all matters pertaining to his tour.

The District Court entered a directed verdict for Four Winds, and a three judge panel of Court of Appeals for the Fifth Circuit reversed and remanded, finding that plaintiff had made out a prima facie case of negligence.[6] The court determined that a jury could have found that the

5. 462 F.2d 899 (5th Cir. 1972)(decided under Florida law).

6. 462 F.2d at 907.

wet, slimy pier constituted a dangerous condition, and that while Four Winds neither controlled, maintained nor owned the pier, Four Wind's tour director, present at the scene, had a duty to warn the plaintiff of that danger, and was negligent in not performing that duty.[7] The court found that this duty to warn arose from Four Wind's representations in its brochure "with respect to the services that would be rendered by [its tour director and] were a part of what Four Winds obligated itself to do in the tour contract with [the plaintiff, who] ... had the right to rely thereon and did rely thereon."[8] The court noted that Four Winds represented in its brochure that its guests would be "cared for" by its tour escort, and that the dictionary definition of "care" and "cared for" includes "charge, oversight, or management, implying responsibility for safety ... to watch over or guard."[9]

The court concluded that:

> *"in view of all the emphasis that Four Winds put in its brochure on its tour escorts or directors ... that [plaintiff] had the right to expect that [its tour director] would warn her of any danger like the slippery condition of the pier walkway and caution her to use extraordinary care to guard against the peril of such a condition. The record clearly shows that [plaintiff] carefully studied the brochure and decided to take a Four Winds tour because of statements and representations made therein by Four Winds, and that she paid the high price charged by Four Winds ... because the brochure guaranteed that she would have and could rely upon the aid at all times of an experienced and responsible tour director, who would know precisely where they were at all times."*[10]

The court further found that it could be inferred that the wet, worn condition of the pier that made it slippery was its normal, rather than temporary, condition; that since the tour director and local guide took the time and trouble to help the elderly guests off the boat, including lifting some over the gap to the pier, then the Four Winds representative was aware that he had assumed a responsibility for their safety; and that the tour director and local guide were first off the boat and physically close to the slippery spot on the pier, and could have/should have noticed it, and moreover, since they had both helped Four Winds clients disembark on the same spot on prior tours, it was reasonable to infer that they knew of its existence.[11] The court finally found that in light of the same facts indicating the plaintiff had made out a prima facie case of negligence, her claim for breach of warranty deserved to be heard by a jury as well.[12]

Stevenson v Four Winds Travel demonstrates that representations in a tour operator's brochure could create a duty and/or a warranty as to a guest's safety while on tour. Interestingly, none of the subject representations had to do specifically with safety. However, the representations in the brochure cited by the court were *factual*, in that they stressed the

7. *Id.* at 906-907.
8. 462 F.2d at 906-907.
9. *Id.* at 907.
10. *Id.*
11. 462 F.2d at 907.
12. *Id.*

Four Winds tour escorts omnipresence, knowledge of the destinations and caretaking acumen, as opposed to employing the language of salesmanship assuring "the very best of everything." See also *Elsis v Trans World Airlines*,[13] (summary judgment denied where the tour operator represented in its brochure that its own expert staff inspected every hotel, sightseeing attraction, and every cruise ship on its tours, and the plaintiffs' Nile cruise ship was not equipped with lifeboats and life preservers, so that the tour operator may be liable for its own negligence when the ship goes down in flames, despite the fact that it did not own, operate, maintain or control the ship, because it had undertaken a duty to detect obvious insufficiencies which an inspection would have revealed; further, language in the brochure assuring clients that they could "sit back and relax with the peace of mind that only [the defendant's vacation packages] could offer" further demonstrated the defendant undertook a duty to provide a cruise ship with standard life safety features).

As we shall see from subsequent cases, the distinction between factual representations and "sales talk" marks the difference between a representation in a tour operator's brochure that is actionable, and one that is not. The question becomes, what sort of representation made in promotional material can a guest reasonably rely upon, such that the misplaced reliance is to their detriment and injury?

