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Liability of tour operator for rape by hotel employee: *X v Kuoni* [2016] EWHC 3090 (QB)

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The High Court held that a tour operator's liability did not extend to the consequences of a rape committed by an on duty hotel employee. 3 Hare Court's Katherine Deal acted for the Claimant in a four-day trial before HHJ McKenna. The Claimant has been granted permission to appeal the decision to the Court of Appeal.

The Claimant and her husband booked a package holiday in Sri Lanka via the Defendant tour operator. The Claimant alleged that on her way back to the hotel reception in the early hours of 17 July 2010, a hotel employee offered to show her a shortcut, then led her into an engineering room and raped her. It was the Claimant's case that, at the material time, she believed her assailant to be a security guard. It later emerged, and was accepted by the Claimant, that he was employed by the hotel as an electrician.

HHJ McKenna concluded that the Claimant was indeed the subject of a rape by the hotel employee. However, he did not accept the Claimant's evidence that she had believed him to be a security guard.

The principle legal issues for determination were (1) whether the rape amounted to a failure to perform or improper performance of the holiday contract for which the Defendant is liable under Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 and (2) if the Defendant was liable, whether it was entitled to rely on any of the statutory defences under the 1992 Regulations.

On liability, HHJ McKenna held that the actions of the employee did not form any part of the contractual services which the Defendant agreed to provide with reasonable care and skill. When the employee lured the Claimant into the engineering room, he was not discharging any of the duties he was employed to do.

In light of the Court's conclusions on liability, there was no need to consider statutory defences. However, HHJ McKenna observed that the Defendant would be entitled to rely on the Regulation 15(2)(c) defence, since the Claimant's rape was an event which could not have been foreseen or forestalled even with all due care. The employee was a man of good character, there were no previous reports or complaints concerning him, and the Claimant made no criticism of his recruitment or vetting.

HHJ McKenna also dealt briefly with vicarious liability (although it formed no part of the Claimant's case at trial) since the Claimant submitted that English law would impose liability on a hotel in these circumstances in light of *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11. HHJ

McKenna observed that in any direct claim by the Claimant against the hotel, the hotel would not be held vicariously liable for the rape committed by the employee. He relied on the fact that the employee was an electrician rather than a security guard, and that there was no close connection between his duties and the attack so as to justify holding the hotel or the Defendant liable.

X v Kuoni has set the bar high for claimants seeking to hold tour operators liable for assault committed by an on duty hotel employee or a supplier of services. In particular, it has made it difficult to establish that the assault formed part of the services that the tour operator agreed to provide under the holiday contract.

On appeal, the Claimant challenges the legal approach adopted by HHJ McKenna when addressing whether, on the facts as found, there was a breach of contract and, if so, a statutory defence.

It is the Claimant's case that the correct starting point is not what the assailant was employed to do, but rather what obligations were owed to the Claimant under the holiday contract. If those obligations included assistance through the hotel in the middle of the night, there was an implied term that such assistance would be provided with reasonable care and skill by whoever discharged it. The Claimant contends that the assailant, as a supplier of the hotel, was undertaking a service under the holiday contract when he assaulted the Claimant, and that the assault constituted a failure to provide this service with reasonable care and skill.

The Claimant contends that HHJ McKenna overemphasised the particular job description of the assailant and misdirected himself as to the broad scope of the contractual obligations owed to the Claimant.

It is hoped that the Court of Appeal will provide clarification as to the proper interpretation of the obligations owed by the tour operator under the holiday contract and their interplay with the 1992 Regulations. The appeal is set for 13 and 14 March 2018.