Language that is not factual, non-specific, or is nakedly promotional does not provide a basis for claims against tour operators

Aside from *Elsis*, *supra*, (which has not been cited by any other courts since), research discloses no cases subsequent to *Stevenson v Four Winds Travel* where a plaintiff succeeded in persuading a court that representations made by a tour operator in its brochure could give rise to a cause of action for personal injuries sustained while on the tour. However, a litigant's hope springs eternal, and plaintiffs' lawyers have repeatedly invoked the reasoning of *Four Winds Travel* when advocating for clients injured abroad while on tours. In these cases courts distinguished the types of representations in subsequent cases from the actionable representations in *Four Winds Travel* by noting that the defendants' brochures used the language of advertising, which constituted statements of opinion rather than statements of fact that could be reasonably relied upon, and were therefore mere "puffing," to use an archaic word beloved by courts.[14] Among the broad classes of representations in travel industry advertising found not to be actionable misrepresentations and/or actionable warranties are the following:

(a) Language expressly designed to put the traveller at rest creates no duty to warn

Courts in various jurisdictions over the last two and a half decades have held that brochure language promising a smooth or relaxed or worry-free vacation neither creates a warranty of safety, breached when a consumer is injured while on tour, nor does such language create an actionable misrepresentation.

13. 1989 NY Misc. LEXIS 1989 (NY Supr., 11/17/1989 index no. 24818/89, 24824/85).

14. Black's Law Dictionary (8th Ed.) defines puffing as: "the expression of an exaggerated opinion –as opposed to a factual misrepresentation – with the intent to sell a good or service." The Oxford English Dictionary traces examples of this meaning of the word back to the mid-16th century.

15. 874 F.2d 386 (7th Cir. 1989)(decided under Indiana law).

In *Wilson v American Trans-Air, Inc.*,[15] the plaintiff was the victim of a robbery and sexual assault when an intruder entered her second floor hotel room at a Cayman Islands Holiday Inn (owned by a Cayman-based franchisor), and the accommodation was offered by the defendant tour operator on its charter tour. A three judge panel of the Seventh Circuit affirmed the District Court's grant of summary judgment for the tour operator. The plaintiff argued that the tour operator breached its duty to warn her about the prevalence of crime on the island because there was language in its brochure designed to put the plaintiff's mind at rest. The court rejected this argument, holding that:

> *"the brochure language relied upon by [the plaintiff] focusing on the 'relaxed informality' of a Cayman Island's vacation is mere 'puffing' ... [and] not a guarantee of safety, and does not constitute affirmative conduct giving rise to a duty to investigate and warn ... a general promise that a trip would be 'safe and reliable' does not constitute a guarantee that no harm would befall the plaintiff."*[16]

In *Catalano v NWA, Inc.*,[17] the plaintiff spouses travelled to Jamaica on the defendant's tour, which included hotel accommodation, with the hotel paid by the tour operator on a commission basis. The wife availed herself of an excursion on a sunfish sailboat offered by the hotel, and while sailing, she was raped by an employee of the hotel. The plaintiff sued the tour operator for, among other things, breach of implied and express warranties and fraud and negligent misrepresentation; all of these claims arose from language in the defendant's brochure, which promised repeatedly "worry free vacations," and that the hotel was a "superior first-class couples-only hotel located on the beach." The Court entered judgment for the tour operator, holding that the phrase "worry free" was not an express or implied warranty because it was contradicted by the existence of the exculpatory clause in the same brochure, and that the language of said clause, releasing the tour operator from responsibility for personal injury caused by the hotel *specifically anticipated the possibility of personal injury on the tour*, thereby destroying any basis plaintiffs for the plaintiffs' claim that "worry free" warranted their safety.[18] The court also held that where the brochure stated:

> *"'MLT would like your vacation to be as comfortable and worry-free as possible' ... this itself indicates that MLT is hoping that the vacation goes as smoothly as possible for its participants. As with almost any vacation, unforeseen problems may arise for which MLT did not warrant itself to be liable."*[19]

More significantly, the court held that the "worry-free" slogan is an example of mere puffing, often associated with descriptions of travel services, and is not a guarantee of no harm. "General descriptions in advertising that the vacation will be safe, fun, exciting, worry-free, relaxing, or enjoyable do not create enforceable warranties that the vacation will be free from

16. *Id.* at 391 (citation and internal quotation marks omitted).

17. 1998 WL 777023 (D. Minn. 1998)(decided under Minnesota law).

18. 1998 WL 777023 at *8.

19. *Id.*

accident or harm," and therefore no warranty was created.[20] The court found that for the same reasons, plaintiffs' claim for fraud and negligent misrepresentation based on the "worry-free" slogan failed as well, because that language was mere puffery and not a guarantee.[21] See also *Viches v MLT, Inc.* (same defendant sued over identical "worry-free" language in its brochure where the plaintiffs were sprayed with pesticides while staying at a hotel in the Dominican Republic booked through the defendant's tour; a negligent misrepresentation claim under Michigan Consumer Protection Act failed because (a) a disclaimer of liability for personal injuries caused by third parties such as the hotel voided all implied warranties by alerting the consumer to the possibility of injury while on tour; and (b) the brochure language was mere puffing, "the expression of an opinion or salesman's talk in promoting a sale, which may not give rise to an action for fraud," and therefore not an actionable misrepresentation.)[22]

The same argument was mounted against a tour operator in *Davies v General Tours, Inc.*[23] There, the plaintiff slipped and fell and injured herself while disembarking from a tour bus in Morocco, operated by the defendant tour operator's independent contractor. As in *Wilson* and *Catalano*, the plaintiff argued that language in the brochure constituted a warranty of her safety, including such assurances as:

> *"[w]e know that you will enjoy the experience;" "[i]f you are taking one of our escorted tours your professional Tour Manager will meet you upon arrival;" "[i]t is this Tour Manager's sole responsibility to assure that you have a totally smooth and comfortable trip. They are there to assist you in any way .... Your tour manager and local guides will work together in each city to make this trip a unique and enriching experience for every General Tours traveler."*

In support of her argument that the defendant implicitly assured her that she would be cared for by the defendant, the plaintiff also referred to the defendant's use of the word "we" in the personal itinerary that was given to her. The plaintiff additionally referred to another document that stated that "[a]t General Tours, we've made a unique commitment to helping ensure your vacation goes as smoothly as possible."

The Connecticut Appellate Court affirmed the trial court's granting of the tour operator's motion for summary judgment, noting that:

> *"Connecticut courts have long recognized, in the context of the sale of goods, the fine distinction between advertisement or "puffery" and language that creates a warranty. Favorable comments by sellers with respect to their products are universally accepted and expected in the market place ... and do not give rise to liability. In general, a court will be more likely to find the creation of a warranty where a party makes a specific representation rather than a general representation."*[24]

20. *Id.* at *9.
21. *Id.*
22. 124 F Supp. 2d 1092, 1098 (ED Mich.2000).
23. 63 Conn. App. 17 (2001).
24. 63 Conn. App. at 38.

Under these principles, the court found that the brochure language did not warrant the plaintiff's safety or that she would receive non-negligent care during every aspect of her trip.[25] The court further noted that any such warranty would be vitiated by the defendant's express disclaimer of liability for any acts beyond its control or by third parties, including all of its independent contractors furnishing all of the services in its itinerary, in the same brochure.[26] Finally, the court distinguished this case from *Stevenson v Four Winds Travel*, noting that there the defendant tour operator made far more specific representations than in the instant case, and admitted its control over the whole tour.[27]

(b) The use of the word "safety" in a tour operator's brochure does not create an actionable guarantee of safety

Even when brochure language expressly assures consumers that they will be travelling in "safety," courts have held that such a representation does not bind the tour operator.

In *Sova v Apple Vacations*,[28] the plaintiff participated in the defendant tour operator's Cancun itinerary; the defendant's brochure advertised optional activities provided by other vendors, including a snorkeling excursion. The tour operator, as is customary, had no connection to the vendor aside from advertising its services and collecting money from its guests to reimburse the vendor. The plaintiff was injured while snorkeling, and sued the tour operator for negligence, claiming that her reliance on the following language in the tour operator's brochure constituted an express warranty of safety: "Apple Vacations has pre-screened all tours for quality, safety and your guarantee of satisfaction." The court found that while this language indicated the defendant had pre-screened the tour for safety, it did not guarantee that there would be no accidents.[29] The court noted that the plaintiff failed to submit evidence indicating that the defendant had failed to pre-screen for safety, while defendant had established that prior to the plaintiff's participation in the snorkeling excursion, over ten thousand of its customers had done so without complaint or incident.[30] The court finally noted that the tour operator's disclaimer of liability in its contract with the plaintiff, which included a waiver of responsibility for injuries sustained while on optional excursions and while engaged in watersports, as well as a disavowal of the negligence of third-party independent suppliers, further vitiated the claim that the brochure language regarding safety

25. *Id*.

26. *Id*. at n. 12.

27. *Id*. at 39-40. Similarly, taking a leaf from *Stevenson v Four Winds Travel*, plaintiff , injured in a slip and fall at an Aruba hotel poolside in *Passero v DHC Hotels and Resorts, Inc*. 981 F. Supp. 742 (D. Conn., 1996), claimed that the tour operator assumed a heightened duty to investigate and warn when it included language in its brochure designed to put client's mind at rest, where the brochure promises "an on-location representative" at its hotel destinations "to ensure a pleasant stay and make [tour participants] aware of all activities available," and "service from pre-trip to post-trip!" which begins "before you leave and stays throughout your vacation." In granting summary judgment, the court held that "this language does not, and cannot, be read as a guarantee that [defendant tour operator's] on-site representatives will protect plaintiff from injuring herself under all circumstances." Id. at 745.

28. 984 F Supp. 1136 (S.D. Oh. 1997)(decided under Ohio law).

29. *Id*. at 1142-43.

30. *Id*. at 1141-42.

constituted a warranty that no accident would occur while snorkeling, or otherwise guaranteed protection against the negligent conduct of an independent vendor over which defendant had no control.[31]

In *O'Keefe v Inca Floats*,[32] the plaintiff took a Galapagos cruise booked through the defendant tour operator. The defendant's brochure stated that:

> *"We use the best small yachts in the Galapagos and you are invited to choose from a range of yachts for your trip. Inca Floats has specifically selected these yachts for their seaworthiness and safety, their suitability for comfortable natural history adventures, and the dedication of their crews to serving you. Inca Floats does not own or operate any yachts."*

In addition, the trip application contained a release of liability and an acknowledgment of the risks and dangers inherent in participating in a cruise. (The court noted that the plaintiff had made a change in the release to the effect that the defendant retained liability for its agent's negligence). While on the cruise, one of the ship's employees entered the plaintiff's room and sexually assaulted her, and she sued the tour operator. Among her claims was that the brochure language constituted a warranty of safety, breached by the tour operator because of the failure to provide locks on the cabin doors. The court noted that while statements in a brochure can constitute an express warranty if a reasonable jury would infer that the statement became part of the basis of the bargain:

> *"a general promise that a trip would be safe ... does not constitute a guarantee that no harm would come to the defendant ... [and here, defendant] had directed [plaintiff's] attention to certain kinds of harm against which it could not protect. Although it is true that the liability release made no mention of the possibility of sexual assault, in light of all the other risks [plaintiff] knew of and assumed, no reasonable jury could infer that Inca had somehow warranted that the trip would be free from assault. The basis of the bargain was that [plaintiff] would sail on a ship that was seaworthy and safe to navigate the water. [Plaintiff] took the trip and the [ship] was seaworthy."*[33]

In granting the tour operator's motion for summary judgment, the court concluded that plaintiff was not without recourse, in that she could still sue the Ecuadoran ship owner, as her assailant was its employee.[34]

31. *Id.* at 1143.
32. 1997 WL 703784 (ND Cal.).
33. 1997 WL 703784 t *5.
34. *Id.* at *6.

(c) Language in a tour operator's brochure promising quality, high standards, comfort and first class all the way is mere puffing, and therefore does not constitute actionable misrepresentation

Finally, in line with decisions holding that the language of a tour operator's advertising, being "mere puffing," cannot create actionable warranties of safety or actionable misrepresentations in personal injury cases, courts have held that assurances that accommodation is high quality, first class, "four stars," etc also cannot be relied upon as promises of safety.

In *McElheny v Trans National Travel, Inc.*,[35] the plaintiff was injured in a fall from an allegedly defective poolside chair at a Bahamas resort hotel, on a trip booked through the defendant tour operator. The plaintiff claimed that language in the tour operator's brochure constituted a guarantee of safety such that it created a heightened duty to investigate and warn of on-site hazards. Specifically, the plaintiff claimed it relied on the tour operator's assignment of "3 suns [which] according to [its] Sun Rating System ... a 3 Sun hotel is a dependable, comfortable hotel with conventional rooms, amenities and public areas. Suited for those wanting good value and more personalized service." In granting the tour operator's motion for summary judgment, the court rejected the plaintiff's argument that such language indicated that the tour operator monitored the operation of the hotel, citing *Passero v DHC Hotels and Resorts, Inc.* and *Wilson v American Trans-Air, Inc.*[36] for the principle that such representations do "not give rise to a duty on [defendant's] part to guarantee safety from every piece of furniture in the hotel ... [or that defendant's] representatives would protect plaintiff from three-legged chairs." The court invoked *Wilson* again for the principle that the tour operator's description of the hotel as "dependable" and its award of "3 Suns" was mere puffing, which can give rise to no duty.[37]

Similarly, the defendant tour operator in *Sova v Apple Vacations*[38] represented in its brochure that "we will make sure that your satisfaction is guaranteed and the quality of the product is kept at the highest standards," and the plaintiff claimed that her reliance on such language led to her injuries while on the defendant's vendor's optional snorkeling excursion. The court rejected this argument, again invoking *Wilson* and characterising the brochure language as "mere puffing," noting that:

> *"the fact that an enterprise is kept 'at the highest standards' does not imply that its operations are immune from mishap. The guarantee of satisfaction contained in the brochure contains no statements indicating any intent on defendant's part to accept liability for personal injuries cause by the negligence of independent third parties,"*

especially when read in light of the disclaimer found elsewhere in the brochure disclaiming the tour operator's liability for the negligence of its third-party vendors. See also *Davies v General Tours*, *infra* at n. 23 (brochure's assurance of a "totally smooth and comfortable trip" is mere puffing and cannot constitute a warranty of safety because "favorable comments by

35. 165 F. Supp. 2d 190 (D. R.I. 2001).

36. *See* footnotes 27 and 15, respectively.

37. 165 F. Supp. 2d at 201-02.

38. *See* n.28.

sellers with respect to their products are universally accepted and expected in the market place ... and do not give rise to liability. In general, a court will be more likely to find the creation of a warranty where a party makes a specific representation rather than a general representation.").

Conclusion

Even where it was not explicitly enunciated, all of the travel cases where the plaintiffs claimed reliance on a tour operator's brochure as the proximate cause of their injuries bear a family resemblance to the cause of action examined in 'Restatement (Second) of Torts § 311. Negligent Misrepresentation Involving Risk Of Physical Harm'; the actual Caribbean fire case offered as a hypothetical in the opening sentences of this article was brought under that cause of action. "[T]he elements of this tort are: (1) a duty of reasonable care in conveying information; (2) breach of that duty by negligently giving false information; (3) reasonable reliance on the misrepresentations, which reliance is the proximate cause of physical injury; and (4) damages."[39] Examination of this tort outside of the confines of travel cases illuminates what separates a successful from an unsuccessful claim. The short answer would seem to be found in the phrase "reasonable reliance."

In Connecticut, where the authors litigated a case akin to the hypothetical synopsised at the outset of this article, "the general rule is that a misrepresentation must relate to an existing or past fact[.]"[40] "Our cases have consistently required that, as one element of ... misrepresentation, a representation be made as a statement of fact. The ...requirement focuses on whether, under the circumstances surrounding the statement, the representation was intended and understood as one of fact as distinguished from one of opinion."[41] For a misrepresentation to be actionable, it "must consist of a statement of a material past or present fact ... Statements of opinion ... are not actionable. Reliance on opinions is *per se* unjustifiable because opinions, unlike facts, do not purport to be incontrovertible."[42] (citation and internal quotation marks omitted)

Outside the context of travel law cases, *Smith v Brutger Companies* is instructive.[43] There a real estate agent was sued for negligent misrepresentation creating a risk of physical harm, because in making his sales pitch on a condominium apartment to plaintiffs, he represented that the building "was a 'luxury apartment complex' and a 'very safe environment' in which to live." The plaintiffs took the apartment, and one of them was subsequently raped in her bedroom by an intruder.[44] The Minnesota Supreme Court held that these statements were not actionable misrepresentations as a matter of law because they were generalised opinions and not statements of fact.[45]

39. *Smith v Brutger Cos.*, 569 N.W.2d 408, 413 (Minn.1997).

40. *Pavia v Vanech Heights Construction Co.*, 159 Conn. 512, 515 (1970).

41. *Crowther v Guidone*, 183 Conn. 464, 468 (1981) (citations and internal quotation marks omitted).

42. *Yurevich v Sikorsky Aircraft*, 51 F. Supp. 2d 144, 152 (D. Conn. 1999) (applying Connecticut law); see also *Parise v Catholic Cemeteries*, No. 4341878, 2000 WL 1196500 at *1 (Conn. Super., 8/3/2000)(Levin, J.) (*quoting* Yurevich).

43. *See* fn.39.

44. *Id.* at 410.

45. *Id.* at 414-15.

Smith v Brutger Companies indicates that opinions about luxury are not to be relied upon as warranties of safety, but it also indicates that even opinions about safety itself do not rise to the level of actionable misrepresentation. The Georgia Court of Appeals, in a jurisdiction that has adopted §311, has similarly ruled. In *Anderson v Atlanta Committee for the Olympic Games, Inc.*,[46] the plaintiffs suffered injuries arising from a bomb explosion at the Ceremonial Park, a venue created by the Atlanta Committee for the Olympic Games pursuant to that organisation's promotion of the 1996 summer games.[47] On appeal, plaintiffs argued that the trial court erred in granting summary judgment for the defendants on a claim for negligent misrepresentation based on §311.[48] The statements allegedly relied upon by the plaintiffs were made by the Olympic Committee's "president and security director to the effect that Atlanta would be 'the safest place on the planet' during the Games." The Appellate Court affirmed, holding that:

> *"those mere statements of opinion do not support ... negligent misrepresentation claims ... Misrepresentations are not actionable unless the complaining party was justified in relying thereon in the exercise of common prudence and diligence. And when the representations consist of general commendations or mere expressions of opinion, hope, expectation and the like, the party to whom it is made is not justified in relying upon it and assuming it to be true ... any statements by [the Atlanta Committee for the Olympic Games] representatives that Atlanta would be the safest place on earth during the Games were mere expressions of opinion, hope, expectation. They were not statements of fact upon which the [plaintiffs] ... could have justifiably relied."*[49]

In light of these principles, the travel cases examined herein, where liability attached to tour operators based on the language in their brochures, *Stevenson v Four Winds Travel* and *Elsis v Trans World Airlines, Inc.*, can be distinguished from the other cases discussed, in which, while seeming so similar factually, no liability was found. In *Stevenson v Four Winds Travel*, the defendants promised consumers moment-to-moment care from omnipresent expert guides who had already experienced everything on the prospective tour; in *Elsis v Trans World Airlines*, the defendants promised consumers that its staff undertook to inspect every ship offered by its independent contractor. In the subsequent cases we reviewed, consumers were merely given vague assurances of: "a worry-free" vacation; a "totally smooth and comfortable trip;" optional excursions that were "pre-screened for safety;" an assurance that "satisfaction is guaranteed and the quality of the product is kept at the highest standards;" and an award of "3 Suns" from the tour operator's "Sun rating system." As in *Anderson v Atlanta Committee for the Olympic Games*, the claimants who failed to meet their burden in the travel cases could not rely on brochure language that consisted of "mere expressions of opinion, hope, expectation" and were "not statements of fact upon which the [plaintiffs]...could have justifiably relied." "Hope and expectation" is a succinct summation of what a prospective traveller feels when, having been captivated by the seductive depiction of

46. 584 S.E. 2d 16 (Ga. App. 2003),
47. *Id.* at 18.
48. 584 S.E. 2d at 21, and 21 n.24.
49. *Id.* at 21.

a potential destination in a brochure, complete with sensuous colour photographs and poetic captions, he picks up the phone to book that dream vacation; but hope and expectation do not alone create reasonable reliance on the tour operator's brochure, such that when injury befalls the traveller because of the negligence of a third party hotelier or bus company, then the tour operator is directly liable.

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